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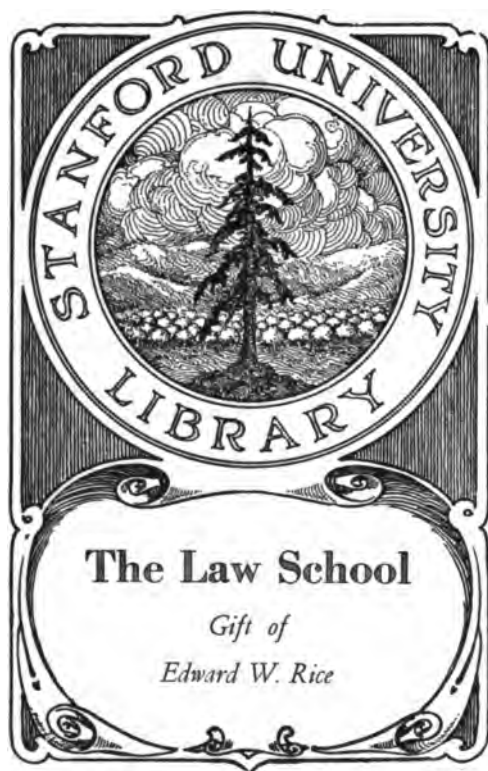
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KNIGHT'S
LOCAL GOVERNMENT
REPORTS,
WITH
LOCAL GOVERNMENT STATUTES,
ORDERS, &c.

EDITED BY

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- 6 Add to Note.—The decision of Wright J. in *Stockdale v. Ascherberg* referred to in the above case was affirmed in the Court of Appeal: see *post*, p. 529. On the question of compulsion, see further *Oliver v. Camberwell Borough Council*, *post*, p. 617, the note on that case, at p. 627, and the supplementary note in the *addenda*, *infra*.
- 79 Add:—Note.—This decision was reversed in the Court of Appeal, *post*, p. 1144.
- 126 Add:—Note.—On October 29, 1904, Channell J., under section 14 (2) of the Conveyancing and Law of Property Act, 1881, granted relief against forfeiture in the above case on the terms that the house should be rebuilt within nine months, as nearly as might be in the old state, that the defendants should pay rent, and indemnify the plaintiffs against costs; the assessment of damages not to be gone into until failure to carry out these terms.
- 192 Add:—Note.—This case was explained in another case of *London County Council v. Payne*, decided December 20, 1904, of which a report will appear in due course. See also *King v. Spencer*, *post*, p. 979; *Star Tea Co. v. Whitworth*, *post*, p. 1000; *Stone v. Tyler*, *post*, p. 1363.
- 197 In line 2 of subsection (2) of section 44 of the Public Health (London) Act, 1891, for “of” read “adjoining.”
- 198 In line 2 for “47 L. J. Q. B. 446,” read “48 L. J. Q. B. 128.”
- 201 Add to Note.—The decision in the above cases was reversed in the Court of Appeal, *post*, p. 1378.
- 232 Add to Note.—As to the position of affairs where a pipe which in fact drains two or more houses not in the same curtilage has been laid wrongfully as between the owner and the local authority, see further *Heaver v. Fulham Borough Council*, *post*, p. 672.
- 257 Add:—Note.—This decision was affirmed in the Court of Appeal, *post*, p. 1161.
- 269 Add:—Note.—This decision was affirmed in the Court of Appeal, *post*, p. 1057.
- 325 Add to Note.—See *Re Blunt's Trusts*, *Wigan v. Clinch*, *post*, p. 1295.
- 380 Add:—Note.—See *Scott v. Brown*, *post*, p. 441, and the note thereto in these *addenda*, *infra*.
- 389 Add:—Note.—This decision was overruled in the Court of Appeal in *Headland v. Coster*, of which a report will appear in due course.

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- 445 Add :—Note.—The order of Joyce J. in the above case was varied by the Court of Appeal. A report of the case in that Court will appear in due course.
- 455 Add :—Note.—It has now been definitely decided in *Tough v. Hopkins*, *post*, p. 1213, that it is not necessary, in an order under section 5 of the Public Health (London) Act, 1891, prohibiting the recurrence of a nuisance arising from black smoke, where all that is required is careful stoking, to specify any works to be executed, even though the defendant may have required that the order should specify works to be executed.
- 469 Add :—Note.—At the trial of the action the interim injunction was dissolved : see *Attorney-General v. Scott* (No. 2), *post*, p. 1113.
- 517 Add :—Note.—The above decision was affirmed in the Court of Appeal, *post*, p. 959.
- 544 Add :—Note.—The above decision was reversed in the Court of Appeal, *post*, p. 1248.
- 555 Add to Note.—The above case was taken to the Court of Appeal, where, on December 9, 1904, after the appeal was part heard, the hearing was adjourned and the case sent back to the justices for further findings of fact. The decision of the Divisional Court in *Thompson v. Eccles Corporation* was reversed in the Court of Appeal, 3 L. G. R. 20.
- 566 Add to Note.—The above decision was reversed in the Court of Appeal, 3 L. G. R. 20.
- 627 Add to Note.—The above case was taken to the Court of Appeal, where, after the appeal was part heard, on November 2, 3, 1904, the case was settled, on terms, it is understood, very favourable to the plaintiff. The decision of Channell J. in *Haedicke v. Friern Barnet Urban District Council* is reported, *post*, p. 1098. His decision was reversed in the Court of Appeal, 3 L. G. R. 20, but upon grounds unconnected with the point at issue in the above case.
- 671 Add :—Note.—The decision in the above case was reversed by the Court of Appeal on grounds not taken before Kekewich J., *post*, p. 1050.
- 722 Add to Note.—*Brooks v. Bagshaw* is reported, *post*, p. 1007.
- 743 Add to Note.—The effect of the above decision, as regards cases where poor law areas are dissolved, is got rid of by the Poor Law Authorities (Transfer of Property) Act, 1904 (4 Edw. VII., c. 20), which will be found in 2 L. G. R. (Statutes), p. 35. It may be questioned whether the decision is in principle reconcilable with *Oldham Corporation v. Bank of England*, *post*, p. 1324.
- 763 In head note, line 7, strike out the words “the districts of.”
- 840 In catchwords, for “59 Geo. III. c. 66” read “52 Geo. III. c. 49.”
- 864 In catchwords for “Poor Law Removal Act, 1846,” read “Poor Removal Act, 1846,” and for “Poor Law Removal Act, 1848,” read “Poor Removal Act, 1848.”
- 885 Add to Note.—*Morris v. Beal* is reported, *post*, p. 1171.

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- 895 Add:—Note.—The above decision was reversed in the Court of Appeal *sub nom. Tonbridge Urban District Council v. Tonbridge Rural District Council*. A report of the case in the Court of Appeal will appear in due course.
- 904 Add:—Note.—The above decision was reversed in the Court of Appeal on a point which Channell J. considered not open to him on the case as stated. A report of the case in that Court will appear in due course.
- 905 In the head note, line 6, for “him” read “them.”
- 917 In the head note, as the fourth holding, read “that the expense of providing new courts for parts of the district within the limits of the Act of 1843, as extended, was consequently properly charged upon the district and not upon the county generally.”
- 985 Add:—Note.—See *Stone v. Tyler*, *post*, p. 1363.
- 1033 Add:—Note.—The above case, *sub nom. Metropolitan Water Board v. Westminster City Council*, was taken to the Court of Appeal, where, after the appeal was part heard on December 8, 1904, the appeal was adjourned, and the case sent back to the learned magistrate for further findings of fact.
- 1112 Add:—Note.—The above decision was reversed in the Court of Appeal: see 3 L. G. R. 20.
- 1285 Add:—Note.—See *Friend v. Mapp*, *post*, p. 1317.
- 1323 Add:—Note.—See *Hull v. Horsnell*, *ante*, p. 1280.

KNIGHT'S LOCAL GOVERNMENT REPORTS.

High Court of Justice.

KING'S BENCH DIVISION.

HARRIS AND ANOTHER v. HICKMAN.

1908.

Nov. 3.

Landlord and tenant—Tenant's covenant to pay rates, &c.—“Outgoings”—Expenses incurred by landlord in abating nuisance on intimation from sanitary inspector—Reconstruction of drains—Tenant holding over after expiry of three years' agreement—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 3, 4.

A tenant of a house for the term of three years, at £70 a year, who had covenanted to pay “all rates, taxes, assessments, and outgoings,” held over, after the expiration of the three years, paying rent.

Held, that he was not liable to repay to his landlord expenses amounting to £70 1s. 6d. incurred by the landlord in repairs to and reconstruction of drains pursuant to an intimation given to him by a sanitary inspector under section 3 of the Public Health (London) Act, 1891, on the grounds, first, that it could not have been in the contemplation of the parties that such expenses should be borne by the tenant; secondly, that the intimation, not being followed by notice under section 4 of the Act, imposed no legal liability on the landlord.

Valpy v. St. Leonard's Wharf Co. (1903) 1 L. G. R. 305, followed; Stockdale v. Ascherberg, 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, distinguished.

ACTION tried before Wright J. without a jury, in which the plaintiffs, landlords, sought to recover from the defendant, their tenant, the expenses of repairs executed by them to premises in consequence of an intimation as to nuisances under section 3 of the Public Health (London) Act, 1891, which it was contended the tenant was, under his covenant agreement, liable to pay.

The costs and expenses sued for as money paid to the defendant's use amounted to £70 1s. 6d.

By an agreement under seal, dated May 22, 1896, Charles Walter Sawbridge agreed to let to the defendant, and the defendant agreed to take, a messuage or dwelling-house, with the garden and appurtenances thereunto belonging, situate in Alleyn Park, Dulwich, in the county of Surrey, known as Winchester House, for a term of three years from

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March 25, 1896, at the yearly rent of £70, payable quarterly on the usual quarter days, the first payment to be made on June 24, 1896, the said rent to be paid clear of all deductions whatsoever (except property tax), and the tenant agreed with the landlord to pay the rent on the days and in the manner appointed, and also "to pay all present and future rates, taxes, assessments, and outgoings whatsoever in respect of the premises, whether payable by the landlord or tenant (except landlords' property tax)," and also to keep the inside of the premises in good repair and condition, and peaceably yield and deliver up at the end or other sooner determination of the term the same to the landlord in such good repair and condition (fair wear and tear and damage by fire excepted).

Upon the expiration of this agreement, which took place on March 25, 1899, the defendant held over and continued to occupy the premises and pay rent upon the original terms already set out.

On April 11, 1899, Sawbridge assigned the premises to the plaintiffs.

On September 29, 1902, the defendant wrote to the plaintiffs' agent stating that if certain specified repairs were done to the house he was prepared to take it for a further term of three years at the same rent and upon the same conditions as those upon which he then held it.

On January 14, 1903, the defendant's son wrote to the sanitary inspector informing him that a nuisance existed on the premises, and requesting him to attend to the matter promptly.

Subsequently two notices or intimations, dated respectively January 20 and February 4, 1903, were received by the plaintiffs.

The first of the notices was in the following terms:—

"To the Owner of the premises situate and being No. 53, Alleyn Park, West Dulwich, in the borough of Camberwell and county of London.

Take notice, the Borough Council of Camberwell, in the county of London, being the sanitary authority in whose district under the said Act [the Public Health (London) Act, 1891] the above premises are situated, have received an information stating that the above-named premises are in such a state as to be a nuisance or injurious or dangerous to health owing to the drain being defective, the drain obstructed, the ground-floor w.c. being defective and in want of a proper cover to interceptor in fore-court, the said nuisance being caused by the act, default, or sufferance of you, the said occupier or owner. You are hereby required forthwith to open up the said drains for inspection by a sanitary officer, and advise the undersigned when ready for such inspection, and to do such other work as may be necessary to effectively abate the said nuisance and prevent its

recurrence. And take further notice that after the expiration of seven days from the service of this intimation the Borough Council of Camberwell, in the county of London, will cause proceedings to be commenced and the said nuisance to be dealt with in a summary manner before a magistrate. 1903.
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Dated this 20th day of January, 1903.

(Signed) EDW. R. COLLINS,

The officer appointed by the said Borough Council to take proceedings under the above-named Act."

The second notice was in the following terms:—

"To the Owner, 53, Alleyn Park Road, West Dulwich.

Take notice that I, the undersigned, having visited the above premises, find that a nuisance, numbered 26 in the schedule at the back hereof, liable to be dealt with summarily, exists thereon. I, therefore, now by this written intimation make the existence of the said nuisance known to you, as being the person who is required to abate it, and I have to require that the same be abated within a period of seven days. At the end of this time I shall again visit the premises, and if the necessary works have not then been completed the Vestry (*sic*), as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice.

(Signed) EDW. R. COLLINS."

These notices were served by the sanitary inspector, and not by or by the order or with the approval of the Borough Council.

On January 24, 1903, the defendant wrote to the plaintiffs' solicitors maintaining that the plaintiffs were responsible for the drains, and requesting that they, the plaintiffs, would at once undertake the work of repairing them.

The plaintiffs repaired the drains and completed the work.

On March 25, 1903, the defendant gave up possession of the premises, but refused to repay the plaintiffs the costs and expenses they had been at in repairing the drains.

Thereupon the plaintiffs commenced the present action, claiming that they were entitled to recover from the defendant upon his covenant, already set out, to pay "all outgoings whatsoever, whether payable by the landlord or tenant," the whole of the costs and expenses incurred by them in executing the works of repair, as money paid by them for the use of the defendant.

Shearman, K.C., and *E. Pollock* for the plaintiffs. The defendant had held these premises upon a three years' agreement at £70 per

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annum, and on its expiration held over, paying the same rent. During the period he held over intimations were served under section 3 of the Public Health (London) Act, 1891, as to the existence of a nuisance. These intimations were served by the sanitary inspector, and not by or by the order of the sanitary authority. The plaintiffs did the repairs. The agreement on the part of the defendant was to pay "all rates, taxes, assessments, and outgoings . . . whether payable by the landlord or not."

H. Hart for the defendant. Whether a tenant holding over does so on the whole of the terms of the expired agreement for three years is a question of fact. An agreement to do substantial repairs is inconsistent with a year to year tenancy: *Oakley v. Monck*, 1866, L. R. 1 Ex. 159; 35 L. J. Ex. 87. [WRIGHT J. mentioned *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305, and *Stockdale v. Ascherberg*, 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492.] In the second place, this work of repair and reconstruction of drains was performed in consequence of an intimation under section 3 of the Act which provides for mere warning or intimation. No notice was given under section 4, the operative section; accordingly the plaintiffs did not incur these expenses under compulsion of law and cannot recover them: *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580. The notices, such as they were, were given without the authority of the sanitary authority, by the sanitary inspector alone: *St. Leonard's, Shoreditch, Vestry v. Holmes* (1885) 50 J. P. 132. [The defendant was called and proved that the rent was £70, and that the landlord had always done repairs. In cross-examination, he stated that the notice to the sanitary inspector had not been sent with his knowledge or consent, but that he approved of the action of his son in sending it.] It is clear that the terms on which a tenant holds over must be a question of fact, and all circumstances relative to them may be taken into consideration. Any agreement to do substantial repairs such as these is inconsistent with a tenancy from year to year.

E. Pollock in reply. The defendant held over on the terms of his agreement. He paid the £70 a year rent, and is liable for repairs; there is no evidence of any variation of the terms on which he held over. *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305, is not against the plaintiffs, for here the parties fully contemplated such a liability if the defendant held over. *Stockdale v. Ascherberg*, 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, is in point. It is immaterial whether the notice was given under section 3 or section 4, for all the latter section does is to provide the machinery. There was a clear case of nuisance. *Andrew v. St. Olave's Board of Works*, 1898, 1 Q. B. 775; 67 L. J. Q. B. 592, is in point, and *Gebhardt v. Saunders*, 1892, 2 Q. B. 452, is to the same effect.

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WRIGHT J. I am of opinion that the plaintiffs' action fails on both grounds. The notices given by the officer of the Borough Council under section 3 of the Public Health (London) Act, 1891, were mere intimations, and never operated as a notice under section 4, because they had never received the approval of the sanitary authority, nor had they been served by the sanitary inspector by the order of that authority. This is a circumstance which distinguishes the present case from *Andrew v. St. Olave's Board of Works*, 1898, 1 Q. B. 775; 67 L. J. Q. B. 592. There is no compulsion of the same kind in section 3 as that contained in section 4, and it is not enough for the plaintiffs to show that the work has been done by them as landlords upon the service of notice or intimation under section 3. On the other hand, section 4 does contain a clear order, that upon the service of notice upon the person by whose default the nuisance arises, that person shall do the work. Had these notices been under section 4 they would have been sufficient; but being as they are under section 3, they are insufficient, and consequently on this part of the case the action fails.

Then comes the serious question, whether the stipulation in the agreement that the tenant will pay "all present and future rates, taxes, assessments, and outgoings whatsoever in respect of the premises, whether payable by the landlord or tenant," should be imported into the tenancy from year to year which subsisted in consequence of the tenant's holding over and paying rent. This is a matter of some difficulty, and I agree with counsel on either side, who both say that the question must be one of fact, and one depending upon the particular circumstances of the case, as to how far the terms of the original agreement are to be held applicable to a tenancy such as we find here; and, further, as has been pointed out, whether the terms of the original agreement ought to be presumed to be applicable in the present case, so far as they can be applied. The point is how far have the parties had it in their contemplation that the tenant should bear such an expense as this. There are two recent cases in which the question has already arisen. In *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305, Farwell J. held that where a cottage had been let from year to year at £20 a year, and works consisting mostly of the reconstruction of drains at a cost of some £58 had been executed by the landlord under notice from a sanitary authority requiring him to abate a nuisance, it could not have been within the reasonable contemplation of the parties that the tenant should bear the expense. In *Stockdale v. Ascherberg*, 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, tried before me, the tenancy was for three years, and thenceforth from year to year, at a rent of £55, and the landlord incurred £83 10s. in repairs to and reconstruction of drains in pursuance of notice under the Public Health

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Act, 1875. I then considered that the principle laid down in *Valpy v. St. Leonard's Wharf Co.* did not apply, because I was of opinion that there, under the particular circumstances of that case, the possible liability for repairs to the drainage, even involving the relaying of the whole system, might well have been within the contemplation of the parties when they mutually agreed to let and hire the premises. The present case is, in my opinion, intermediate between the cases I have just mentioned, and is covered in principle by *Valpy v. St. Leonard's Wharf Co.*; and this being so, I am bound by that decision. Here the tenancy is from year to year, the rent payable is £70 per annum, and the cost of repairs to the drains £70 1s. 6d. In the face of the decision in *Valpy v. St. Leonard's Wharf Co.*, I cannot hold that the parties could have reasonably contemplated such a liability in a tenancy which might last for a year only. I am, therefore, of opinion that the plaintiffs' action fails on this ground as well as on the other, and I give judgment for the defendant with costs.

Judgment for defendant.

Solicitors for the plaintiffs—Taylor and Taylor.

Solicitors for the defendant—Hutchison and Cuff.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

On the question whether or not compulsion is put upon a person on whom an intimation of the existence of a nuisance is served by an officer of a local authority of his own motion, reference may be made to *Silles v. Fulham Borough Council* (1903) 1 L. G. R. 643, and to the note to that case.

On the question of the liability of the tenant under a covenant to pay outgoings, *Re Warriner*; *Brayshaw v. Ninnis* (1903) 1 L. G. R. 765, may be referred to in addition to the cases cited in the above case.

High Court of Justice.

KING'S BENCH DIVISION.

HOBBS v. MOREY.

1903.

Nov. 17.

Elections—Municipal election—Disqualification—Nomination of disqualified candidate—Throwing away of votes—Petition—Claim of seat—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12 (1, c), 56, 87 (1, c), 93 (4).

The disqualification of one of two candidates for election to a single vacancy among the councillors of a borough, on the ground of interest in a contract with the Corporation, of which the electors have no notice, does not invalidate his nomination so as to entitle the other candidate to the seat as the only candidate validly nominated; nor does it cause the votes given for the disqualified candidate to be thrown away so as to entitle the other candidate who has the minority of the votes actually given to claim the seat on the ground that he has the majority of lawful votes.

On an election petition in such a case the election will be declared void, and a fresh election must be held.

SPECIAL case stated for the opinion of the Court under section 93 (7) of the Municipal Corporations Act, 1882, pursuant to the order of a judge.

1. At an election held June 19, 1903, to fill a casual vacancy in the office of councillor for the north ward of the borough of Newport, in the county of the Isle of Wight, the respondent and the petitioner were respectively nominated as candidates for election to fill the same office, and were the only persons nominated as candidates for election to fill the said office.

2. The respondent obtained a majority of votes at the said election, and was declared by the returning officer at the said election to have been elected to fill the office of councillor for the north ward of the said borough.

3. The respondent was at the time of his nomination as a candidate for the said office, and at the time the said election was held, a partner in the firm of H. W. Morey and Sons, and at the time of his nomination and at the time of the election the firm was a party to a contract to supply goods to the Council of the borough.

4. The respondent was at the time of his nomination and at the time of his election disqualified by section 12 (1, c) of the Municipal Corporations Act, 1882, for being elected and for being a councillor of the said borough by reason of his interest as a partner of the said firm in the said contract.

5. On June 11, 1903, after the respondent had been nominated

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“Borough of Newport, Isle of Wight.

Election of a Councillor for the North Ward of the said Borough on the 19th day of June, 1903.

I, Cornelius Salter, of Newport, I.W., mayor of the above borough, acting upon the nomination papers delivered herein, do hereby determine upon the objection lodged by Mr. Tom Hobbs, of Rosemount, Avondale Road, Newport, I.W., cattle dealer, against the nomination of Henry Morey, Junr., of No. 102, Carisbrooke Road, Newport, I.W., timber merchant, on the ground that he is a person interested in a contract, and is thereby disqualified to be nominated as a candidate for the said election, that I, as mayor, cannot adjudicate on such objection so raised, and do determine the nomination to be valid in form.

Dated this 11th day of June, 1903.

CORNELIUS SALTER.”

6. On the 19th day of June, 1903, after the close of the poll at the said election, and before the returning officer declared the result of the election, the petitioner delivered to the returning officer a notice in writing whereby the petitioner claimed to be declared elected to the said office on the ground of the respondent being disqualified as aforesaid for nomination for and election to the said office. On the 8th day of July, 1903, the petitioner presented a petition to this honourable Court against the election of the respondent to the said office. In his petition the petitioner prayed that it might be determined that he was duly elected to the said office.

7. On July 25, 1903, the following notice was given on behalf of the respondent to the petitioner :—

“Union Bank Chambers, 61, Carey Street,
 Lincoln's Inn, July 25, 1903.

Dear Sirs,—

Hobbs v. Morey.

Newport, I.W. (North Ward), Election Petition

Please take notice that the respondent does not intend to contest the

allegation in paragraph 3 of the petition that he was at the time of his nomination and election disqualified by his interest in a contract with the Borough Council. He does not, however, admit that the petitioner was the only person duly nominated, or that the petitioner was to be deemed to be elected as alleged in paragraph 4, and will contest the petitioner's right to claim the seat. We do not, therefore, propose to give notice that the respondent does not intend to oppose the petition. As there are no facts in dispute, we agree that the case raised by the petition can be most conveniently disposed of in the form of a special case for the decision of the High Court. 1908.
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The respondent does not admit that the contract in question is still in existence, but you will, no doubt, agree that this point does not arise on the petition.

Yours faithfully,

LEY, LAKE, AND LEY.

Messrs. Sole, Turner, & Co., 69, Aldermanbury, E.C."

8. The questions for the opinion of the Court are:—

(1) Was the election of the respondent to the office of councillor for the ward invalid?

(2) Is the petitioner to be deemed to be elected to the office of councillor of the said ward?

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), contains the following provisions:—

Section 12 (1). A person shall be disqualified for being elected and for being a councillor, if and while he

(c) Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council

Section 56 (2). If the number of valid nominations is the same as that of the vacancies, the persons nominated shall be deemed to be elected.

Section 87 (1). A municipal election may be questioned by an election petition on the ground

(c) That the person whose election is questioned was at the time of the election disqualified

Section 93 (4). At the conclusion of the trial the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and shall forthwith certify in writing the determination to the High Court, and the determination so certified shall be final to all intents as to the matters at issue on the petition.

R. Cunningham Glen for the petitioner. The petitioner is entitled to be "deemed to be elected" under section 56 (2) of the Municipal Corporations Act, 1882. The election was for one vacancy, and there were but two candidates. By section 87 (1, c) a municipal election may be questioned by an election petition on the ground that the person whose election was questioned was at the time of the election

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disqualified. By section 93 (4) the Election Court is to determine whether the person whose election is complained of, or any and what other person was duly elected. The respondent was disqualified by reason of his interest in a contract with the Corporation, and his nomination was invalid, so that under section 56 (2) the petitioner is entitled to the seat. But apart from that section the Court has power under section 93 (4) to declare who was duly elected. The disqualification goes to the root of the matter; the votes for the respondent were all of them votes thrown away, and the only valid votes given were those for the petitioner: *Beresford-Hope v. Sandhurst* (1889) 23 Q. B. D. 79; 58 L. J. Q. B. 316; *Harford v. Linskey*, 1899, 1 Q. B. 852; 68 L. J. Q. B. 599. *Drinkwater v. Deakin* (1874) L. R. 9 C. P. 626; 43 L. J. C. P. 355, is distinguishable, for there the disqualification was for corrupt practices. The petitioner's nomination was valid, there was only one office to fill, the nomination of his opponent was invalid, and the petitioner is entitled to be deemed elected under section 56 (2) and so declared.

Corrie Grant for the respondent. The principle of law is that no candidate is entitled to a seat unless he can establish the fact that he has received a majority of lawful votes, except in such a case as *Beresford-Hope v. Sandhurst* (1889) 23 Q. B. D. 79; 58 L. J. Q. B. 316; where the candidate, a lady, was disqualified by *status*. This special case, as stated, contains no indication that notice of the respondent's disqualification was given to the electors. Upon the face of it his nomination was good, and there was no apparent or manifest objection to his *status*. [KENNEDY J. called attention to the judgment of Lord Watson in *Pritchard v. Bangor Corporation* (1888) 13 App. Cas. 241; 57 L. J. Q. B. 313]. The petitioner cannot claim the seat unless elected by a majority of votes, but he can have a fresh election.

R. Cunningham Glen in reply. *Pritchard v. Bangor Corporation* only deals with the jurisdiction of the returning officer. In *Lady Sandhurst's* case the question was whether the votes given for her had been thrown away; that is not the question here. This is a statutory matter not governed by the rules of Parliamentary elections, which are founded on common law. The petitioner is entitled to be declared elected.

KENNEDY J. The question here is as to the right of the petitioner to claim to be elected to the office of councillor for the north ward of Newport, Isle of Wight; and there is no question raised by the case as to notice being given to the electors of the disqualification of the respondent, who at the election obtained the majority of the votes. He admits that he was a disqualified person who, by the operation of

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section 12 (1, c) of the Municipal Corporations Act, 1882, could not be elected to the office of councillor. The petitioner contends that by reason of this disqualification of the respondent, and by reason of there only being two candidates at the election, he, the petitioner, is entitled to be declared elected. It is said that this disqualification of the respondent prevented him from becoming a candidate, because he could not be validly or properly nominated, and that by the terms of section 56 (2), there being but one valid nomination, namely, that of the petitioner, who was one of the two candidates for the single vacancy in the Council, the petitioner ought to be deemed to be elected. I cannot assent to this contention. It seems to me clear upon the authorities, and upon the fair construction of the statute, that what was intended by the expression "valid nomination" in section 56 is that which was expressed by Lord Watson in *Pritchard v. Bangor Corporation* (1888) 13 App. Cas. 241, at p. 252; 57 L. J. Q. B. 313, where he says: "If no objection is made, or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification, or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer." That being so, the election proceeds. The question is not one between these two candidates. We have no power in cases of parliamentary or municipal elections to disregard the consequences of the election having taken place and votes having been given. We are not at liberty to disregard it. It is said, however, that there are cases in which we should do so, and *Beresford-Hope v. Sandhurst* (1889) 23 Q. B. D. 79; 58 L. J. Q. B. 316 is cited as an instance. Certainly if a person be nominated who is manifestly disqualified, and who does not possess any *status* entitling him to election, the votes given for him may be treated as thrown away, as was said by Wright J. in *Harford v. Linskey*, 1899, 1 Q. B. 852; 68 L. J. Q. B. 599. Again, there may be a case where the person elected must have been known to be disqualified for nomination, as in *Lady Sandhurst's* case, in which the votes might well be treated as thrown away. But in a case like this, where there was no disqualification on the face of the nomination paper, and where the disqualification, such as it was, was not known to the electors, it is impossible to treat the votes given at the election as votes thrown away, except upon a scrutiny showing that a number of the electors had actual warning, and that their votes so thrown away were sufficient in number to turn a majority into a minority. Under such circumstances the

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Hobbs v. Morey. petitioner cannot claim the seat as a candidate who has received a majority of the votes. A fresh election must be held; and this view is in accordance with the practice and the law as to both Parliamentary and municipal elections. The petitioner does not allege that there was any notice of the respondent's disqualification for nomination given to any of the electors, and he cannot himself be treated as a person nominated who can claim the seat.

DARLING J. I am of the same opinion. Practically the case is governed by the judgment of Lord Watson in *Pritchard v. Bangor Corporation* (1888) 13 App. Cas. 241; 57 L. J. Q. B. 313. Our answer to the first question in the case must, therefore, be "Yes," and our answer to the second, "No."

Judgment accordingly.

Solicitors for the petitioner—Sole, Turner, and Knight.

Solicitors for the respondent—Ley, Lake, and Ley, for Richard Roach Pittis, Newport, Isle of Wight.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

ALLMAN v. HARDCASTLE.

1903.

July 6.

Streets — Nuisances — Metropolis — Obstruction of street — Costermongers — Right to prosecute — Information laid by officer of metropolitan borough council and expressed to be on behalf of council — Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 60 (7).

A person may be convicted under section 60 (7) of the Metropolitan Police Act, 1839 (which deals with the obstruction of streets by costermongers, &c.), on an information laid by an officer of a metropolitan borough council acting under instructions from the council and expressed to be laid "on behalf of the council"; for there is nothing to restrict the right to prosecute under the enactment to the police and, on the question whether there can be a conviction, it is unnecessary to consider whether the council have power to prosecute, since the words "on behalf of the council" may be rejected as surplusage if necessary.

St. Leonards, Shoreditch, Vestry v. Franklin (1878) 3 C. P. D. 377; 47 L. J. C. P. 727, distinguished.

CASE stated by a metropolitan police magistrate, who had dismissed an information preferred by the appellant against the respondent under section 60 (7) of the Metropolitan Police Act, 1839. The facts and the nature of the information were stated in paragraphs 5 *et seq.* of the case as follows : —

5. (i.) That the prosecution was instituted by the appellant, a servant of the mayor, aldermen, and councillors of the metropolitan borough of Southwark acting by the Council of the borough on the instruction and by the order of the said Council.

(ii.) That the prosecution was conducted by counsel instructed by the solicitor for the council of the borough of Southwark.

(iii.) That the summons, dated February 7, 1903, stated "information has been laid this day by Edward Allman, inspector of streets, on behalf of the Southwark Borough Council, for that you on 5 February, 1903, at a thoroughfare or street known as London Road, in the metropolitan borough of Southwark, in the county of London, within the district aforesaid, did unlawfully expose for sale certain articles, to wit, oysters, upon and so as to hang over the carriageway or footway of the said street so as to cause annoyance or obstruction in the said thoroughfare contrary to the Metropolitan Police Act, 1839, s. 60 (7)."

(iv.) That the respondent (who is a costermonger) did, in fact,

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on February 5, 1903, in the said thoroughfare or street known as London Road, in the said borough of Southwark, expose oysters for sale on a barrow standing in the carriageway of the said thoroughfare, and that such obstruction was contrary to subsection (7) of section 60 of the Metropolitan Police Act, 1839, and unlawful.

It was further proved that the respondent was not carrying on business as a costermonger in accordance with the police regulations made pursuant to the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1.

6. On the part of the respondent it was contended that the information was bad in law upon the following grounds :—

(a) That the same was expressed to be laid by the appellant on behalf of the said Southwark Borough Council.

(b) That the same was laid on the instructions and by the orders of the said Borough Council.

(c) That the said Borough Council was in law unable to lay the information either as a body corporate or by its servant.

(d) That a corporation could not act as a common informer unless expressly or impliedly authorised by statute.

(e) That as the corporate body (the Southwark Borough Council) had no power to lay the information it could not appoint the appellant to lay such an information on its behalf.

7. On the part of the appellant it was contended—

(a) That the appellant was entitled in law to lay the information as servant or agent and by the direction and on behalf of the Southwark Borough Council.

(b) That the said Borough Council was entitled in law to lay the information by the appellant, its servant and agent.

(c) That the words, "on behalf of the Southwark Borough Council," in the summons were descriptive of the appellant's position, ^{and} _{or} that they were surplusage, and could be disregarded, and that the information should be treated as laid by the appellant individually.

(d) That the Borough Council were not common informers, but by reason of their powers were proper prosecutors of the respondent for the offence charged.

(e) That the solicitor for the respondent having cross-examined as to obstruction, size of barrow, and other facts, it was too late to raise the point at the close of the evidence for the prosecution.

(Note.—The respondent's solicitor cross-examined the first and other witnesses to elicit facts to support the said point, but did not

raise the argument or expressly indicate the point until the close of the evidence for the prosecution.)

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(f) That the point raised by the respondent being purely technical, and as to the substance or form of the information and summons, and not going to jurisdiction; and the respondent not having been deceived or misled by the informality or defect (if any) in the information or summons, the respondent should on the finding of fact have been convicted.

8. The magistrate's attention was called to the several cases herein-after set out:—*St. Leonards, Shoreditch, Vestry v. Franklin* (1878) 3 C. P. D. 377; 47 L. J. C. P. 727; *Egginton v. Pearl* (1875) 33 L. T. 428; *Wandsworth District Board v. Pretty*, 1899, 1 Q. B. 1; 68 L. J. Q. B. 193; *Reg. v. Francis* (1899) 15 Times L. R. 323; *Summers v. Holborn Board of Works*, 1893, 1 Q. B. 612; 62 L. J. M. C. 81; *Kcep v. St Mary, Newington, Vestry*, 1894, 2 Q. B. 524; 63 L. J. Q. B. 369; *Reg v. Bradley* (1894) 10 R. 183.

9. After consideration of the said contentions and cases the magistrate was of opinion that the Southwark Borough Council in prosecuting the respondent for obstruction should have proceeded under the statutory powers conferred upon them by Michael Angelo Taylor's Act—the Metropolitan Paving Act, 1817 (57 Geo. III. c. xxix.) s. 65—and that the respondent was entitled to succeed on the ground that this was a prosecution by a corporate body, and that a corporate body cannot be a common informer except by specific or implied statutory authority; and that as it was shown that the appellant was acting in the said proceedings not upon his own initiation, but as agent for the Southwark Borough Council, and as that Council had no right to delegate to an agent that which they had no power themselves to do, and that the said point of law raised by the respondent was not as to the substance or form of the information or summons, but went to the jurisdiction of the court, and therefore the summons must be dismissed, which the magistrate accordingly did without costs. This decision affected 12 informations in which the like circumstances of obstruction were proved, and which by consent of the solicitors for the several defendants were treated as being heard at the same time.

10. The question upon which the opinion of the Court was desired was whether the magistrate upon the above statement of facts had come to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Section 60 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), provides as follows:—

Every person who in any street or public place within the limits of the metropolitan

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police district, shall be guilty of any of the following offences, shall be liable to a penalty not more than forty shillings for every such offence; (that is to say,)— . . .

(7) Every person who shall expose anything for sale in any park or public garden, unless with the consent of the owner or other person authorised to give such consent, or upon or so as to hang over any carriageway or footway, or on the outside of any house or shop, or who shall set up or continue any pole, blind, awning, line, or any other projection from any window, parapet, or other part of any house, shop, or other building, so as to cause any annoyance or obstruction in any thoroughfare.

Avory, K.C., Frank Dodd, and J. E. Walker for the appellant. This is a novel point, for convictions have taken place every day in the week before all the metropolitan magistrates. It is conceded that the police could summon the respondent, but it is contended that anyone can lay an information where the public are wronged. The Southwark Borough Council could lay the information, or the appellant could do so on their behalf. The magistrate has been misled by the case of *St. Leonard's, Shoreditch, Vestry v. Franklin* (1878) 3 C. P. D. 377; 47 L. J. C. P. 727, which decided that a corporation could not sue for a penalty under a statute as common informers unless they were expressly authorised by the statute. The magistrate has confused the idea of a common informer suing for a penalty with a prosecution by a person on behalf of and representing the public for an offence which is a distinct offence against them. The elementary proposition is that any person may prosecute for an offence against the public. There are statutes which create offences against individuals and individual rights, and under which by implication it is held that the individual must be the prosecutor. There are other statutes which expressly provide that the person aggrieved, or whose right has been infringed, must prosecute, but here there is no such provision, and it is clear that any person can prosecute. In the absence of any statutory restriction almost anyone can be prosecutor: *Cole v. Coulton* (1860) 2 E. & E. 695; 29 L. J. M. C. 125.

As to the magistrate's opinion that the appellant should have proceeded under Michael Angelo Taylor's Act, the reason that he has proceeded under the Police Act is to avoid the difficulties which have already arisen under the earlier Act, and the magistrate has overlooked the fact that the prosecution is for an offence against the public. *Back v. Holmes* (1887) 57 L. J. M. C. 37, is an authority that in a case of public policy anyone can institute a prosecution.

Danckwerts, K.C., and Harold Brandon for the respondent. No one questions that, for ordinary offences against the State where the Crown is technically the prosecutor, it is competent for anyone to prosecute, but these proceedings are regulated by the Summary

Jurisdiction Acts, which require the name of the real prosecutor to be stated in the information. [LORD ALVERSTONE C.J. Why are these prosecutors called common informers?] Because they are not interested in the matter. Here the person who comes forward is a representative. He is not the prosecutor, and the person who is the prosecutor must be stated in the information. Corporations are not endowed with the capacity to act as prosecutors in a case like this. In *St. Leonard's, Shoreditch, Vestry v. Franklin* (1878) 3 C. P. D. 377; 47 L. J. C. P. 727, Lord Coleridge C.J. refers to specific powers being created under which proceedings can be taken, but corporations have no power generally to set the criminal law in motion. The magistrate holds here that borough councils and bodies constituted under an Act of Parliament do not possess the power to prosecute generally. Having under Michael Angelo Taylor's Act power to prosecute, the presumption is that they have none under the Police Act. The position of costermongers is not that of ordinary persons; they can only be prosecuted for obstructing the highway in London if they violate the police regulations. If the costermonger here had violated those regulations, the police were the proper authorities to prosecute. Parliament undoubtedly intended that costermongers should be dealt with by the police. The Borough Council have proceeded as common informers, and to do so is *ultra vires*. The police are the authority to make these regulations as to costermongers. By section 1 of the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), section 6 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), is not to apply to costermongers so long as they carry on their business in accordance with the police regulations. The police have to decide what is and what is not harmful to the public, and are naturally the authority to see that their regulations are complied with. [CHANNELL J. Is it contended that the appellant could not lay this information as a private individual?] The contention hardly goes so far as that, but in this case it was found that the appellant was not the prosecutor, and that the Borough Council acted in that capacity. According to the Summary Jurisdiction Acts it must be stated who the prosecutor is in order that the costs may be put upon the proper and responsible head. [He also cited *Reg. v. Francis* (1899) 15 *Times* L. R. 323.]

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LORD ALVERSTONE C.J. If we were to adopt Mr. Danckwerts's argument a very important question might arise. It is suggested that this prosecution must fail because the prosecutor is a common informer, and because the Southwark Borough Council have no statutory authority to enable them to take proceedings. Nothing

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has been put before us to show whether the Southwark Borough Council do or do not possess such statutory powers. Mr. Danckwerts has used as an argument the circumstance that the Commissioners of Police are endowed with the power to take such proceedings; but there has been nothing put before us—no statute or anything—determining or defining the constitutional powers of metropolitan borough councils. I do not express an opinion as to whether in this case a prosecution could be brought by Allman on behalf of the Southwark Borough Council or not. Except for the purpose of determining who would be liable for costs, the question whether he had or had not authority to commence the proceedings on behalf of the Council would not have arisen. It seems to me that these words “on behalf of the Southwark Borough Council” are absolutely unnecessary, and can be disregarded. When we asked Mr. Danckwerts if he contended that the police only could prosecute, he very properly said he would not go so far as that. I think this prosecution, without deciding whether the Council can or cannot initiate the proceedings, is a proper one, and I see no reason why the information should not be laid by Allman, who says he laid it on behalf of the Borough Council. I think, with all due respect to the learned magistrate, that he has misunderstood the reasoning in *St. Leonard's, Shoreditch, Vestry v. Franklin* (1878) 3 C. P. D. 377; 47 L. J. C. P. 727. In that case Lord Coleridge C.J. was speaking of a corporation suing for penalties, not of a corporation prosecuting for the purpose of securing the infliction of a penalty. It is perfectly true that for many purposes “informers” is an apt expression, properly used even in regard to ordinary prosecutions, but what Lord Coleridge C.J. was referring to was an action for the recovery of penalties by a corporation as a common informer. I do not wish to say anything as to whether the Council can or cannot take proceedings of this kind, but so far as this case goes, I am of opinion this prosecution is in order, and should be proceeded with.

WILLS J. I am of the same opinion. The only consequence that would happen supposing Mr. Danckwerts is right in saying that the Council have no statutory or other authority to lay an information on its own behalf would be with reference to costs.

CHANNELL J. I am of the same opinion.

Case remitted.

Solicitor for the appellant—G. C. Topham.

Solicitor for the respondent—D. A. Romain.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

1908.

July 9, 10.

PAKENHAM v. TICEHURST RURAL DISTRICT COUNCIL.

Sewers—“Drain” or “Sewer”—Conduit leading to no outlet—Conduit laid by trespasser—Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 4.

A conduit in order to be a “sewer” within the Public Health Act, 1875, must be, in some form or other, a line of flow by which sewage or other liquid matter of some kind, such as would be conveyed through a sewer, is taken from one point to another point and there discharged. It must have a terminus a quo and a terminus ad quem.

If by way of trespass a conduit such as to fall within the definition of “sewer” has been laid upon land without the knowledge or sanction of the landowner, the landowner upon ascertaining the fact may cause it to be removed, but if he permits it to remain, adopting the act of the trespasser, it will vest as a “sewer” in the local authority.

A conduit is none the less a sewer because at a particular point in its course there is a cesspool which existed before the conduit was laid, and which has been converted into a catchpit, nor because at a particular point in its flow the sewage has been so treated as to have become innocuous.

THIS was an action by the plaintiff claiming (1) a declaration that certain sewers, ditches or drains passing through his estate, known as Bernhurst, situate at Hurst Green, in the rural district of Ticehurst, in the county of Sussex, and receiving the sewage from drains, houses, privies, and slaughter-houses situate in or near to the village of Hurst Green aforesaid, were sewers vested in and under the control of the defendants as the rural sanitary authority of the district of Ticehurst; (2) an injunction to restrain the defendants from causing or permitting such sewers, ditches and drains, or any of them, to remain uncovered or otherwise so kept as to be a nuisance or injurious to health, or causing or permitting such sewers, ditches and drains, or any of them, to remain uncleansed or unemptied; and a mandatory injunction on the defendants consequential on such first-mentioned injunction; (3) damages; and (4) costs.

The two questions raised by the action were (1) whether these sewers, ditches and drains were sewers within the meaning of the Public Health Act, 1875, and (2) if they were, whether the defendants, as the local sanitary authority, had kept them in proper order.

The plaintiff was the owner in fee simple and occupier of the

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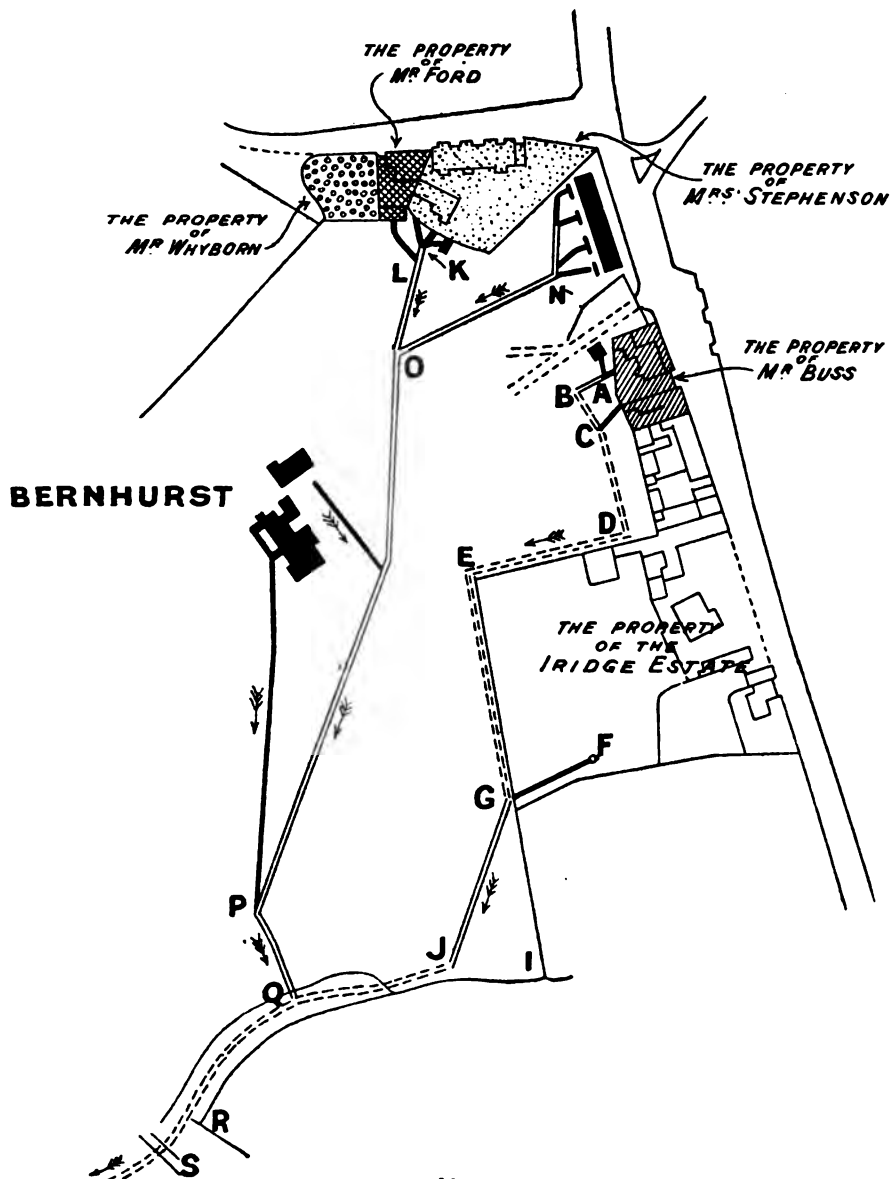
Bernhurst Estate. He became the owner of the greater part of the estate in 1858, and of the remainder thereof in 1867, but until 1902 he did not reside there.

The facts are fully stated in the judgment of Buckley J. with reference to a plan which was appended to the statement of claim, and of which a sketch (slightly distorted for the sake of convenience) is given opposite the present page of this report.

In the original plan the various drains and sewers were shown by blue and red solid and dotted lines. In the sketch in the present report other methods of distinguishing between the various lines of pipes have been adopted, and the references in the judgment to the plan have been adapted so as to accord with the sketch.

Buckmaster, K.C., and *G. P. C. Lawrence* for the plaintiff. By section 4 of the Public Health Act, 1875, a "drain" is defined to mean "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed," and by the same section "sewer" is defined to include "sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." Section 13 provides that all existing and future sewers within the district of a local authority shall vest in and be under the control of such local authority. Section 18, which provides for the alteration and discontinuance of sewers, shows that open courses, such as ditches, are contemplated by the Act as being sewers. Section 19 enacts that "every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." If the pipes in the present case are sewers, an obligation is cast upon the defendants to cleanse them. It construing the Act it is to be borne in mind that it is a sanitary Act, and does not contemplate property. The Act vests the sewers in the local authority for the benefit of the public health. If once a connection is made the disconnection by the local authority will not cause a sewer to cease to be a sewer. The fact that part of a sewer passes through an open ditch does not make it cease to be a sewer: *Wheatcroft v. Matlock Local Board* (1885) 52 L. T. 356. Also, the fact that the requisite sanction and approval of the making

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NOTE.-

The covered drains alleged to be sewers are shown thus _____

The covered private drains are shown thus _____

The open ditches alleged to be sewers are shown thus = = = = =

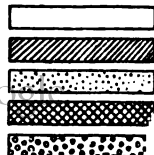
Parts coloured Yellow are shown thus - - - - -

" " Orange " " " " - - - - -

" " Green " " " " - - - - -

" " Pink " " " " - - - - -

" " Blue " " " " - - - - -



of a sewer was not obtained does not prevent it, when made, from being a sewer: *St. Matthew, Bethnal Green, Vestry v. London School Board*, 1898, A. C. 190; 67 L. J. Q. B. 234; *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245. Here there is a continuous series of pipes or drains into a cesspool and a similar series of pipes or drains from the cesspool. These constitute a sewer, and the plaintiff is therefore entitled to maintain the present action.

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[*Astbury, K.C.* If there is no negligence on the part of the defendants, we submit that the present action cannot be maintained. If there is negligence, then the plaintiff, no doubt, may recover damages, but nothing further, unless the defendants have been committing a common law nuisance, in which case no doubt the Court could grant an injunction.]

The Court may give damages on the basis that the defendants have neglected their statutory duty: *Baron v. Portslade Urban District Council*, 1900, 2 Q. B. 588; 69 L. J. Q. B. 899. The plaintiff asks first for a declaration that these pipes or drains are sewers, and secondly for nominal damages under section 19, on the ground that the defendants have not kept the sewers in order. A sewer made by a landowner for the sole purpose of draining houses erected by him on his own land is not made by him "for his own profit" within the meaning of the exception in section 13 of the Act, and consequently such sewer vests in the local authority: *Ferrand v. Hallas Land and Building Co.*, 1893, 2 Q. B. 135; 62 L. J. Q. B. 479. It cannot therefore be suggested that the drain draining the cottages on the plaintiff's land is within the exception if it is a sewer. A series of pipes draining into a cesspool with no outflow is, no doubt, not a sewer: *Meador v. West Cones Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561. That case differs very much from the present, as here there has been a constant discharge into the ditch. If at the time of action brought this was a sewer, disconnection by the local authority will not make it cease to be a sewer: *St. Leonard's, Shoreditch, Vestry v. Phelan*, 1896, 1 Q. B. 533; 65 L. J. M. C. 111. A ditch may be a sewer, although quite open. A sewer is a means of conveying sewage from more than one independent tenement. The ditch in the present case has been the only means of conveying sewage for the last ten years. Unless some point can be made of the fact that in a part of the system there are cesspools, there is no ground for saying that this system of pipes is not a sewer. The question to be considered is whether there is a conduit taking sewage from more than one independent tenement. It is clear that these pipes do. All that can be suggested

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is that at P there is a cesspool which prevents it being a sewer. From G to J it is clear that it must be a sewer. If so, how can it cease to be a sewer from J to Q merely because it is open? The authorities show that this cannot be the case. What the plaintiff has to do is to show the actual condition of the ditch and that the defendants have neglected to carry out their statutory duty, and that, it is submitted, he has done.

Astbury, K.C., and *R. J. Parker* for the defendants. The pipes or ditches referred to are not sewers vested in or under the control of the defendants. A pipe into and an overflow out of a cesspool is not a sewer. The plaintiff has connected the cesspool with the ditch, which is wholly upon his estate and is his private property. The level of the ditch B to S rises from the point C, and water cannot therefore flow from C to E. The defendants have stopped the inflow from A, C, and F. B, E, G, and J, Q, R, S, T are open ditches and not sewers. They drain into a stream which is not the property of the plaintiff. This is a trespass, and can be stopped.

[BUCKLEY J. Is not the law this:—The owner of land in which a neighbour wrongfully places a sewer is entitled either to require the trespasser to remove it: *Hedley v. Webb*, 1901, 2 Ch. 126; 70 L. J. Ch. 663, or to say to the local authority, "I adopt the trespasser's act; this is a sewer which vests in you"?]

If, however, these pipes or ditches are sewers, the defendants were not at the time of action brought aware, and could not by the exercise of reasonable care have discovered, that they were sewers. They are not, therefore, responsible for any nuisance caused by them: *Bateman v. Poplar District Board* (No. 2) (1887) 37 Ch. D. 272; 57 L. J. Ch. 579. Where you have a thing constructed to carry sewage, *prima facie* that is a sewer. Where, however, it is constructed for some other purpose, but is subsequently used for sewage, it is not necessarily a sewer. A river into which sewage is sent and absorbed does not become a sewer, but continues to be a river: *Newcastle Corporation v. Houseman* (1898) 63 J. P. 85. The mere outfall at various points into the ditch J, Q does not make it a sewer. The question in such cases must always be one of fact. Whether or not Q to T is a sewer depends upon the question of fact whether or not the use subserved by the natural ditch is mainly that of carrying sewage from F, G, J.

[They also referred to *Croft v. Rickmansworth Highway Board*, (1889) 39 Ch. D. 272; 58 L. J. Ch. 14, and the Public Health Act, 1875, ss. 40, 41, 48, 49, 91.]

Buckmaster, K.C. replied.

BUCKLEY J. To the statement of claim in this case is appended a very convenient plan, which gives one a bird's-eye view of the whole situation, and enables one to deal with it. The real question to be tried in the action is whether or not certain closed and open conduits shown on that plan which lie on the plaintiff's land are sewers within the Public Health Act, 1875. By paragraph 11 of the statement of claim the plaintiff alleges that they are sewers vested in and under the control of the defendant Council. By paragraph 13 of the defence the defendants deny that any of the pipes or ditches are sewers vested in or under the control of the defendants. And, again, in paragraph 5 they allege, as to certain of them, they are the private property of the plaintiff. The question, therefore, is whether these are or are not sewers. Consequent upon the determination of that question, the plaintiff asks by his statement of claim for certain injunctions, which he does not now ask for at the bar. He also asks by his statement of claim for damages. At the bar he simply asks for nominal damages to show, if he succeeds, that he had a grievance in respect of which he is entitled to call upon the defendants for relief.

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Now the pipes and ditches and conduits in question constitute really two systems, an eastern and a western system. I will first describe the eastern system. That system begins with a drain from the plaintiff's entrance lodge at his gates. Then comes a property which was the property of a Mr. Buss, coloured orange on the plan, upon which there were certain houses from which, or from the cesspools in the gardens or curtilages of which, there was a discharge into the ditch B, D. Is so much of that system as lies on the plaintiff's land—that is the double dotted line B, C, D or the continuation of that, D, E, G—a sewer?

Before stating the conclusion at which I have arrived upon that point, I will state certain general principles which I apprehend are applicable to this case. A sewer within the Public Health Act, 1875, must, I conceive, be in some form or other a line of flow by which sewage, or water of some kind, such as would be conveyed through a sewer, shall be taken from one point to another point, and there discharged. It must have a *terminus a quo* and a *terminus ad quem*. There must be a line of flow from one to the other. It was decided in *Meador v. Wcst Cowes Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561, that if there is a thing which conveys sewage and which has no outflow at all, but simply terminates in a pit on the land of the person who lays the pipe, that is not a sewer. I need not go into the facts of that case. There the plaintiff did lay a further connection with the outflow; but that was wrongful, and had to

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be removed. The result was that there was simply a flow to another place on his land, and that there was no outflow. It was decided that that was not a sewer. That is enough for the purpose of the first part of the case which I have to decide. It is proved in the present case that the matter which was flowing from the points A, B, C never went beyond the point D, which was a higher point on the land, and that nothing ever passed D so as to flow along D, E. G. This is, therefore, a case, as it seems to me, like *Meador v. West Cowes Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561—that of simply a flow of sewage or liquid matter of some kind into a hole where it stopped, and where there was no outflow. There is another ground which also would be applicable to this part of the case, and that is this—that the cesspools of these cottages so overflowed into the ditch as to create a nuisance. The local authority, after action brought, required the occupiers of these cottages to cease to discharge into the ditch in that way, and they have done so. There is now nothing that discharges into this ditch B, C, D, except at A on the plaintiff's own land. I think, therefore, that the plaintiff fails as regards this line B, C, D, E, G, which I hold is not a sewer.

Before going into the rest of the case, I must state some further general principles as I understand them to be decided by authority. If a sewer in point of fact has been laid and used, it is none the less a sewer because it has been laid wrongfully, as, for instance, where the proper local sanction, or sanction from the proper authority, has not been obtained. That was so decided in *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 254, and in *St. Matthew, Bethnal Green, Vestry v. London School Board*, 1898, A. C. 190; 67 L. J. Q. B. 234. But if a sewer has been laid wrongfully in the sense that somebody has committed a trespass by going on to the lands of another and there laying such a pipe as that it is a sewer, it does not follow that he has so acted as in point of fact to hand over the land of his neighbour to the local authority, because if it is a sewer it vests in the local authority. That was so decided in *Hedley v. Webb*, 1901, 2 Ch. 126; 70 L. J. Ch. 663. The action there was brought by the owner of the land on which the trespass had been committed against the trespasser, asking for and obtaining an order that the defendant should take up and remove the drain or sewer which he had wrongfully laid on the plaintiff's land. The local authority were not parties to the action. An order could not, of course, have been made dealing with land which had vested in the local authority in the absence of the local authority. The result of that decision, and of the other decisions, to my mind is that if by way of trespass a sewer has been laid without the knowledge

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of the landowner on his land, it is competent to the landowner, when he finds it out, to say, "This was wrongful against me; this is not a sewer at all because it was put on my land by way of trespass as against me, and it must be taken away." I conceive he can say that, both as against the person who laid it and as against the local authority. *Hedley v. Webb*, 1901, 2 Ch. 126; 70 L. J. Ch. 663, was an *à fortiori* case, and the order there was made to remove the pipe in the absence of the local authority in whom, if it had been a sewer, it would have been vested. But if, in point of fact, such a system of pipes has been laid down by one man in the land of another as to constitute a sewer with the consent of the latter, or, if it has been laid without consent of the latter, and subsequently he finds out that it has been done, and says, "I do consent, I do not complain of trespass, I am quite content," then it seems to me that will be a sewer, and, as such, will vest in the local authority. The question, therefore, whether a thing is a sewer or not, is, I think, upon the question of what it carries, a question of fact. It is not every system of conduct of fluid which contains some sewage matter which is a sewer. You have to see what it is in substance.

With that I go to the facts of the present case in order to see first as regards the rest of the eastern system, what those facts are. They are these:—There lies there certain property of the Iridge Estate on which there are seven houses and an inn called the "Queen's Head," and those seven houses and the "Queen's Head" have for very many years, certainly for more than 20 years, had a system of pipes by which their drainage has been carried down to a point which on this plan is marked F, and it is proved that by agreement between the owner of the Iridge Estate and the owner of the plaintiff's estate there was laid, more than 20 years ago, a system of pipes marked on the plan F, G, J. At F there was a cesspool. That cesspool has been there a great many years—40 years or more, on the evidence. It would seem that before the system of pipes F, G, J was laid this cesspool was a source of nuisance, and overflowed, and, as I gather, the overflow went into the ditch E, G below and created a nuisance. By the consent of the landowners the pipes F, G, J were laid to take the matter from the cesspool; in other words, that which had theretofore been a cesspool overflowing the land was, as it seems to me, made into a catchpit in a system of sewerage. There were pipes above and below it, and the cesspool was a sort of catchpit between; and through that system, from the Iridge houses and the "Queen's Head" Inn there flowed into this, which I call the catchpit, and from it into the Iridge system of pipes F, G, J a large amount of

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sewage. The houses are now supplied with water-closets, and have been so supplied for a long time. There is an abundant supply of water there, and a great deal of liquid sewage is sent down those pipes which comes out through J.

In order to complete the statement of facts, I had better trace what flows from J. At J there commences, at its eastern end, what I suppose is an old agricultural ditch, except that it is proved that somewhere by J there is a spring that feeds it. It is a small water-course or ditch and watercourse. The water which thus comes in at J, the fresh water to the extent of the spring, and sewage to the extent of the discharge at J, flows along the line J, Q, R, S, T until it flows out at T, into a stream which is there. At S there is a bridge and a farm road, through which there is carried a culvert by a 9-inch pipe. The evidence is that at S there is a large accumulation of sewage coming from the source which I am now tracing, and from another which I shall have to trace presently. It forms a pool at S of foul matter, and so much of the liquid, whatever it is, as can pass, passes through the 9-inch culvert through the road, and then flows on from S to T, and so into the brook. As regards this system F, G, J, it appears to me that was a system of pipes laid down by the common consent of the two landowners, through whose land those pipes run in order that it might convey the sewage from the Iridge Estate houses and from the "Queen's Head." There are more than one house. I think that those pipes were laid in order that they might be, and that they are, a sewer which was put there in order to convey the drainage. In my opinion that is none the less a sewer because there was before it was made, and is still, at F a cesspool which has thus been converted into a catchpit. I think F, G, J constitutes a sewer.

Before going on to state what I think as regards this watercourse or ditch, I will go to the western system and state what I know about that. At and near the point N on the plan there have stood for 100 years, or something like that, some old cottages. These old cottages had water-closets, which were drained by a pipe, which is now replaced by the line N, O. It do not know that it is in identically the same place, but substantially the same place. The cottages at and near N were a few years ago pulled down, and new cottages have been built on their site. These, again, have water-closets, and the drainage from these cottages is carried down the same pipe, or the same line of pipes. I do not mean the same identical earthenware pipes, but a new line of pipes in the place of the old pipes. For more than 20 years on the evidence, and it may be for 100 years, those cottages at and near N have discharged

liquid sewage through a line of pipes something like N, O. I further know that there are three plots lying off the plaintiff's estate coloured blue, pink, and green. Clarke, who was called by the defendants, and who has been the inspector of nuisances since 1873, and has therefore known this for 30 years, tells me that the pipes which run from the blue and the pink have been there as long as he has known the place, that is, for 30 years, and how much more I do not know. As regards the cottages on the green, those were built about 23 years ago, and ever since then they have had their connection into that pipe, so that the system of liquid discharge which comes from the points L and K from the blue, pink, and green has gone on for 20 years and more. From that point there is, and has all this time been, a pipe which goes to the south through O, and at O is joined by the liquid matter which is coming from the cottages at N. That goes on to the south till it reaches a point P. In the interval it receives a drain, which comes from the plaintiff's building, of some kind—I do not know what, but a stable, or something of that sort—and at P it receives also the drains from the house. At P there is a cesspool. From P again to the south there is a line of pipes, P, Q. Snepp, the gardener, who has known this place for 15 years, stated that P, Q has existed ever since he knew the place. P, Q was renewed some five years ago and newly laid, but the line of pipes P, Q has existed for the last 15 years. P, Q discharges into the watercourse or ditch which I have described before.

Now, is this system L to O and N to O, and so on through P to Q, a sewer? I know that the connection of the drains of the blue, pink, and green to the pipe which led on to the south was made with the consent of the plaintiff, that is to say, that the connection which brought fluid matter from those premises to the north down into the pipes was arranged by him. There is no question but that that was a system of dealing with sewage arranged with his consent. The only point is that it was so arranged as to go into the cesspit P, and it is said that it is not a sewer because it has a line of flow which ends at the cesspit P, and therefore is within *Meador v. West Cowes Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561.

Now the evidence as to P is this, that this line of pipes P, Q has been constructed 15 years at least, and that it is used in this way. The flow of drainage to P is such that the cesspit there is filled by two days' use, and if they clean it out, in two days it is full again. It is the practice to clean it out once a year at least, and to clean it out more frequently if occasion requires them to do so. The gardener said that if the owner or any other persons were

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coming to reside there, they cleaned it out before they came. If they saw that there was a nuisance they cleaned it out. It was not cleaned out every two days or anything approaching that, but something like every 12 months. In other words, the line of pipes P, Q were so laid that there should be from L, K and N on the north to Q on the south a continuous flow through P, finding its outfall at Q. Now is that a sewer? I think it is. It is none the less a sewer because, as in the case of the cesspit at F, there is interposed a cesspit that may have been made in the first instance simply to serve the mansion house, but which has been converted into a catchpit by being made a link in a system which has a continuous flow through the two lines of pipes I have described. The evidence is that both at Q and at J there is a continuous discharge. I ought to qualify that, because at J there is no longer a continuous discharge in consequence of what I will mention presently. I therefore hold that the system from L and N through O to P and Q is a sewer.

Then what are the facts as regards the line J, Q, R, S, T? If that which finds its outfall at J and Q is sewage, it is sewage which, as I have shown, by the consent of the owner of this land has been led into the ditch belonging to the owner of this land in order that it may flow away through his ditch. There is no question but that an open ditch may be a sewer quite as much as a closed sewer. If authority were wanted for that, I might refer to the case of *Wheatcroft v. Matlock Local Board* (1885) 52 L. T. 356. The question is not whether it is open or closed, but how it is used. It seems to me, on these facts, that the landowner here has, by consent as regards his neighbours, and for convenience as regards his own sewage discharge, chosen to take sewage into his ditch J, Q, R, S, T, and there to discharge it, and to use his ditch as the means of the discharge of the sewage after it has reached the ditch. It seems to me to follow from that that J, Q, R, S, T is again a sewer.

But then I am told it is not a sewer, because when the point S is reached there is such an impediment to its flow by this road and the culvert through it that the foul matter all accumulates above the culvert, and that which gets through is comparatively innocuous, and there has been a discussion as to whether the matter below S, T is to be described as being offensive or not. I do not think it matters whether it is so or not. The flow of sewage through J, Q, R, S as an arranged conduit for conveying faecal matter is none the less a sewer, down to the point S at any rate, because at that point the flow is so dealt with that at a lower point it becomes innocuous. If a thing be a sewer it is none the less a sewer because at a particular point further

down its flow the sewage has been so treated that it becomes innocuous. In point of fact, I think the result of the evidence is that what happens at S is not that the sewage is stopped and prevented from being sewage below S, but only that the more gross and impure parcels of the sewage flowing down there are caught and stopped, and that that which goes on from S to T is still sewage, although more diluted. I think, therefore, J, Q, R, S, T is also a sewer.

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As regards the nuisance which arises from this system, there is really no dispute between the parties. As regards the point Q, the evidence of the defendants' own witnesses was that the outflow there is very foul. They say that it is the plaintiff who fouled it, and that he does not clean out the cesspool. That it is foul there there is no question at all. There is some evidence again to this effect, that the pink plot belongs, or did belong, to one Ford, a butcher, who had a slaughter-house there which discharged blood and refuse, and there was a witness who examined the place recently and who spoke to finding dried hairs, which he thought were bullocks' hairs, on the bank by this water-course, which had been deposited there when the water was higher, and had dried there. There is sewage matter coming down there now which finds its way into the ditch. As regards the point J the facts are a little different. Owing to complaints which were made, steps have been taken to empty and render sweeter this catchpit or cesspool at F. There is now a pump there, and if the pump is properly worked, and the cesspool is kept empty, the result will be that no more faecal matter will come down F, G, J. It appears that some surface water has come down, and will continue to come down, that line from some gullies in the yard opposite the "Queen's Head"; but the connection between the cesspool at F and the line of pipes F, G, J has, since action brought, and quite recently, been cut off. If the parties continue to pump the cesspool at F effectively, there will be no more discharge of faecal matter at J. But if F, G, J was a sewer, as it appears to me it was, it does not cease to be a sewer because it has been so treated now that some sewage matter finds its way down it no longer. The authority for that is *St. Leonard's, Shoreditch, Vestry v. Phelan*, 1896, 1 Q. B. 533; 65 L. J. M. C. 111. But beyond that there remains this, that if this pumping is not done (and it appears clear it ought to be done) with the frequency with which it ought to be done, and the cesspool at F still overflows, there may be a repetition of the nuisance. I hope that will not occur. The state of things at J has been very much modified, but that does not, in my opinion, at all alter the character assumed by the pipe G, J by what has taken place in the past.

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The result of all this is that the plaintiff succeeds, in my opinion, as to the great bulk of these connections which he says are sewers, but he fails as to a small part. It only remains to consider what ought to be done as regards damages. As to that the matter stands thus: Complaints were made by or on behalf of the plaintiff from time to time of the great nuisance arising from this ditch and these pipes, and that there was a nuisance there is no dispute. I am not at all sure that either party exactly understood their rights. I think the defendants are justified in saying that the plaintiff in many cases was dealing with the matter as if he was calling on the local authority to act under a different section of the Act of Parliament. I do not think that that makes any difference. Ultimately, in August, 1902, there was a definite complaint, and, so far as I can see, until the date of the issue of the writ that complaint was not acted upon by removing the nuisance. I think, therefore, there is some damage. The plaintiff does not ask for substantial damages. He is quite content to take an order for nominal damages. I think there has been default on the part of the defendants, and I must give nominal damages.

It only remains to say how I ought to deal with the costs. I always like to deal with the costs on the footing of deciding the point which is really in dispute between the parties. It is obvious that the real dispute in this case was whether these various pipes were sewers for which the defendants are responsible, and which they must keep in order; or whether they were drains and pipes and ditches on the plaintiff's land for which he was responsible. As to the greater part of that the plaintiff succeeds and the defendants fail. As to the small part the defendants succeed and the plaintiff fails. I do not propose to have any separate taxation of costs as regards that. As regards the costs, what I order is that the defendants pay the plaintiff two-thirds of the cost of the action.

I will therefore declare that the lines of pipes on the plan in the statement of claim are sewers, excepting the dotted double line B. C, D, E, G. I give the plaintiff 20s. damages, and I order the defendants to pay two-thirds of the costs of the action.

Judgment accordingly.

Solicitors for the plaintiff—Sharpe, Parker, Pritchards, 'Barham and Lawford, for W. C. Cripps, Son, and Daish, Tunbridge Wells.

Solicitors for the defendants—Busk, Mellor, and Norris, for J. C. Lane Andrews, Wadhurst.

Supreme Court of Judicature.

COURT OF APPEAL (No. 2.)

KENDAL v. LEWISHAM BOROUGH.

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Oct. 29 ;
Nov. 3, 4.

Streets—Paving expenses—Metropolis—Apportionment of estimated expenses—Apportionment by temporary surveyor—Metropolis Management Act, 1855 (18 & 19 Viet. c. 120), s. 105—Metropolis Management Amendment Act, 1862 (25 & 26 Viet. c. 102), s. 96.

Order of Kekewich J. (1 L. G. R. 416) discharged on terms by consent.

THIS was an appeal by the plaintiff from the decision of Kekewich J. dismissing the action with costs. The case is reported, 1 L. G. R. 416.

Powell, K.C., and *W. A. G. Woods* for the appellant.

Macmorran, K.C., *Avory, K.C.*, and *Poyser* for the respondents.

Acting under a suggestion which fell from the Court, counsel on either side agreed to settle the case on terms and to leave the costs of the action and appeal to be dealt with by the Court. The terms of settlement were :—

“The actual expenses of the paving and the plaintiff’s due proportion thereof are to be determined in case of disagreement between the parties by a surveyor or engineer to be agreed upon, or, in case of non-agreement, to be nominated by the President for the time being of the Institute of Civil Engineers, which surveyor or engineer shall determine whether any and what work other than paving has been done, and whether any and what sum in respect of that work is to be deducted from the £628 11s. 7d. mentioned in the defendants’ accountant’s statement and report, dated Jan. 21, 1903, and, if any sum is to be deducted therefrom, the defendants are to pay the plaintiff’s and other costs of the reference, but, if there is no deduction, the plaintiff is to pay the defendants’ and other costs of the reference, defendants to retain out of the moneys they have collected from the tenants the sum payable by the plaintiff as his proportion agreed to be determined as aforesaid, and to pay to the plaintiff the balance.”

THE COURT then heard counsel on the question of costs, and made an order by consent that the parties agreeing to the terms initialled by counsel the order of the Court below should be discharged; and further directed the respondents to pay to the appellant £75 in respect of costs. Liberty to apply to the judge in chambers.

Order appealed from discharged by consent.

Solicitor for the appellant—S. J. E. Benham.

Solicitor for the respondents—Templer L. Down.

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COURT OF APPEAL.

July 16, in
Court below ;
August 11,
in Court of
Appeal.

MELTHAM SPINNING CO. v. HUDDERSFIELD CORPORATION.

Water—Waterworks—Compensation water—Neglect of statutory duty to deliver compensation water—Penalties—Penalties in nature of liquidated damages—Recovery of penalties—Huddersfield Water Act, 1869 (32 & 33 Vict. c. ex.), ss. 28, 32—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140–161.

The Huddersfield Water Act, 1869, under which the defendant Corporation have constructed and maintain waterworks, requires them to deliver certain compensation water ; and provides that in case of neglect on the part of the Corporation, in consequence of which the statutory quantity of compensation water is not delivered, the Corporation shall, for every day on which the neglect occurs, forfeit and pay to the occupiers of each of the mills and works affected thereby (who may sue for and recover the same) the sum of £5, and shall in addition make compensation for any damage sustained by such occupiers, or any of them, in respect of which such penalties are an insufficient compensation, and that such occupiers may recover such compensation by proceedings in any court of competent jurisdiction. The Act provides that the expression court of competent jurisdiction shall have effect as if the debt or demand with respect to which that term is used was an ordinary simple contract debt. And the Act in effect incorporates the clauses of the Railways Clauses Consolidation Act, 1845, with reference to the recovery of damages not specially provided for and of penalties, which clauses provide for the recovery of such damages and penalties summarily before justices.

Held (1), following *Beaumont v. Huddersfield Corporation* (1902) 1 L. G. R. 118, that the £5 a day recoverable under the *Huddersfield Water Act, 1869*, is in the nature of liquidated damages, and is not a "penalty" properly so called.

(2) That the expression "penalty," in sections 140 et seq. of the *Railways Clauses Consolidation Act, 1845*, means a penalty properly so called, i.e., a penalty imposed for punitive purposes, and not for the purpose of compensating the party injured.

(3) That the provisions of the *Railways Clauses Consolidation Act, 1845*, are consequently not applicable to the recovery of the £5 a day ; and that that sum may accordingly be sued for by action in the High Court.

ACTION set down in the special paper before Wright J. upon a point of law.

The action was brought under section 32 of the *Huddersfield Water Act, 1869*, for the sum of £785, being £5 a day for 156 days.

The material provisions of that Act, under which the defendants have constructed and maintain water works, are as follows :—

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Section 2 incorporates, *inter alia*, the Waterworks Clauses Acts, 1847 and 1863, subject to certain provisions not material to the present case.

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By section 3, it is provided that in the Act and the Acts incorporated therewith, the term "court of competent jurisdiction" shall have effect as if the debt or demand with respect to which that term is used was an ordinary simple contract debt and not a debt or demand created by statute.

Sections 28 to 30 require the Corporation to deliver into certain streams certain quantities of compensation water per minute during certain hours on every working day.

Section 31 require the Corporation to construct and maintain gauges for measuring the compensation water.

Section 32 is as follows :—"In case of neglect on the part of the Corporation to maintain any such gauge in a state of efficiency, and in case of any other neglect by or in consequence of which any of the several quantities of water aforesaid from the said reservoirs shall not so flow, the Corporation shall for every day on which such neglect occurs forfeit and pay to the occupiers of each of the mills and works affected thereby (who may sue for and recover the same) the sum of £5, and shall in addition make compensation for any loss, damage, or injury sustained by such occupiers, or any of them, in respect of which such penalties are an insufficient compensation, and such occupiers may respectively from time to time recover such compensation with costs from the Corporation by proceedings in any Court of competent jurisdiction."

By virtue of section 85 of the Waterworks Clauses Act, 1847, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, were incorporated with the Huddersfield Water Act, 1869, as is explained in the judgment of Collins M.R., where the material provisions of the Act of 1845 are sufficiently referred to.

The plaintiffs alleged that there had been neglect on the part of the Corporation whereby the statutory quantity of water had not been delivered on 156 days, and that they were occupiers of mills and works affected thereby, and they brought this action for the recovery of £5 a day for 156 days accordingly.

The defendants by their defence raised the contention that the £5 a day provided for by section 32 of the Huddersfield Water Act, 1869, was recoverable before justices and could not be recovered in an action.

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They contended that the £5 was a penalty and that the provisions of the Railways Clauses Consolidation Act, 1845, above referred to, which provide for the recovery of penalties before justices, consequently applied to it, and that there being thus a special mode of recovering the £5 a day provided, an action would not lie for the recovery thereof.

The action was set down as has been stated for the determination of this point.

Danckwerts, K.C., R. W. Harper, and Williams for the defendants.

Scott Fox, K.C., and Lowenthal for the plaintiffs were not called upon to argue.

WRIGHT J. I cannot see that there is any foundation for the argument that has been addressed to me here. It seems to me that the language of the 32nd section is reasonably plain. I do not know how it can be much plainer. It says this—that the parties entitled to these penalties may sue for and recover the same. I will assume that that part of the section is to be read alone without reference to the last clause of the section. It appears to me that the natural meaning of the words, “may sue for and recover the same,” is “may sue for in an action and recover by ordinary proceedings.”

I do not know that the matter is susceptible of any further statement, because, if that be the meaning of the section, then the incorporated sections of the Railways Clauses Consolidation Act, 1845, do not apply, because they apply only when the recovery is not otherwise provided for. The exact words of section 145 of the last-mentioned Act are, “every penalty or forfeiture . . . the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices.” It seems to me here that this is otherwise provided for. Then looking at the last words of section 32 of the Huddersfield Water Act, 1869, it seems plain that the additional compensation is intended to be made recoverable by an action, because it says, “may respectively from time to time recover such compensation with costs from the Corporation by proceedings in any court of competent jurisdiction.” I cannot imagine language pointing more strongly to an ordinary action than this, and that construction of it is strengthened by the provision in section 3 that in the Act the term “‘Court of competent jurisdiction’ shall have effect as if the debt or demand . . . was an ordinary simple contract debt.”

I cannot think there is any doubt about it. I think the action lies and ought to be determined.

The learned judge gave judgment for the plaintiffs on the point accordingly, and gave the defendants leave to appeal.

The defendants appealed.

Danckwerts, K.C., R. W. Harper and Davies Williams for the appellants.

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Scott Fox, K.C., and Lowenthal for the respondents.

Beaumont v. Huddersfield Corporation (1902) 1 L. G. R. 118; *Adams v. Batley* (1887) 18 Q. B. D. 625; 56 L. J. Q. B. 393; *Lewis v. Swansea Corporation* (1887) 4 Times L. R. 122, 706; and *Reg. v. Paget* (1881) 8 Q. B. D. 151, were cited in the course of the argument.

COLLINS M.R. This is an appeal from a decision of Wright J. on the construction of the 32nd section of the Huddersfield Water Act, 1869, and the point is whether that section, with the other sections from other Statutes which are incorporated with the Act, debars a person who claims the benefit of the section from pursuing his remedy in the superior courts; in other words, whether the relief, if I may call it relief, provided to the individual by that section, is a penalty and a penalty properly so-called, which can be put in suit—I use the word “suit” deliberately—only before justices, or whether it is, in point of fact, provision for compensation which can be put in suit in the superior courts or the civil courts.

Now the section runs thus: [His Lordship read the section, and continued:—] The argument for the appellants is very shortly this:—The Waterworks Clauses Act, 1847 (which is incorporated with this local Act, under the heading “With respect to the recovery of damages not specially provided for”—that is, by the special Act—“and of penalties, and to the determination of any other matter referred to justices or to the sheriff, be it enacted as follows”), contains in section 85 the following provision:—“If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act.” The material words there are “and of penalties,” because the recovery of damages is specially provided for, therefore what we have to consider upon that is penalties. Now I come to the words of the Railways Clauses Consolidation Act, 1845, which by this means are introduced into the special Act. Section 145 is: “Every penalty or forfeiture imposed by this or the special Act, or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices.” The effect of that is that “may” is really equivalent to “must,” because if there is special machinery applied by a statute, it has the effect—upon authorities which have been cited and which I need not refer to again—of ousting any other remedy. The remedy must be sought where the statute has given

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it and not elsewhere. So it stands now, up to this point in the discussion, that if the subject-matter of this claim is a penalty or a forfeiture within the meaning of section 145 of the Railways Clauses Consolidation Act, 1845—if the particular class of remedy to which section 32 of the special Act is addressed is the same thing as that which is described as a penalty or forfeiture in section 145, then the remedy must be sought in the manner provided by the Railways Clauses Consolidation Act, that is, before two justices.

Now a broad distinction has been laid down in cases dealing with this subject-matter between that which is in its nature strictly a penalty and that which is in its nature compensation. There are some classes of cases which appear to be on the border line between the two, *prima facie*, but the governing factor in distinguishing one from the other is, whether or not it is punishment to the wrong doer or a compensation to the person who has suffered. If the main factor in the matter is compensation to the person who has suffered, that takes it out of the category of penalty, strictly so-called, although the word "penalty" is often very loosely used so as to embrace either one or the other.

Now we address ourselves to this case in the light of the case of *Beaumont v. Huddersfield Corporation* (1902) 1 L. G. R. 118, an authority of this Court—I am bound to say one arrived at without the advantage of the very able argument addressed to us by Mr. Danckwerts to-day in this case—but that decision is binding upon us, although it does happen to be our own decision, and therefore, we must follow it here whether it was right or wrong. It is, I think, decisive to this extent in this case, that the particular class of remedy dealt with by section 32 is a remedy in the nature of compensation and not penalty properly so-called. I need not go through the reasoning upon which the Court in that case arrived at that conclusion, but we were certainly satisfied at the time, that the section in terms provides for that which is called a penalty being part payment of compensation. It is not a provision for a punishment first, with the additional right to all the damages afterwards, but if the damages afterwards are sought for in addition, credit must be given for the amount paid, which is, therefore, not paid strictly as a punishment by the offender, but as part compensation to the person complaining. The wording of the section, I think, makes it impossible to put any other construction upon it. The point then is narrowed to this. This particular class of remedy being on the compensation side, and not on the punitive side, what is the effect of the introduction of the Railways Clauses Consolidation Act into the discussion? That depends upon whether that which is called a penalty in the Railways Clauses Act and which can be put in suit only before the statutory tribunal alluded to in that

Act, namely, the justices, was meant to embrace something that was not, strictly speaking, a penalty, but was compensation rather than a penalty. Now I think we get from section 145 of the Railways Clauses Consolidation Act itself, and from the context in which it is introduced, a clear indication that what it was dealing with was penalty in the proper sense—that is a punishment for an offence. The words are “penalty or forfeiture,” and though it is perfectly true that these words, even in an Act of Parliament, are capable of being used—or misused—in an ambiguous sense, still credit may occasionally be given to an Act of Parliament for using a word in its proper sense, and I think in this section the words “penalty or forfeiture” do seem to have been used in what I call their proper sense, that is, in the strict sense; and I think that is supported by the provisions that follow; necessarily punitive incidents quite, as distinguished from compensatory incidents. [His Lordship referred to sections 146 and 147 of the Act, which are now repealed, and continued:—] ‘These are all punitive provisions and it seems to me that that is a class of provision which is introduced, by the process I have gone through, into the special Act and which is to meet the emergency in case there be no special provision in the Act already dealing with it. It seems to me the emergency in this case is dealt with by the Act itself without having recourse to the punitive procedure to which I have just referred, because I think, as I have already said, that on the face of this Act it is, in the main and in substance and intention, a provision for compensation, though there are, I agree, introduced into it the words “forfeit” and “penalty.” Where the context imperiously demands it, one must give some latitude to the word “penalty,” and it may be to that word “forfeiture;” but it seems to me that that latitude is not demanded by the Railways Clauses Consolidation Act and its context, but that the context that I have referred to does point distinctly to something having a punitive character, whereas the words themselves, in this 32nd section, show, as this Court has decided, that it is not mainly punitive, if it be punitive at all, really, but compensatory, and that the reason why the smaller amount of £5 is loosely called a penalty is, that it is assumed, and it is in the public interest that it should be assumed, that damages to at least the amount of £5 were done, which may very well be imposed whether there is direct proof of damage or not. That is a matter of public convenience, but wherever the compensation may exceed that amount, then credit must be given for the £5 and the compensation sued for in the ordinary way, and it certainly would be very undesirable that a person should have to go to the criminal court for £5 and then bring the remainder of his claim, which might only be £1 in a civil court.

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Notwithstanding the very clear and able argument we have had from Mr. Danckwerts in this case, it seems to me that Mr. Justice Wright's opinion was correct and that this appeal must be dismissed.

COZENS HARDY L.J. I agree, and for the same reasons. If section 32 had stopped in the middle with the words "£5," I should have felt considerable difficulty. I am not sure that I should have been as clear as Mr. Justice Wright was that the words "who may sue for and recover the same" are sufficient to prevent the £5 being a penalty strictly so called, which could only be recovered before the justices, but the latter part of the section removes my difficulty. It treats the £5 as compensation; it contemplates that it may be, in the language of the section, insufficient compensation, and it says that the occupier may recover such compensation in any court of competent jurisdiction. "Such compensation" does not mean, as it seems to me, the excess beyond the £5. It means the full compensation to which the occupier is entitled under the express provisions of the section. But whatever my own view might be, the decision of this Court in *Beaumont v. Huddersfield Corporation* (1902), 1 L. G. R. 118, is really, I think, decisive. The Master of the Rolls, in that case, dealing with this very section says, "It has in it specific conditions for giving to each individual in the most distinct terms the right to what is in a sense a penalty, but is really liquidated damages, which are not provided for apart from ordinary damages, as in the *Swansea* case," i.e., *Lewis v. Swansea Corporation* (1887), 4 *Times* L. R. 122, 706; and Romer L. J., dealing with this very section, says: "The £5 it is to be pointed out, given to the occupier is, as appears from the section itself not a pure penalty; it is what may be called a compensation penalty. It is in the nature of compensation. Remark the words in the section, 'in respect of which such penalties are an insufficient compensation,' which show the nature of these so-called penalties. It is quite reasonable for the Legislature to say that if such neglect as is mentioned in the section is established, it shall be taken as against the Corporation that the occupier of each mill affected has at least suffered thereby damage to the extent of £5, without those occupiers being put to the expense of proving the exact amount of damage; and that is what I think, in effect, the Legislature has done under section 32." It seems to me that the Court of Appeal, in the *Beaumont* case, did really decide that this £5 was not a penalty properly so called to which the machinery afforded by the Railway Clauses Consolidation Act would apply, and that, therefore, the plaintiffs are not limited to an application for penalties before justices.

Appeal dismissed with costs.

Solicitors for the appellants—Riddell & Co., for F. C. Lloyd, Town Clerk, Huddersfield. 1908.

Solicitors for the respondents—Rowcliffes, Rawle, & Co., for Ramsden, Sykes, and Ramsden, Huddersfield. Maltham
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Reported in the Court below by Gilbert Metcalfe, Esq., Barrister-at-Law, *and in the Court of Appeal by* Erskine Reid, Esq., Barrister-at-Law.

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COURT OF APPEAL.

Nov. 11, 12.

ELY BREWERY CO. v. PONTYPRIDD URBAN DISTRICT COUNCIL.

Highways—Negligence—Retaining wall built by local authority—Flood caused by wrongful act of third party—Liability of local authority.

The plaintiffs were the owners of a house adjoining the Y. Road, within the district of the defendants. There was a channel at the side of this road for the purpose of carrying off surface water from the road. On a certain occasion, after a heavy rain, the water coming down this channel broke through it, and forced its way into the cellar of the plaintiffs' house, thereby doing damage. The plaintiffs alleged that the damage occurred owing to a retaining wall which the defendants had built on the Y. Road when raising the level of another street running into it, their contention being that it might have been anticipated that on occasions water would be diverted on to their land by the way in which the wall was placed. On the facts found by the judge at the trial the wall in no way interfered with the ordinary flow of water down the channel, even when caused by heavy rain, but the flood on the day in question was caused by water running into the channel owing to the wrongful act of the owners of adjoining land in allowing a conduit on their land to become blocked.

Held, affirming the decision of Bruce J., that the defendants were not liable for the damage to the plaintiffs' house, there being no negligence on their part in not building their retaining wall in such a way as to prevent its interfering with an unusual flow of water caused by the wrongful act of other persons.

APPEAL from a decision of Bruce J.

The plaintiffs were the owners of a public-house on the north side of a road called Ynysgyfilon Road, within the district of the defendant Council. The road was on the slope of a hill. There was a channel on the north side of this road for the purpose of carrying off surface water flowing over the road. A street called Morgan Street, over which the defendant Council also exercised control, led into Ynysgyfilon Road upon the south side of it at a point higher in level than the plaintiffs' public-house.

In March, 1898, the defendants raised the level of Morgan Street by building a retaining wall on Ynysgyfilon Road. The plaintiffs alleged that the defendants built the retaining wall negligently and wrongfully in such a manner as to stop up a channel which they said then existed on the south side of Ynysgyfilon Road, and so to divert all the surface water from that channel, and cause it to flow along the channel on the

north side ; that that channel was not sufficient to carry off the whole of the surface water ; that on or about December 7, 1901, the water broke up and washed away part of the channel and forced its way under the foundations of the plaintiffs' public-house and into the cellar thereof and thereby did damage ; that at various times since December 7, 1901, the defendants had endeavoured to divert the water from the channel on the north side of the road to the south side by means of a wooden shute, and afterwards by an iron pipe, but had neglected to keep the shute and pipe free from silt, so that the water continued to flow along the channel on the north side of the road, and on various occasions in 1902 forced its way under the foundations of the public-house. The plaintiffs claimed damages and an injunction.

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The defendants alleged that any damage which the plaintiffs might have sustained was due to *vis major*, and to circumstances over which they had no control, and for which they were not responsible ; that a violent storm broke over the district at the date mentioned and flooded an old watercourse on private property above Ynysgyfilon Road, over which the defendants had no control, and which at the date in question had been wrongfully allowed by those responsible to become blocked, so that an unwonted flood of water burst on to the road and broke up the channel ; that they repaired the roadway and channel with all due speed, and that the wooden shute was only used by them to divert the water from the damaged place while doing so. The iron pipe was put to prevent recurrence of the danger.

The action was brought in the Chancery Division, and tried by Bruce J. without a jury at Cardiff. He came to the conclusion on the evidence that there was always a channel on the north side of the road, but he was not satisfied that there was a channel on the south side. He thought the evidence established that prior to the building of the retaining wall there was a kerb running across the Ynysgyfilon Road very much in the same position as the retaining wall, and that the building of the retaining wall did not alter the flow of the water or cause any mischief to the plaintiffs, because the flow was always substantially down the channel on the north side, and the complaint of the plaintiffs as to the diversion of the flow of water was not substantiated ; and that the flood on the day in question was caused by the gully on private property being stopped up, but for that the defendants were not answerable. He continued : " Mr. S. T. Evans contended that, at all events, when the damage was done the defendants, the Urban District Council, ought to have repaired the damage, even if they were not responsible for it. He says when the damage was done, and the channel on the north side was injured by the flood, they ought to have exercised vigilance in repairing it. I was for some time impressed with

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that argument. The delay between the 7th December and the 24th March seemed to me to be a long time for remedying the defects. But I think the defendants, as an Urban District Council, cannot be responsible for an act of non-feasance. It is said that they can be rendered liable for an act of misfeasance in placing the iron pipe, because the iron pipe was an unsatisfactory way of repairing the damage. I cannot agree with that view. I think the iron pipe was sufficient to prevent the water flowing into the plaintiffs' premises, and after the iron pipe was put there there was a substantial stoppage of any water flowing into the plaintiffs' premises. The iron pipe, I think, was sufficient to carry water flowing down the north side of the Ynysgyfilon Road clear of the plaintiffs' premises. Therefore, in the result, I must give judgment for the defendants."

The plaintiffs appealed.

Astbury, K.C., S. T. Evans, K.C., and J. Sankey for the appellants. Putting the retaining wall on the road was in itself a thing which might cause damage, and the Council did it at their peril. They would be liable for any damage resulting therefrom, though the immediate cause of the damage was no act of theirs.

An act of omission by a local authority may amount to an act of commission—a misfeasance. If a local authority make a drain, and then neglect to keep it in repair, and in consequence damage results, they would be liable for the damage: *Bathurst Borough v. Macpherson* (1879) 4 App. Cas. 256; 48 L. J. P. C. 61; *Dent v. Bournemouth Corporation* (1897) 66 L. J. Q. B. 395.

Abel Thomas, K.C., and Benson for the defendant Urban District Council. Upon the facts as found by him Bruce J. was right.

Astbury, K.C., replied.

VAUGHAN WILLIAMS L.J. In my judgment Bruce J. was perfectly right. His findings upon the questions of fact are apparently not seriously disputed, and the question comes to be a question of law. We heard something at first as to what was the liability of a highway authority *quâ* highway authority. There is no dispute about that. They are not responsible for acts of omission of their duty as a highway authority, and we need not trouble about that. Then it is equally not in dispute that they are responsible for acts of misfeasance, not because they are a local authority, but because the fact that they are a local authority does not relieve them from liability for acts of misfeasance which would be incurred by people other than a local authority.

That being the state of things, what is the position of this local authority? As regards the persons using the road, if they do anything

on the road that would constitute a nuisance to those using it, they would be liable for that misfeasance. But that proposition is not very material here really, because the plaintiffs are not people who are using the road, and they, therefore, cannot rely upon the breach of any duty by the owners or those in control of the road towards the public in general for the purpose of establishing this misfeasance. That being so, we have really to look at this case just as if the local authority had been the owners of or had the control of a piece of land as private individuals. What are the facts of the case? There is a sloping piece of land down which water has flowed from the mountains, and has flowed, to a certain extent, through a defined channel, a channel defined by edging-stones. The local authority built this retaining wall, and it is suggested that the result of building it was to throw the water which previously flowed safely down this hill or down this channel on to the plaintiffs' land. If that had been so, I do not suppose that anybody would have questioned that there was good cause of action against the local authority; but Bruce J. has found to the contrary. What he has found is that there was a largely increased flow of water down this hill, and that that was caused, not by the water which ordinarily flowed down the hill from the mountains, but by the introduction of a flow of water which did not ordinarily flow that way, and that the introduction of that flow of water was caused, and wholly caused, by the wrongful act of those who obstructed a conduit which carried away water from another part of the land, and the result of that obstruction was that this water was sent down an unusual course, that is to say, the course of this street where the retaining wall was.

It is said that notwithstanding those findings the local authority are responsible. I am of opinion that they are not responsible. It is conceded that this is not a case in which the mere building of the wall was wrongful. It is conceded that this is not a case falling within the doctrine of *Fletcher v. Rylands* (1866, 1868) L. R. 1 Ex. 265; 3 H. L. 330; 35 L. J. Ex. 154; 37 *Ib.* 161, and therefore we have to see what was the duty of the defendants in respect of this retaining wall which they built. Nobody says that the retaining wall was built for the purpose of diverting the water and throwing it on to the neighbours' ground; but it is said really that it was negligently built (because that is what it comes to), in such a way that it might be anticipated that the water would from time to time, or occasionally, flow on to the neighbours' land. I agree that that would be wrong. You have no right so to build a wall that if there happens to be a heavy rainfall or a heavy flood your neighbour's premises will be flooded by reason of the wall which you have put up. But that is not so in this case. On the facts of this case the wall in no way interfered with the ordinary flow of water down

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this hill, nor even with the heavy flow of water down this street when the heavy flow was caused merely by heavy rains. The extra flow of water here was caused entirely by the wrongful act of other people in allowing the conduit to which I have referred to be blocked, and so throwing the water down this street instead of down the conduit.

In my judgment, it was no negligence of the defendants not so to build their retaining wall as to prevent its interfering with an unusual flow of water down this street, caused by the wrongful introduction of water on this part of the hill. In my judgment, the defendants are no more liable than they would have been if the same persons, the same strangers, who obstructed the conduit, and thus threw a flood of water down Ynysgyfilon Road, had, instead of doing that, taken an engine-hose and thrown the water, either the water from the conduit or the water from anywhere else, behind this wall. In my judgment, the defendants were guilty of no sort of negligence in building a wall which could only produce evil results to the adjoining land in a case which they were not bound in any way to anticipate would arise. I think the judgment of Bruce J. was quite right.

ROMER L.J. I agree. I need only say that on the evidence I do not see my way to differ from the findings of fact of Bruce J., and upon those findings of fact I am clear that there is no cause of action against the defendants in this case.

STIRLING L.J. I also agree for the reasons in substance which have been given by my brother, and I do not think I can usefully add anything to them.

Appeal dismissed.

Solicitors for the plaintiffs—Peacock and Goddard, for Macintosh, Dixon, & Co., Cardiff.

Solicitors for the defendants—Gibson and Weldon, for J. Colenso Jones, Pontypridd.

Supreme Court of Judicature.

COURT OF APPEAL.

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CHESTERFIELD RURAL DISTRICT COUNCIL v. NEWTON.

October 28.

Highways—Extraordinary traffic—Recovery of expenses—Costs of action in High Court—Less than £250 recovered—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1, a).

A highway authority brought an action in the High Court to recover expenses incurred by reason of extraordinary traffic. The claim, which was in accordance with the surveyor's certificate, was for more than £250, but the verdict of the jury was for £60, and judgment was entered for that amount with costs.

Held, that under section 12 (1, a) of the Locomotives Act, 1898 (which provides that such expenses "may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court"), the action, inasmuch as the plaintiffs' right to bring it was based on their surveyor's certificate, was rightly brought in the High Court, and that the plaintiffs were entitled to have their costs taxed on the High Court scale.

APPEAL by the defendant Newton against an order made by Walton J. at chambers.

The action was brought by the plaintiffs, as the highway authority for their district, in the High Court against three defendants to recover £732 for expenses certified by the plaintiffs' surveyor to have been incurred by them in the repair of a highway by reason of damage caused thereto by extraordinary traffic, for which the defendants were responsible.

In the statement of claim the sum of £634 13s. 5d. was claimed against the defendant Newton and the balance from the two other defendants. These two defendants settled with the plaintiffs, and the action proceeded against Newton alone.

The action was tried before Ridley J. and a jury at Derby, and the jury found for the plaintiffs, assessing the total expense due to extraordinary traffic over the highway at £120. It was admitted that there had been other extraordinary traffic over the road besides that for which the defendant Newton was responsible, and it was agreed that he should be liable for only half the sum that might be found due by the jury. The learned judge accordingly entered judgment for the plaintiffs against Newton for £60, with costs, stating that if it were necessary, and if he had the power, he would certify that the case was one that was properly brought in the High Court.

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The appeal was argued on the hypothesis that the learned judge had in fact given such certificate.

On the taxation of the plaintiffs' costs, the Master held that they should be taxed on the High Court scale, and his decision was affirmed by Walton J.

The defendant Newton appealed.

Bonner (Hugo Young, K.C., with him) for the defendant Newton. The plaintiffs are not entitled to costs on the High Court scale. By section 12 (1, a) of the Locomotives Act, 1898, expenses occasioned by extraordinary traffic "shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court." The word "may" in this clause should be read as equivalent to "must," and the clause is therefore an express statutory provision giving the county court exclusive jurisdiction in these cases up to £250. The true test of jurisdiction is the amount recovered, not the amount claimed: *Solomon v. Mulliner*, 1901, 1 K. B. 76; 70 L. J. K. B. 165. The amount recovered was but £60, and the plaintiffs, although they brought the action in the High Court, cannot be in a better position as to costs than if the action had been brought in the county court. Ridley J. had no power to give a certificate that the action was properly brought in the High Court, because section 116 of the County Courts Act, 1888, does not apply. That section refers only to actions founded on contract or tort. The present action is certainly not founded on contract; and it is not founded on tort either, for the use of the highway was lawful, the object of the statute being not to prohibit extraordinary traffic, but merely to give the highway authority a statutory right to recover the expenses from the person responsible for the traffic: *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161.

The case does not come within the provisions of section 5 of the Judicature Act, 1890, giving a discretion as to costs to the Court or a judge, because that section excepts the case of express provisions in any statute, and here there is an express provision that the action must be brought in the county court.

[He also cited *Cooper v. Streeter* (1889) 60 L. T. 95.]

Etherington Smith and *T. H. Walker* for the plaintiffs. Judgment was obtained by the plaintiffs for £60, "with costs." There is no appeal against that judgment, which therefore stands, and the only question is as to the scale on which the costs are to be taxed. The action having been tried by a jury, Order LXV., r. 1, decides the question, and entitles the plaintiffs to costs on the High Court scale,

unless deprived by an order of the judge for "good cause"; and no such order was made. If Order LXV., r. 1, does not apply, the case falls within section 5 of the Judicature Act, 1890, by which the judge is empowered in his discretion to allow costs on the High Court scale unless there is some statute or rule of court to the contrary.

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Apart from express legislation, the fact that the plaintiffs might, as it turned out, have recovered in the county court the amount awarded cannot affect the question of costs; and the Locomotives Act, 1898, is silent as to costs. As to section 116 of the County Courts Act, 1888, even assuming that the action was founded on tort, the amount recovered was beyond the limit specified in the section, so that no certificate was necessary to give the plaintiffs a right to High Court costs, and, moreover, the judge in fact gave a certificate. There is no substance in the contention that the action was one that could or should have been brought in the county court. The plaintiffs had no alternative but to claim on the writ the amount certified by their surveyor. They could not have abandoned part of those expenses and sued for £250 only in the county court. A public authority is not like a private individual *dominus litis* in the sense that he can waive part of his claim against the defendant.

Bonner replied.

COLLINS M.R. I think this appeal fails. The question for discussion arises in this way. The action was brought by the highway authority under section 23 of the Highways and Locomotives (Amendment) Act, 1878, which provides that where by a certificate of their surveyor it appears to the highway authority that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by the authority in repairing a highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, the authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognisance of the case to have been incurred by the authority by reason of the damage arising from such weight or traffic. The main provisions of that section stand, but the mode in which the liability under it is to be enforced is dealt with by section 12 (1, a) of the Locomotives Act, 1898, which amends section 23 of the Act of 1878 by enacting that "expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court." The other provisions in

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that section we are not now concerned with. As has been pointed out, it is a condition precedent to the bringing of any action at all that a certificate should be given by the surveyor. In this case the surveyor has given his certificate, and has certified the amount of the expenses at £732. In these circumstances the local authority brought their action in the High Court against three defendants to recover the sum certified for by the surveyor. Two of the defendants settled with the plaintiffs, and the action went on against Mr. Newton alone. The Jury found for the plaintiffs, and assessed the damages at £120, and the learned judge, following an arrangement come to between the parties that the defendant Newton should pay only half of the amount found by the jury, entered judgment against him for £60, with costs. The learned judge said that, if it was necessary to do so, he certified that the action was one properly brought in the High Court. The costs were taxed on the High Court scale; and this appeal is brought to raise the question whether the costs were rightly taxed on that scale.

Mr. Bonner, on behalf of the defendant, said that the learned judge at the trial had no discretion to allow cost other than county court costs, because there was absolute provision in section 12 (1, a) of the Locomotives Act, 1898, that the expenses "may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that amount in the High Court." He contended that "may" means "must"—that, although the claim was for £732, yet, as it has been ascertained that the amount really due was under £250, the action ought to have been brought in the county court, and costs could only be recoverable on the county court scale. It seems to me perfectly clear that this was an action that could have been brought in the county court, but equally clear that it is an action which the High Court had jurisdiction to entertain, the claim being on the face of it for over £250. Mr. Etherington Smith, on the other hand, said that the case was one that fell within Order LXV., r. 1, which provides that "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge. . . . Provided . . . that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." The learned counsel contended that the action having been brought in the High Court, which Court had jurisdiction to entertain it, and the action having been tried there with a jury, the costs must follow the event unless the proviso

in the rule as to "good cause" applied. He further contended that it does not follow in the absence of special legislation that the jurisdiction of the High Court over costs is impaired merely because there is a naked provision in the Locomotives Act, 1898, under which the action might have been brought in the county court. I agree with the contention that apart from special legislation the mere fact that the action could have been brought in the county court does not affect the right to costs. If such special legislation is to be found at all, it is only to be found in section 116 of the County Court Act, 1888, and if that section does not apply, then there is no such special legislation dealing with this case. It was argued by Mr. Bonner that this case does not fall within that section, because the action is not an action of tort. But when one looks at section 116, one sees that if his contention is correct, and this is not an action of tort, and therefore outside the section, his contention places him in this dilemma. If his contention is right, then he has to admit that there is no special legislation dealing with the costs, because if the action is not one of tort then it is not within the section, and if it is not within the section it stands unprovided for, and Order LXV., r. 1, determines the matter. If, on the other hand, the action was founded on tort upon the ground that the acts complained of by the plaintiffs were extravagant, unreasonable, and excessive, then, if the amount recovered had been such that a certificate would be required that there was sufficient reason for bringing the action in the High Court, the certificate has been given. If no certificate is required, because the amount recovered is beyond the limit mentioned in section 116 of the County Courts Act, 1888, the costs follow the event, unless cause is shown to the contrary. So that in either view of the case Mr. Bonner is unable to succeed, and the plaintiffs are entitled to costs on the High Court scale.

I only desire to add that I do not think that section 5 of the Judicature Act, 1890, to which we were referred to during the argument, applies to this case. In my opinion it does not apply because the action was tried with a jury, and the costs are therefore regulated by Order LXV., r. 1.

The decision of Walton J. affirming the order of the Master is, in my opinion, perfectly right, and this appeal ought to be dismissed, with costs.

MATHEW L.J. I am of the same opinion. I think that under section 12 (1, a) of the Locomotives Act, 1898, the High Court had jurisdiction to entertain this action. There was nothing to prevent the plaintiffs from suing in the High Court. Section 23 of the Act of 1878 provides that the highway authority may recover the expenses

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of extraordinary traffic where "by a certificate of their surveyor" it appears that such expenses have been incurred. It is under the surveyor's certificate that the action is brought. In this case the certificate put the expenses at more than £250, and the action was therefore rightly brought in the High Court. If Mr. Bonner's argument was sound, it would be quite uncertain until the verdict was given whether the High Court had jurisdiction to try the case, and if it turned out when the verdict was given that the amount awarded was for less than £250, the assumed jurisdiction of the High Court would be absolutely gone. That cannot be what the Legislature intended. If the provisions of section 116 of the County Courts Act, 1888, do not apply, then I agree that Order LXV., r. 1, decides the question. If section 116 does apply, then, apart from the fact that the amount recovered is beyond the limit in the section, the judge had power to certify for High Court costs, and he has done so.

I am of opinion that the appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs—Stevens, Son, and Perks, for Jones and Middleton, Chesterfield.

Solicitors for the defendant—Stanley, Evans, & Co.

Reported by Erskine Reid, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

1903.

REX v. WORCESTER CORPORATION AND OTHERS.

July 13.

Mandamus — Disobedience — Attachment — Service of writ — Return to writ — Sewage scheme — Peremptory mandamus to Corporation — Delay in commencing and carrying out the works ordered — Worcester Extension Act, 1885 (48 & 49 Vict. c. clxiv.), s. 108.

In July, 1897, a peremptory writ of mandamus, ordering a municipal Corporation to carry out a sewage scheme, was duly served upon 10 members of the City Council, which numbered 48 members, and the original writ was handed to one of the 10 members so served, but was afterwards lost. The Corporation being in default, an order of the Court to return the writ, with an authenticated copy of the original writ attached, was, in March, 1903, served upon each of the then members of the Council.

Held, that there had been such service of the peremptory writ of mandamus upon the whole of the members of the Council as constituted in March, 1903, as to render them individually liable to attachment for disobedience to it.

Held also, on the facts, that there had been such delay in carrying out the works as amounted to disobedience to the writ.

RULES *nisi* calling upon the Corporation of the City of Worcester to show cause why a return made by them to a peremptory writ of *mandamus* should not be taken off the file of the Court; and calling upon the individual members of the City Council, numbering 48, to show cause why writs of attachment should not issue against them individually for disobedience to the same writ.

By the Worcester Extension Act, 1885 (48 & 49 Vict. c. clxiv), s. 108, it was enacted that "the Corporation shall forthwith cause to be prepared a scheme for disposing of the sewage of the city in pursuance of the powers in that behalf conferred on them by the Public Health Act, 1875, in such manner as to prevent any offence being committed against the Rivers Pollution Prevention Act, 1876, by the discharge of such sewage into the River Severn and in the event of such scheme not being prepared as aforesaid and proceeded with in due course and with due diligence and carried into effect within three years from the 25th day of March, 1885, the Local Government Board may make an Order limiting the time for the carrying out by the Corporation of a scheme for the disposal of the said sewage in the manner aforesaid and such Order shall be enforceable in the same manner as if it were an Order made under section 299 of the Public Health Act, 1875."

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The Corporation allowed the three years from March 25, 1885, to expire without having carried into effect the sewage scheme contemplated by section 108; and in July, 1897, the peremptory writ of *mandamus* in question was obtained at the instance of the Local Government Board, calling upon them to carry it into effect, and was served upon 10 members of the City Council, seven of whom still survived, by producing the original to them and handing them copies. The original writ itself was handed to one of these members in order that the return might be indorsed upon it and the writ sent back to the Crown office with its indorsement. The original had, however, since been lost.

No return having been made by the Corporation to the peremptory writ of *mandamus*, an order of the Court requiring a prompt return to be made was, on the 13th or 14th of March, 1903, served, together with a copy of the original writ attached to it, authenticated by the seal of the Court, upon each of the 48 members of the City Council.

On April 7, 1903, a meeting of the Council was called, and tenders, for which advertisements had been issued in the preceding February, for contracts for the execution of the necessary works, were brought before the Council. And on June 22 the Council entered into a contract for the execution of one out of the three sections into which the works were divided.

The Corporation thereupon made their return to the writ of 1897, stating that they were carrying out a scheme for the disposal of sewage as commanded, and that a contract for a section of the work had been entered into. The Local Government Board deemed this return insufficient, and took the present proceedings with a view to its removal from the file of the Court. The position taken by the Corporation with regard to the sewage scheme was that the difficulties of carrying it out were so enormous that the delay on their part had been inevitable.

Willis Bund for the Corporation showed cause. The return to the peremptory writ of *mandamus* by the Corporation was the only return which, under the circumstances, they could have made. The only way they can obey the writ is by entering into contracts with contractors to carry out the sewage works and they have succeeded in entering into one of the necessary contracts. They have endeavoured to the best of their abilities to evolve a scheme in compliance with the terms of the writ, but they have, owing to the lie of land, met with great difficulties. The tunnelling under the River Severn is not the least of these; and they have great difficulties in carrying out a scheme in such a manner as to prevent any offence being committed against the Rivers Pollution Prevention Act, 1876, by the discharge of sewage into the River Severn,

as by the writ they are commanded. It is also the case that the writ itself was issued in 1897 by consent of the Corporation in order to avoid the question of costs. The Corporation can only carry out the scheme by exceedingly elaborate works constructed at enormous cost. First of all they have to borrow the money to carry them out. This they have ultimately done, with the sanction of the Local Government Board, and so far they are obeying the writ. But three and a half years elapsed before they could obtain the sanction of the Local Government Board to this borrowing of money, and this circumstance has been in itself a fruitful cause of delay. It cannot be said that they have yet obeyed the writ, but it may be urged that they are now in the act of obeying it, by contracting for a section of the work. They have done all that it was possible for them to do.

Macmorran, K.C., and *J. B. Matthews*, for the members of the City Council, showed cause. Out of the 48 present members of the City Council upon whom the Order of March, 1903, was served, there are only seven who were ever served with the original writ of *mandamus*. That writ was served in the first instance upon 10 members of the Council, of whom three have since died. Many of the present members of the Council have become members long since 1897, some as recently as last November. It is submitted that, whatever may be the position of the seven who were served with the writ, the other 41 cannot be attached, since they were never served with the original writ. Service of a writ of *mandamus* is essential to found proceedings for disobedience to it: "Short and Mellor's, Crown Office Practice," (Ed. 1890) pp. 52, 674; "Grant on Corporations," (Ed. 1850) p. 230; *Reg. v. Ledgard* (1841) 1 Q. B. 616; 10 L. J. Q. B. 198. The service of the Order of March last, though no doubt a copy of the original writ was annexed to it, was not intended as service of the writ and ought not to be held to constitute service of that writ. Further, it is submitted that even as against the seven, no writ of attachment should issue. In order to render members of a corporate body liable to attachment for disobedience to a writ of *mandamus*, where the only evidence for the prosecution is that the corporate body have not, in fact, obeyed the writ, service must be effected upon at least a majority in number of the members of the Corporation. There being no evidence before the Court of any personal acts of disobedience on the part of any of the seven members individually, but the case against them being founded merely on the neglect of the corporate body to obey the writ, there is no evidence before the Court to warrant their attachment; for non-constat but that they may have always done their best to obey the writ, but have been out-voted by the majority. To fix them with disobedience, they not

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having been a majority of the Council, some evidence of individual contempt should have been forthcoming.

* Even if service of the Order is to be held as equivalent to service of the writ, the 41 members of the Council are only affected by the writ as from the date of that service. They cannot be held responsible for any disobedience to the writ on the part of the Corporation before that date. And it is obvious that an order to provide for the disposal of the sewage of Worcester is not an order that can be obeyed in two or three months. The affidavits show that the writ is now in course of being obeyed, and therefore even in the case of the seven members, and *a fortiori* in the case of the 41, no writ of attachment should issue. [They also cited *Rex v. Wix Inhabitants* (1831) 2 B. & Ad. 197; *McKeown v. Joint Stock Institute*, 1899, 1 Ch. 671; 68 L. J. Ch. 390.]

The Solicitor-General (Sir E. Carson, K.C.), *The Attorney-General* (Sir R. B. Finlay, K.C.), and Sutton with him, in support. All the Local Government Board desire is that this long existing scandal should be put an end to. The local Act was passed as far back as 1885, and the Corporation were given three years' to comply with its terms, but the year 1903 has arrived, whilst hardly anything has been done in the meantime to abate something that is a public nuisance. The order that the Court is asked to make is that this return be taken off the file. [WILLS J. That we are quite prepared to do.] That being so there is undoubted disobedience to the writ issued by this Court so far back as 1897. The Court is asked to make an order of attachment as prayed for against these gentlemen. It is not desired to enforce that attachment if they really mean to comply with the Act of Parliament and with the Order contained in the writ of 1897. All that is desired is to bring the matter to a point at which there can be no further dilatory practices pursued and continued in by the Corporation. The one matter relied on by the members of the Council is in substance that they have not been shown the original writ. As regards seven of these gentlemen they admit they have been shown it, and the original writ was given to an alderman who was a prominent member of the Sewage Committee. The Local Government Board have done all that was possible under the circumstances, because they have given the original writ to one of these gentlemen against whom this motion is made, on behalf of the Corporation, and they have served in March of the present year an authenticated copy, which was all they could do, on the other 41 members. They now say that they have not been served with the writ, still we find these gentlemen, who have been served with a copy of this writ, making this return, which is not a good return, but at all events making a return upon the service afforded

them, which was the only possible service the Local Government Board could give. Under these circumstances it is futile to urge that they should have any further delay. *Reg. v. Ledgard* (1841) 1 Q. B. 616; 10 L. J. Q. B. 198, is an absolute authority that the only admissible return to a writ such as this is that its requirements have been complied with. 1908.
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WILLS J. In this case I entertain no doubt whatever that the technical objections which have been raised do not apply to any of the defendants. Of course, with regard to the seven, there is no doubt that they were originally served with the peremptory writ of *mandamus*, and that they have been re-served with it in a manner to which I am shortly going to call attention. With regard to the rest, they were only served with a copy of the original peremptory writ of *mandamus* on the 13th or 14th of March. Now it is objected that they were not properly served because they were only served with an Order from this Court which contained a copy of the peremptory writ of *mandamus*, and referred to it as the authentic act of this Court; and it is said that because they were not shown the piece of parchment upon which the original writ of *mandamus* was written at the time of the service of the copy, it is a bad service for the purpose of this motion. I think, particularly under the circumstances of this particular case, and looking to the history of this piece of parchment, which they say ought to have been shown to them, and which they are perfectly well aware could not have been shown to them, the objection is as futile and as frivolous as one as could have been taken.

The reason, and the only reason, why the original peremptory writ of *mandamus* was not shown to them, and could not be shown to them at the time when the copy of that *mandamus*, authenticated by the seal of this Court, was served with the Order of last March to make a return to it, so as to make the technical requisites of service perfect, was that it had long ago been handed to one of them, an Alderman of the City, to receive it on behalf of the Corporation, and that he had shown so little respect to the Order of this Court that he had lost it; and this fact has been authenticated under the hand of the Town Clerk in an affidavit made by him to account for its not being returned on the present occasion along with the answer to it. Therefore, an impossibility created by the act of one of the defendants himself, is relied upon as a reason why the only kind of service that could possibly be made should be a bad service. I think that to listen to such a contention would be a grievous mistake, and I think that the service of the peremptory writ of *mandamus* has been effectually made for the purpose of this motion upon all the members of the Council.

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There is this difference, that with regard to 41 of them it cannot be said to have been served in 1897, or, indeed, until the 13th or 14th of March in the present year.

Now I think the time within which such reasonable steps to obey the *mandamus*, as, under the circumstances, ought to have been taken after the Order of last March was served upon them, is the interval, as regards the 41 gentlemen, between the 13th or the 14th day of March and the 26th of May.

What happened during that interval? No meeting of the Council was called until the 7th of April, which does not look like being in a hurry to perform the duty cast upon them by the Order of the Court. At that meeting, for the first time after the insertion of the advertisement for tenders in February, the tenders are brought under the notice of the Council; and then it is said that there was a resolution passed which was no longer dilatory, because it was an acceptance of one of the tenders. But what is the truth? The truth is that it was not a definite acceptance of the tender; it was subject to inclusion in the tender of an alteration suggested by Mr. Chatterton, the engineer, and subject to a contract being entered into with Kellett. As was not unnatural, the moment that there came a question as to the inclusion of such work, a difficulty arose, and Kellett and the Corporation were not at one as to what ought to be done; and the result was that the contract never was signed by him. The engrossment was delivered to him somewhere about the 29th of April, when the difficulty arose; and these gentlemen who, it is suggested, were doing their duty, did not then proceed to take immediate action; and it was not until the 9th of June that they chose to have another Council meeting. The matter was not concluded then, and, so far from its being concluded, negotiations had to be entered into with another firm; and, ultimately, although not until the 22nd of June, a contract was entered into with this fresh contractor.

Now it is said in these affidavits, and it has been represented on behalf of the Council to the Local Government Board on several occasions, that the works which it is necessary for the Corporation to construct consist of three sections, the first of which embraces the construction of a tunnel under the Severn; the second, works to deal with the sewage after it is at the bottom of the tunnel, where, if left, it would only do mischief; and the third relates to something else. Each of the two first of these sections is said to require a period of eighteen months to complete it, and the last of the sections is said to require two years.

What would it be supposed these gentlemen would do if they were in earnest? Anyone would suppose that they would at once enter into all

the three contracts, put the works at once in hand, or, at all events, take steps to make the three contracts effectual, and insist upon the works being carried out. Instead of this, nothing is to be begun until the further order of their engineer. There is no assurance by anyone that the works will be begun within a reasonable time ; and, looking at the scandalous history of this case from beginning to end, certainly one of the most despicable stories that has come under my notice since I have been on the Bench, it is impossible to feel that the Corporation will not again make use of their engineer and raise difficulties and delay the commencement of the works now contracted for.

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Under these circumstances it seems to me quite impossible to say that these gentlemen, collectively and individually, were not in default for that which has been done and that which has been left undone between the 13th or 14th of March and the 26th of May (the date of the present rules *nisi*). If that be the case it is quite free from any technical difficulty of any sort or kind, and those who have failed to obey the peremptory writ of *mandamus* of the Court are in default.

With regard to 41 of these gentlemen, it is urged that they have not had the same opportunity of taking steps in compliance with the Order of the Court, because they have not been so long members of the Council, as the remaining seven ; and further it is urged that they were not served in the first instance with the peremptory writ of *mandamus*.

I have expressed my opinion, I hope in no doubtful sense, that there are materials before the Court which would justify the Court, if it saw fit, in issuing at once writs of attachment. With regard to the seven it seems to me there is absolutely nothing to be said, and that as against them the writs of attachment ought to issue. The Solicitor-General has very properly said that the only object of these proceedings is to bring these gentlemen to their senses at last, and to teach them that there are means by which this Court can secure, and will secure, obedience to its orders, even from a reluctant and recalcitrant Corporation. Therefore the Solicitor-General is content with the Order which we propose to make ; which will be that, with regard to the seven members, writs of attachment will go, and will lie in the office until the 15th of next November, which will give ample time after the assembling of the Courts for those concerned to come to the Court and to ask that a further stay may be made ; and a further stay will be made if they have conducted themselves properly in the matter in the meantime ; if not, certainly no such stay will be granted. With regard to the remaining 41 members, the Order will be that the matter stand over until the same date, and they also—I wish emphatically to warn them—will stand in great peril unless they have, in the meantime,

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taken effectual steps to show that there shall be no more of these scandalous and unseemly delays which have defeated the object of the original Act and have defeated the subsequent Order made by the Local Government Board, and the Order made by this Court, for so many long and wasted years.

CHANNELL J. concurred.

Order accordingly.

Solicitors for the Local Government Board—Sharpe, Parker, & Co.

Solicitors for the Corporation—Church, Rendell, & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

On November 6, 1903, J. B. Matthews moved the Divisional Court, *ex parte*, on behalf of the seven councillors against whom the writs of attachment had been issued, upon the written consent of the solicitors for the Local Government Board, for an order that the writs should continue to lie in the office after the 15th of November, until a Divisional Court should sit to deal further with this matter.

The Court granted the application.

High Court of Justice.

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REX v. GILLESPIE AND OTHERS (*Ex parte* WEST HAM OVERSEERS).

Dec. 11, 14.

Poor rate—Recovery—Tender of part of rate—Refusal of justice to issue warrant for the whole amount—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4—Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), ss. 1, 5, 8, Schedule.

Where, on the hearing of an application for a distress warrant for the recovery of poor rate, the ratepayer makes a bonâ fide tender of part of the amount due, while declining to pay the balance, the justices may refuse to issue a warrant for more than the balance, though the overseers have not accepted such tender.

RULE *nisi* calling upon R. A. Gillespie, Esq., stipendiary magistrate in and for the county borough of West Ham, and Clement Boardman and Sons to show cause why the magistrate should not issue his warrant to levy by distress and sale of the goods and chattels of Clement Boardman and Sons the sum of £441 8s. 9d., being the amount of a certain rate or assessment duly made on or about April 28, 1903, to meet the expenses which would be incurred by the overseers of the poor of the parish of West Ham before September 29, 1903, payable by Clement Boardman and Sons in respect of certain premises situate in the parish of West Ham, of which the said Clement Boardman and Sons were occupiers.

Messrs. Boardman and Sons had tendered in part payment the greater portion of the sum demanded, but had declined to pay the portion that they thought would be applied towards the maintenance of voluntary schools under the Education Act, 1902.

Upon the motion for the rule *nisi*, Mr. Frederic Ernest Harris, superintendent assistant overseer of the parish of West Ham, made the following affidavit:—

1. Under the provisions of the Education Act, 1902, the West Ham School Board was on the 1st day of May, 1903, abolished, and the Town Council of the county borough of West Ham became the local education authority.

2. The parish of West Ham is coterminous with the county borough of West Ham, and on the 28th day of April, 1903, a rate of 2s. 11d. in the £ was duly made to meet the expenses which would be incurred by the overseers of the poor in and for the parish of West Ham before the 29th of September, 1903.

3. In the valuation list of the parish on which the rate was made the following assessments appear:—

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[Here the various properties and figures were set out in columns, the amount of rate demanded being £441 8s. 9d.]

4. All the said premises are in the occupation of Messrs. Clement Boardman and Sons, and their names appear as the occupiers of the same respectively in the said valuation list and in the rate book of the parish of West Ham, and they were rated accordingly, and liable to pay in respect of the said rate the sum of £441 8s. 9d.

5. The rate included the education rate for the same parish. The members of the firm of Clement Boardman and Sons, or some of them, are also members of the local passive resistance league, formed for the purpose of enabling the members thereof to take joint action in refusing and resisting payment of so much of the rate as they deem to be applicable to the maintenance and support of non-provided or sectarian schools in the parish and borough of West Ham.

6. In pursuance of the objects of the said league, the firm of Clement Boardman and Sons claimed to deduct from the said sum of £441 8s. 9d. the sum of £25 8s. 9d., as the amount which they alleged represented the part of the rate applicable to non-provided or sectarian schools.

7. As such superintendent assistant overseer as aforesaid I had an interview with the members of the firm of Clement Boardman and Sons, and informed them that, subject to any direction of the overseers to the contrary, I should be willing to accept payment on account of the £441 8s. 9d., less the deduction of £25 8s. 9d.

8. On the 16th day of June, 1903, at a meeting of the overseers of the parish of West Ham then held, I reported what had taken place at my interview with Messrs. Clement Boardman and Sons, and also what had taken place at other interviews between me and other members of the passive resistance league, and the overseers then resolved that, looking to the objects of the league, part payment of the rate with the avowed intention of refusing and resisting payment of the part deemed to be in respect of non-provided or sectarian schools, should not be accepted, but that in the case of Messrs. Clement Boardman and Sons I should be authorised to carry out the provisional arrangement I had made and accept payment of the £416 on account.

9. Thereupon I communicated the decision of the overseers to Messrs. Clement Boardman and Sons, and in reply received from John A. Boardman, a member of the firm, a letter, dated the 19th June, 1903, now produced and shown to me, and marked F. E. H. In the said letter the said John A. Boardman, on behalf of himself and his partners, objects to being placed on any other footing than any other ratepayers in the borough.

10. In consequence of this letter the said John A. Boardman was invited to attend, and did attend, a subsequent meeting of the overseers held on the 22nd June, 1903, and laid his views before them, when the overseers, after consideration, resolved to abide by their previous resolution not to accept part payment of the rate when such part payment was offered or tendered subject to deduction of the part deemed to be in respect of non-provided or sectarian schools.

11. This resolution was communicated to the said John A. Boardman, but he nevertheless tendered the said sum of £416 on account of the rate, and at the same time claimed to deduct the £25 8s. 9d. as being in respect of non-provided or sectarian schools, and the tender was therefore declined.

12. Thereupon demands for payment of the said sum of £441 8s. 9d. were served upon Messrs. Clement Boardman and Sons, but they declined to pay the amount, and again tendered the sum of £416, which was again refused by direction of the overseers, and I then, by direction of the overseers, lodged a complaint in the West Ham Police-court, and a summons was duly issued out of the said court, returnable on the 22nd July, 1903, against the said Clement Boardman and Sons for the said £441 8s. 9d., with 3s. 6d. costs.

13. On the return of the said summons the said John A. Boardman appeared in the court on behalf of his firm, and in court again tendered the sum of £416, and refused to pay the balance of £25 8s. 9d. I again declined to accept the £416 tendered, and requested R. A. Gillespie, Esq., the stipendiary magistrate, by whom the said summons was heard, to issue a distress warrant for the £441 8s. 9d. mentioned in the summons, but he declined to do so, and issued a distress warrant for the balance of £25 8s. 9d. only.

14. The overseers are advised and believe that the stipendiary magistrate had no power to compel the overseers under the circumstances hereinbefore set out to accept payment of a part of the rate from Messrs. Clement Boardman and Sons, or to refuse to issue a distress warrant for the whole amount of £441 8s. 9d. so due from them as aforesaid.

15. This application for a rule calling on the stipendiary magistrate and on Messrs. Clement Boardman and Sons to show cause why a distress warrant should not issue for the said sum of £441 8s. 9d. is made at my instance as prosecutor.

In answer to the rule the learned magistrate had made the following affidavit, which was read in court:—

1. A complaint by John Kendall, an assistant overseer of the parish of West Ham, was made to me on the 15th of July, 1903, that (amongst others) Clement Boardman and Sons, being persons duly

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rated to the poor in a rate made on the 28th of April, 1903, in the sum of £441 8s. 9d., had not paid the said sum, but had refused and neglected to do so. Thereupon a summons was issued to the said Clement Boardman and Sons to appear at the West Ham Police-court on Wednesday, the 22nd of July, 1903, at half-past 10 in the forenoon, to show cause why they had not paid, and neglected or refused to pay the said rate.

2. On the said 22nd July, 1903, Mr. John A. Boardman, on behalf of the said Clement Boardman and Sons, appeared before me at the said court. The assistant overseer produced the book containing the poor rate, with the allowance by the justices, and proved the demand and non-payment for seven days previous to the summons. No objection was taken to the rate or to the formalities, but in cross-examination the assistant overseer admitted that Messrs. Boardman had tendered £416 on account of the rate by leaving the amount at the rate office, which amount was subsequently sent back to Messrs. Boardman. The assistant overseer also stated that he did not think he ever refused part payment of a rate before. Messrs. Boardmans' ground of objection to pay the balance was that they disapproved of the recent Education Act.

3. At my suggestion Messrs. Boardman made another tender of the £416 in court, but the assistant overseer refused to accept the same; thereupon I refused to issue a distress warrant for more than £25 8s. 9d., the balance.

4. Section 8 of the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), provides as follows:—"And whereas it may be convenient, and save expense and litigation, if forms to be used for the purpose of levying the sums aforesaid should be given: Be it enacted that the forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law."

5. A reference to Forms A², B., and C¹., shows that it is necessary to state in each that the respective persons "have not respectively paid the said sums or any part thereof, but have respectively refused so to do" I was of opinion that it was clearly contemplated by the statute that a ratepayer "to save expense and litigation" might pay, and the overseers receive, a portion of the rate, and further, that Messrs. Boardman and Sons had not refused payment of the rate but only a part thereof, having in fact by their tender shown their willingness to pay the greater part thereof, namely, £416, which the overseers neglected and refused to accept.

6. I was further of opinion that although acting ministerially it was never contemplated that I should issue a distress warrant for £441 8s. 9d., with the consequent increase of expense to the rate-

payers (amounting to over £20) in executing it, when £416 in cash was to be had in court for the lifting, and outside this, £25 8s. 9d. was the only sum remaining unpaid, and, moreover, the only sum which the Messrs. Boardman had neglected and refused to pay.

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7. I deemed it my duty as a magistrate to ensure payment to the overseers of the full payment of their rate, and this I consider I did effectually by enabling them to take £416 in cash, and granting them a distress warrant for the balance of £25 8s. 9d. I at the same time avoided burdening the ratepayers with extra expense which the statute seems to me to enjoin.

8. I have sat as deputy police magistrate and as police magistrate at this court for over 14 years, and during that time have heard many thousand poor rate summonses, and it is of very frequent occurrence that the assistant overseer has asked me to issue distress warrants for less amounts than those for which the summonses were issued, payment on account having been accepted by the overseers. I have never personally known a single instance in which such payment has been refused, and I verily believe that until this question of the education rate arose payment on account of poor rates has always been accepted.

In answer to the rule a member of the firm of Clement Boardman and Sons filed the following affidavit:—

1. I am a member of the firm of Messrs. Clement Boardman and Sons, of the Broadway, Stratford, aforesaid, drapers and house furnishers. I have read a copy of the affidavit of Frederic Ernest Harris sworn on the 1st day of August, 1903. My said firm are in occupation of the premises mentioned in paragraph 3 of the said affidavit. By a rate made on the 28th of April, 1903, for the parish of West Ham, the said premises were rated at the amount of £141 8s. 9d. to meet the expenses incurred by the overseers of the poor in and for the parish of West Ham before the 29th of September, 1903.

2. It is entirely wrong to say that I am or that any member of my firm is a member of any league or society for the purpose of enabling the members thereof to take joint action in resisting payment of any rate in respect whereof we are assessed or any part thereof. I am a member of the passive resistance league referred to in paragraph 5 of the affidavit of the said Frederic Ernest Harris, and I cannot in accordance with the dictates of my conscience voluntarily pay the part of the poor rate applicable to the support of sectarian or non-provided schools in this parish, and my firm has refused to voluntarily pay £25 8s. 9d. of the rate made on the 1st of May last, and had tendered the balance, but I have not nor has any member

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of my firm offered any resistance to the recovery by the overseers or any person on their behalf of the said rate. On the contrary, my firm are ready and willing to offer all facilities to the overseers and their bailiffs in connection with the execution of the distress warrant ordered to be issued by the learned magistrate.

3. I have had conversations with respect to the part payment of the rates of the borough with both the prosecutor, who is the borough treasurer, and with the assistant overseer, and also with collectors of the poor rates in the borough, and they all informed me that they had never previously refused to receive payment of any sum offered on account of the rates; previously to a formal demand being made upon my firm for the said sum of £441 8s. 9d., I informed the borough treasurer my firm were willing to pay £416 on account and in part payment.

4. On one occasion, the date whereof I am at this moment unable to fix, my said firm tendered a portion of the rate then alleged to be due from them, and objected to pay the balance for reasons which were different from those operating with my firm in this case, and the portion was immediately accepted on account of the rate.

5. In this case the prosecutor, acting in his capacity of borough treasurer for West Ham, verbally agreed with me to accept part payment of the rates which my firm were liable to pay, and in a letter from him, dated 17th June, 1903, now produced and shown to me, that marked 7, A., B. 1, he informed he was so expressly authorised by the overseers to accept part payment of the said rates.

6. I attended before the overseers on 22nd June, 1903, and explained to them that the non-payment of the balance of £25 8s. 9d. by my firm was due to the serious objection of myself and my co-partners in the said firm to certain provisions in the Education Act of 1902, under which the cost of non-provided schools was thrown on the rate.

7. On June 23rd, 1903, I received a letter from the said Frederic Ernest Harris, now produced and shown to me, and marked 7 A., B. 2, in which he confirmed the letter of the 17th June, 1903, wherein he stated that he was expressly authorised by the overseers to accept part payment of the rate.

8. On the 30th June, 1903, a written demand for £441 8s. 9d. was left upon my firm's premises by the assistant overseer. Accordingly, on the 14th July, 1903, I tendered the sum of £416 on account of the rate in cash at the rates office, Town Hall, West Ham, and I left the money there. At a later hour on the same day John Kendall, the assistant overseer, brought the money to the premises of my firm, and handed it back to me, saying that the overseers could not accept it.

9. A summons was subsequently served upon my firm, which summons is now produced and shown to me, marked 7, A., B. 3, and on the 22nd July, 1903, I appeared before Robert Alexander Gillespie, a magistrate, to answer the said summons. At the hearing I drew the magistrate's attention to the fact that the summons was not in accordance with the forms required by 12 & 13 Vict. c. 14, inasmuch as the words "or any part thereof" were omitted from it, and I objected to the summons on the ground that it was so drawn as to exclude from the consideration of the court the fact that my firm were then and had been willing to pay the sum of £416 towards the rate.

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10. On the same occasion I proved to the magistrate that my firm had tendered the sum of £416 in part payment of the rates due from Messrs. Clement Boardman and Sons, and I proved also that my firm had not refused or neglected to pay the rate, but that they had only refused or neglected to pay a part thereof, namely, £25 8s. 9d.

11. At the suggestion of the magistrate I made in court another tender of the sum of £416, but the assistant overseer who proved the case for the overseers, and the borough treasurer, who appeared before the magistrate in support of an application for a warrant, refused to accept the same. My firm were then and have at all times since been ready and willing to pay the said sum of £416, and it was entirely unnecessary to issue a distress warrant for the recovery of the said sum or any part thereof.

Robson, K.C., Macmorran, K.C., and T. Artemus Jones showed cause. The learned magistrate was willing to issue a distress warrant for £25 8s. 9d., which had not been tendered, and the question is whether an order in the nature of a mandamus ought to be granted directing him to issue the warrant for the full amount of £441 instead, £416 of which had been tendered. The facts are not in dispute. Messrs. Boardman took some exception to the part of the rate which they thought represented the amount which would go towards the maintenance and support of non-provided schools—schools originally built as voluntary or denominational schools, and now maintained at the cost of the municipality out of the rates by virtue of the recent Act. The refusal to pay the poor rate is an offence under the statute of 43 Eliz. c. 2, s. 4, punishable in certain events by imprisonment. By the Distress for Rates Act, 1849, this imprisonment is limited to three months. The debt here is not a merely civil debt, but falls within what may be termed the *quasi* criminal law, to which a penalty attaches over and above the amount

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of the debt itself. If the magistrate be wrong here, the overseers will henceforth be able to inflict a very serious punishment upon the ratepayer over and above that contemplated by the law. Here the debtor, having tendered the amount within a few pounds, it is contended on the other side that the overseers are entitled to have all or none. The preamble to the Act of 1849 treats the issuing of this warrant as an act within the discretion of the justices. What the Act contemplates is seen pretty clearly from the forms in the schedule; the complaint is that the ratepayer "hath not paid the same or any part thereof but hath refused so to do." The summons is in the same words, and the warrant recites the complaint; so that all three documents refer to a refusal to pay the rate "or any part thereof." It is the overseer's duty to demand the whole amount. Then, if he finds he cannot get the whole amount, he is to demand at least part payment if he thinks he can get it, because he has to inform the magistrate that the defaulting ratepayer has refused to pay any part of the rate, which implies that a demand for a part can be made. It is clear that the magistrate is not limited to issuing his warrant for all or none, but it is his duty to inquire generally whether part has been tendered. It is the overseer's duty to allege that a defaulter has refused to pay any part. [LORD ALVERSTONE C.J. mentioned the case of *Tynemouth Union v. Backworth Overseers* (1888) 57 L. J. M. C. 53.] Here the magistrate has said that he would not issue the distress warrant for that which the ratepayer is willing to pay. Acts of magistrates are sometimes spoken of as if they were ministerial acts. The law is put concisely in "Archbold's Poor Law," at p. 1056 of the 15th edition, which shows that conflicting decisions exist with regard to the discretionary power of magistrates to issue distress warrants, whether their functions are ministerial or judicial. Here the ratepayer has not refused to pay any part of the rate; on the contrary he has tendered part, therefore his refusal only relates to the balance, and it is in the discretion of the magistrate to issue a warrant for the balance. When the objection is not one which could be made a ground of appeal against the rate justices are not bound to issue their warrant. A distress for £441 is a greater cost to the ratepayer than would be the case if the levy were for £25.

Danckwerts, K.C., E. Morten, and Sturgess in support. Before discussing the question of law it may be well to point out that the overseers have in this case been practically forced into the line they have taken. It was brought to their knowledge by Mr. Boardman himself and others that there was a widespread agreement in the borough not to pay any part of the rate which could be said to be

attributable to the maintenance of voluntary schools. In the vast majority of cases the part of the rate in question would be a few shillings. Whether, however, the amount for which a distress warrant is applied for is large or small, a fixed charge of 6s. 6d. has to be paid by the overseers for the warrant; and it is in the discretion of the magistrate whether he will allow the overseers to recover this charge from the defaulting ratepayer. If the overseers were to apply for a distress warrant for the recovery of a sum so small that this charge of 6s. 6d. would be quite disproportionate to it, the magistrate might be inclined to refuse to allow the charge to be recovered from the ratepayer; and in that case the overseers, in trying to enforce payment of the rate in full, would be throwing good money after bad. The position they have taken up is, therefore, perfectly reasonable and in the true interest of the ratepayers at large.

On the question of law our proposition is that it is for the overseers to determine whether they will accept part payment of a rate or not; that the discretion in this respect rests with them alone, and not with the magistrate or with the ratepayer.

It is well settled that if a rate is a legal rate the jurisdiction of the magistrate with reference to enforcing it is purely ministerial. The rate itself constitutes the order for payment, and in issuing the distress warrant the magistrate is merely issuing execution in respect of an existing order. He must, of course, inquire whether the rate is legal in order to see if there is such an existing order; but once satisfied that the rate is legal, his functions are entirely ministerial: *Reg. v. Price* (1880) 5 Q. B. D. 300; 49 L. J. M. C. 49; *Newbould v. Colman* (1851) 6 Ex. 189; 20 L. J. M. C. 149; *Southwark and Vauxhall Waterworks v. Hampton Urban District Council*, 1899, 1 Q. B. 273; 68 L. J. Q. B. 207; *Seaman v. Burley*, 1896, 2 Q. B. 344; 65 L. J. M. C. 208; *Reg. v. Handsley* (1881) 7 Q. B. D. 398; 51 L. J. M. C. 137. The Distress for Rates Act, 1849, studiously preserves the ministerial character of the magistrate's jurisdiction in issuing the distress warrant, while giving him a discretion as regards costs and the committing of the defaulter to prison: *Re Edgcombe*, 1902, 2 K. B. 403; 71 L. J. K. B. 722.

On the other side, great stress was laid on the language of the forms; and in particular the words "or any part thereof" were relied on. It is, however, to be observed that the words are not—as they must be read if the argument based on them is to prevail—"nor any part thereof," but "or any part thereof." These words, it is submitted, are inserted merely to show how the form is to be adapted if there has been part payment. They have, however, no bearing on the material question in this case, namely, in whom the power resides

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of deciding whether part payment shall be accepted. That power, it is submitted, must be in the overseers. It is they who by making the rate order that a given sum shall be paid. The magistrate does not order payment; he merely grants execution. In this connection it is to be observed that the obligation to pay imposed by the rate is in the nature of a debt from the ratepayer to the overseers, although it is not a mere debt, but also what may be called a public obligation. Further, though for the purpose of appeal to the Court of Appeal the proceedings for enforcing the liability have been held in *Seaman v. Burley*, 1896, 2 Q. B. 344; 65 L. J. M. C. 208, to be criminal, yet for most purposes they are civil: *Reg. v. Blenkinsop*, 1892, 1 Q. B. 43; 61 L. J. M. C. 45; *Reg. v. Whitecross Street Prison Governor* (1865) 6 B. & S. 372; 34 L. J. M. C. 193.

As to the question of tender:—where one entire sum is due the debtor cannot tender part so as to oblige the creditor to accept it: *Searles v. Sadgrave* (1855) 5 E. & B. 639; 25 L. J. Q. B. 15; *Dixon v. Clark* (1847) 5 C. B. 365; 16 L. J. C. P. 237. [KENNEDY J. If the money were paid into Court, no judge would allow execution to issue for more than the balance.] No doubt; but in the case of an action that matter is dealt with by rule, and, moreover, the Court acts judicially, while here the magistrate acts ministerially. The principle is that the debtor cannot compel the creditor to accept part payment. And that principle shows that it is in this case for the overseers to decide whether it is expedient to accept part payment or not, and not for anyone else. In assuming power to decide whether the overseers ought to accept part payment, the magistrate, whose functions are ministerial, is assuming a discretion not vested in him, and the Court should refuse to allow him to assume such a discretion, as the Court refused to allow justices to assume a discretion in *Reg. v. Boteler* (1864) 4 B. & S. 959; 33 L. J. M. C. 101.

[*Robson, K.C.*, at the suggestion of the Court, gave an undertaking that the £416 should be paid if the rule were discharged.]

LORD ALVERSTONE C.J. I am of opinion that this rule must be discharged. I wish it to be distinctly understood that nothing I say in this case must be supposed to give any countenance to the refusal of persons (I am speaking, of course, in a court of law) to pay rates that are justly due, and I desire to make this distinctly plain. I am dealing with this case as though it were an ordinary case, as though I had not known the motive which was set up as an excuse for not paying the whole of the rate. I am anxious to say that, because it sometimes has been supposed that a judgment given in a case of this kind has countenanced or given support to matters

with which it has nothing to do. As I pointed out, the question we have to decide is whether, when application is made to a magistrate under the Distress for Rates Act, 1849, and the person against whom the application is made is there, and says: "Here is a part of the money: you can take it to-day," the magistrate is bound to issue a distress warrant for the whole amount. With the greater part, I think I may say with all but one point, of Mr. Danckwerts' able argument I entirely agree. I entirely agree with all the subordinate or minor preliminary propositions that he laid down. I agree with him to this extent, that the overseer is entitled to say: "I will not take less than the full amount." It seems to me that having got thus far, we have only to consider what are the rights and duties of a magistrate asked to issue a distress warrant under the statute. I think it is quite right to say, broadly speaking, that the duty of the magistrate is ministerial, but that does not decide the question, because we must then explain what is meant by ministerial. I have no doubt—and not only have I no doubt, but I have so decided in two or three cases in the last two years—that where there is a good rate, and the magistrate is satisfied that the person rated is the proper person and has not paid, the grounds which he can consider as reasons for not issuing a distress warrant are very limited. It is not necessary to go through them. I have never pretended, nor do I pretend, to give a complete catalogue of them, as some new case may arise. But I am not aware of anything which has ever justified the view that a magistrate must issue a distress warrant if a ratepayer is prepared to pay there and then the whole amount. Nor do I know of any authority which suggests that he must issue the distress warrant for the whole, if there and then the overseer can receive, or has received, a part of the money which is due to him. It seems to me that all the authorities that have been cited are really beside the question we have to consider. I think nobody can read Distress for Rates Act, 1849, without being satisfied that the Legislature contemplated process for part of the rate and part payment as well as process for and payment of the whole. I am not saying that they did not contemplate that under many circumstances a distress warrant would go for the whole amount.

Section 5 directs that the party charged shall be summoned. Therefore the party is to be there. And section 6, though it is true that it relates specially to cases where proceedings have been taken to compel payment with a view to a person being lodged in prison, provides that if at any time before such person is committed to and lodged in prison for non-payment of the rate, or by reason of its being returned to the distress warrant that there are no goods and

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chattels, or no sufficient goods or chattels, "such person shall pay or tender to the churchwardens or overseers of the poor . . . the sum so sought to be recovered, together with the amount of all costs and expenses up to that time incurred," proceedings are to be at an end. Therefore it seems to me that the actual words of the statute clearly contemplate that there may be an application made for less than the full amount. I also wish to point out that the statute also contemplates an application being made for more than the amount of a particular rate, because it orders the justices in some cases to issue a distress warrant for the rate and all the arrears that there are, which would of necessity involve some inquiry as to what the real arrears were. It is perfectly true that the forms given in the schedule as forms are only optional. It is perfectly true that the forms need not be exactly followed, because the statute provides for the use of forms "to the like effect," but still the forms indicate that the Legislature contemplated the Act being used where a part of the rate could not be recovered.

Under these circumstances, I must say, treating this as an ordinary case and nothing else, I am very much impressed with that which the magistrate states to be the practice which has now existed for fourteen years. He says that he has heard many thousands of poor rate summonses, and it is a very frequent occurrence that the assistant overseer has asked him to issue a distress warrant for a less amount than that for which the summons was issued. The point Mr. Danckwerts takes that impresses me, and the one point that has given me difficulty in this case, is that he says the overseers need not accept less than the full amount, and that the cases in which distress warrants for such amounts have been issued have been at the request of the overseers. That is probably true, but I think according to the principles of justice that, when the statute contemplates process going for a part which is refused to be paid, there being a question of previous tender (I agree that no question of previous tender ought to be gone into, because that might necessitate a trial of what was a tender), and where in court the magistrate is satisfied the money is to be had for the lifting or for the asking, and the process of the court is only required to enforce payment of the balance, he has a right to issue a distress warrant for the balance. I pointed out when the rule was moved that it seemed to me extremely doubtful whether a mandamus ought to go, because on that day, when the magistrate so acted, the overseers could have had the £416 in cash and a distress warrant for the balance. I have listened with the greatest attention to Mr.

Danckwerts' argument, and I am unable to see anything which prevents our taking what seems to me the reasonable and proper course and holding that where a process is to be issued it ought to be issued only for that which is really required to be recovered. I must point out that, although I do not suppose it is any ground or motive in this case, any other judgment would throw upon the recalcitrant debtor who either was not able to pay or was not willing to pay, larger costs as between himself and the overseers, because the overseers, or the persons who levied, would be entitled to recover larger fees in respect of levying a larger amount. I am therefore of opinion that this rule must be discharged. I understand that the undertaking to pay the £416 remains.

LAWRANCE J. I entirely agree.

KENNEDY J. I agree too. I wish to associate myself in my judgment entirely with what my Lord has said with regard to treating this case simply on general grounds. It appears to me that I can put my reasons very shortly, and I think, considering the importance of the case, I ought to do so. The question is whether we are by this procedure of mandamus to compel a magistrate to issue a distress warrant in respect of the whole of a rate, when on the hearing of the summons an actual tender of a large portion of the rate is made there and then in court before him. *Prima facie* that would seem to be an unlikely course for the law to sanction. It does involve, although no gain to the overseers, questions of greater cost to the ratepayer. But when we look at it from the view which Mr. Danckwerts invited us to take—the view of authority—I see nothing which compels this Court in obedience to the authority of previous decisions to take the view that the magistrate ought to be compelled by mandamus. Persons, of course, must pay the rate as ordered by law. Persons, of course, must recognise that which this Court has more than once laid down, namely, that a magistrate before whom the person who ought to pay a rate is brought for the non-payment of that rate is acting ministerially and not judicially, in this sense: that if it is a valid rate—if, as, for example, in such a case as *Reg. v. Bradshaw* (1860) 2 E. & E. 836; 29 L. J. M. C. 176, the person summoned is in visible occupation of the property rated—the magistrate cannot go into any question except this: "Is there due and unpaid the rate which has been made according to law?" In that sense his office is ministerial. But then the question arises: Is the magistrate, in issuing the warrant and accepting the rate as the basis of the amount for which he must put in force the powers intrusted to him by giving a distress warrant, bound to overlook the fact that there and then in court the ratepayer in question says, "Here

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is this amount in part payment"? I know of no authority obliging one to come to such a conclusion, and it seems to me most unreasonable. I confess I think a good deal of the argument of Mr. Danckwerts in regard to tender seemed to me from the first to be outside the real question for consideration, because no one has suggested that the magistrate, when the person is brought before him by the overseers on a summons for non-payment of a rate, should go into the disputed question as to whether at any time the person who ought to pay the rate has tendered either the whole amount or any part of it. He is not there to try the question as to whether there has been a valid tender or not of the whole or part of it. I quite agree that his duty is ministerial and not judicial. There is the rate, and the man has to pay, and he has to see at that moment what is the amount actually unpaid. But directly he does that he must see that the money is, as in this case, actually produced, and the man says, "I am willing to pay." Would Mr. Danckwerts say that supposing a ratepayer came with the whole amount, never having paid up to that moment, the overseer could say, "I will not take the amount even now; I want your distress warrant for the whole of the rate"? Surely that cannot be right. It would be issuing a distress warrant, with all its circumstances of cost, all its circumstances of annoyance, against a person who up to that time, no doubt, had not paid, but who then and there actually offers the money before the magistrate, and against whom I should presume the magistrate's duty was to order him to pay the costs so far incurred by the steps which had alone produced the money. It seems to me that while it is not the least within the function of a magistrate to consider previous tenders, still, if the money is there and then offered in payment of the whole or any part, his duty, while he looks at the amount of the rate as *prima facie* the amount absolutely due, and which he must consider to be due as the legal rate, and while he cannot go into the question of the liability of the person who is visibly in occupation of the property rated, his duty is to say, "Well, in using the machinery to get this rate I must look, and properly look, at the sum which is here in court, which leaves me free to put in force the machinery only for the balance remaining unpaid."

Therefore, on these grounds, it seems to me that it would not be right to compel the magistrate to issue a distress warrant for a rate when either the whole or a part of it is actually offered in court before him; and the overseer can only properly recover, as an official, the balance, being already, without any machinery of distress warrants,

enabled there and then to receive that which is either the whole or a substantial part of that which he is entitled to claim.

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Rule discharged.

Solicitors for the prosecution—Hillearys.

Solicitors for the respondents—Lloyd George and Sons.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Note.

In *Re Wiles*, decided a few days after the above case, and reported *post* p. 103, it was held that though the justices cannot be compelled, in proceedings for the recovery of poor rate, to issue a distress warrant for more than the balance where there is a tender of part payment in court which the overseers decline to accept, yet the justices are at liberty to do so if they think fit.

It may be added that in *Seaman v. Burley*, 1896, 2 Q. B. 344; 65 L. J. M. C. 208; 75 L. T. 91; 45 W. R. 1; 60 J. P. 772; 18 Cox C. C. 403, it was held that proceedings for the recovery of poor rate are a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873, and that consequently no appeal lies to the Court of Appeal from a decision of the Divisional Court on a case stated in such proceedings. It has been thought in some quarters that this case and some of the cases there followed have gone too far, and it is very possible that the House of Lords may hereafter be asked to review these decisions. In the meantime *Seaman v. Burley* would apparently prevent its being possible to have the decision in *Rex v. Gillespie* reviewed by the Court of Appeal.

High Court of Justice.

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KING'S BENCH DIVISION.

October 30.

HACKNEY BOROUGH COUNCIL v. LEE CONSERVANCY BOARD.

Streets—Metropolis—New street—Paving expenses—"Owner"—Land held for purposes of navigation of river—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77.

Land acquired by the Lee Conservancy Board, for the purpose of strengthening a river bank under their control, is held by the Board as trustees for public purposes of a nature inconsistent with the letting of the land for ordinary beneficial purposes. The Board are consequently not "owners" of such land within the meaning of the Metropolis Management Acts so as to be liable for the paving expenses of a new street on which the land abuts. And it makes no difference in this respect that the conveyance of the land to the Board contains a reservation to the vendors of a right to construct wharves, &c., on the land.

ACTION tried before Wright J. without a jury, in which the plaintiffs, the Council of the metropolitan borough of Hackney, claimed £300 2s. 6d., being the estimated expenses of paving a new street, known as Maiwand Road, Clapton Park, in the borough of Hackney, due to the plaintiffs from the defendants as owners of land bounding or abutting on Maiwand Road aforesaid. The defendants were the Conservators of the River Lee Navigation.

On October 9, 1902, the plaintiffs resolved that Maiwand Road, being a new street within the Metropolis Management Acts, 1855 and 1862, should be well and sufficiently paved by making up the road and channelling the same, and by paving the footways, forming the street crossings, and performing the necessary gully work; further, that notices be served demanding the respective amounts apportioned on the owners of the houses and land bounding or abutting on Maiwand Road, and upon receipt of such amounts the works be carried out, and upon the works being done and the accounts closed, that the street be from that time repaired and maintained by the Council.

The plaintiffs alleged that the defendants were the owners, within the meaning of the Metropolis Management Acts, of land bounding or abutting on Maiwand Road, throughout 285 feet 10 inches of the length thereof; and the sum of £300 2s. 6d. was apportioned on them in respect of their ownership. On October 22, 1902, payment of the amount was demanded of the defendants, who refused to pay the same.

By their defence the defendants did not admit that Maiwand Road was a new street within the Metropolis Management Acts. They denied that their land bounded or abutted on Maiwand Road as alleged or at all. And, alternatively, if their land bounded or abutted on the road as alleged, they denied that they were the owners of such land within the meaning of the Metropolis Management Acts.

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Shortly stated, the facts were as follows :—

The defendants are the successors of the Lee Conservancy Trustees, who were by 7 Geo. III. c. 51 empowered to make new cuts for the purposes of the navigation of the river. The trustees made a new cut or canal from Lee Bridge to the waterworks called the Hackney cut. The present Maiwand Road fronts this cut.

In 1849 the Lee Conservancy Trustees purchased a strip of land, from 21 to 27 feet wide, containing about two roods, lying next this navigable cut of the Lee just outside the bank of the cut, for the purpose of strengthening the bank. The conveyance of this strip contained a reservation to the vendors, their heirs and assigns, or other the owner or owners for the time being of the land immediately adjoining the land intended to be conveyed on the south-west side, during the lives of all the parties thereto and of all the then trustees of the River Lee and the lives and life of the survivors and survivor and during 21 years from the decease of such survivor, to make form and construct upon the piece of land thereby conveyed, or partly upon it and partly upon the adjoining land, a dock or docks, landing place or landing places, wharf or wharves, so as to be able and have the right and privilege at all times thereafter to use and take advantage of the River Lee and the navigation thereof for the shipment, landing, &c., of all kinds of goods and materials free of charge or duty.

This strip of land had been bounded on the west side, the side opposite to the river, by a ditch which was filled up about the year 1867.

In 1880 the London and Suburban Land and Building Company conveyed to one Goodman and another a parcel of land on the west of the strip of land of the Lee Trustees, now the site of Maiwand Road. In the same year a 40-feet road was approved. In 1882 notice of intention to build on the land was given. In January, 1889, the plaintiffs' predecessors, the Hackney Board of Works, resolved to pave and make up Maiwand Road as a new street. In June of the same year it was discovered that a 40-feet road would be an encroachment of 13 feet on the defendants' land; and on 24th April, 1890, the London County Council approved of a 30-feet road on condition that no barriers be erected or obstruction caused. In 1901 the plaintiffs rescinded the resolution of the Hackney Board of Works for the

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paving and making of Maiwand Road and passed the resolution on which the present action was brought.

Macmorran, K.C., and *T. Beven* for the plaintiffs. The apportionment has been duly made. Maiwand Road is a new street. Although it dates from 1882 it has never been made up. It abuts on or is bounded by the defendants' land, and the defendants are liable for the apportioned expenses of paving.

Avory, K.C., and *Morten* for the defendants. Whether Maiwand Road is a new street or not is a question of fact. All the building was begun in 1882 and finished in 1889, so that the road existed as a street then, and the Board of Works exercised their powers upon it as a new street in 1889. It is submitted, therefore, that by this time it has ceased to be a "new" street, if it is a street at all. Again, the buildings are erected upon one side of the way only; and there is no possibility of building on the opposite side which abuts on the river; and it is submitted therefore that it is not a street at all, for the idea of a street is that it should have buildings on both sides.

The defendants' land does not bound or abut on the street; for there was an old ditch lying between the defendants' land and Maiwand Road, and, though the ditch has been filled up, the soil of the land formerly occupied by the ditch still remains in the freeholders, who sold the strip of land to the defendants in 1849.

The next point is that the defendants are not "owners" within the definition in section 250 of the Metropolis Management Act, 1855. They are not persons receiving a rack rent or who could receive a rack rent. The whole scheme of the Lee Conservancy is the maintenance of the navigation as a highway. The defendants can only acquire lands to make banks, and a bank is a necessary part of a navigable river. Even if this bank be not in the same category as the bed of the river, it is at least equivalent to a roadside fence or retaining wall, of which there can be no owner within the section. This is even a stronger case than that of *Great Eastern Railway v. Hackney Board of Works* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105; see per Lord Watson at 8 App. Cas. p. 693. The conveyance of 1849 confirms this strip of land to the defendants with a right to the freeholders to make wharves, &c.; therefore this is land acquired for the purpose of maintaining a navigable river, and for that purpose only. The defendants are not owners within section 250, for their property is placed *extra commercium*, and is not capable of being let at a rack rent: *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399 (which overruled *Fulham Vestry v. Minter*, 1901, 1 K. B. 501; 70 L. J. K. B. 348); *Thames Conservators v. Port*

Sanitary Authority of Port of London, 1894, 1 Q. B. 647; 63 L. J. M. C. 121; *Forbes v. Lee Conservancy Board* (1879) 4 Ex. D. 116; 48 L. J. Ex. 402. The defendants are an unpaid body of trustees for maintaining a river highway, and are in the same position as the owners of a highway, and are not owners liable to contribute to paying expenses.

Macmorran, K.C., called upon to reply as to the last point only. The defendants are charged as owners of land adjoining the river. No statute lays it down that their powers are less than the powers of a private owner. They can erect buildings on this strip of land, let it, or deal with it in any way they please. It has not been dedicated by them to public purposes, and there has been reserved to their vendors a right to erect docks, wharves, or landing places, so that the land is not rendered *extra commercium*. This is a very different state of things to that which existed in *London County Council v. Wandsworth Borough Council* for here there is a right reserved to the freeholders to use the land for purposes of pecuniary value. If the defendants can reserve this right for the freeholders they can do it for themselves. The plaintiffs rely on the general ground that in the absence of anything in their Act forbidding them there is nothing to stop the defendants putting this land to profitable purposes. There is no evidence that this land is *extra commercium*, and the defendants are as owners of land abutting or bounding on a new street liable to pay the sum apportioned upon them for making it up.

WRIGHT J. I think that on the last point of the case, which is the most important, the principles laid down by Lord Watson in *Great Eastern Ruitway v. Hackney Board of Works* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105, and by Vaughan Williams L.J. and the other Lords Justices in *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399, and also referred to in the other cases that have been mentioned, cover this case, although the facts in the present case are not exactly similar to the facts in any of these cases. I think that the case is one in which the defendants are constituted by the Acts under which they acquired this land trustees for public purposes of a nature inconsistent with the land being rack rented as between tenant and owner. It is clear that the land could not be let for any purpose. I think that is the true test that more than one of the learned judges has taken. If the defendants are trustees for the public, and if they cannot let their land for ordinary beneficial purposes, that being contrary to the purposes for which the lands are held, namely, public purposes bringing no profit to the owner, it seems to me the case is brought within the principles of the

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decisions I have referred to ; and it clearly is so. Under the conveyance of 1849 the trustees hold solely for the purpose of the public navigation of the river. I cannot see any distinction between land required for the purposes of strengthening the banks of the river, and the land constituting the actual bank or the bed of the river itself.

As regards the first point that was made, I think this was a street. It is admitted that there may be streets with buildings on one side of them only, and of course there are numberless cases in which streets have one side only. There may be a park, or a river, or a railway, or anything on the other side, but no one would call Piccadilly or the Chelsea Embankment anything but a street.

Then there is the point about its not being a "new" street, and there is some difficulty about that. There is some force in the argument that it existed in 1889, and was admittedly dealt with between the years 1882 and 1889. I do not know of any decision which at all tends to fix the quantity of the lapse of time which would prevent a street from being a new street. Nor is there any period of limitation, that I am aware of, that can be applied under any of the Acts. I feel it is going somewhat far, but I do not see any ground upon which it would be right to fix a time short of the time when the proceedings were last taken, and say that at that time it ceased to be a new street. I do not feel pressed at all with the difficulty of the former proceedings. They were really regarded by everybody as being a nullity because it was agreed on all hands that the 40 feet width involved taking in land which the Board of Works had no right to take in, or, in other words, a trespass. Of course, anything based on a mistake of that kind cannot stand at all.

Then as to the point that the land does not bound or abut on the street. If the land were such as to be in other respects liable, I should think the proper inference would be that this strip of land between the Conservancy Board's land and Maiwand Road really had been dedicated as much as the rest of the surface. I do not see that a line can be drawn by saying that the public pass over only a certain portion, because this part of the case depends on the fact that a street of only a certain width is constructed. If the whole width from the Conservancy Board's land to the buildings in Maiwand Road is, in point of fact, intended, then there is no intervening strip on the other part of the same road. There is no other part not dedicated, I should think, since that ditch was filled up, and it would form an irresistible inference that the surface of the ditch was dedicated then even if it was not dedicated up to the time when it was levelled.

But on the ground that the Conservancy Board are not beneficial owners within section 105 of the Metropolis Management Act, 1855, it seems to me I must give judgment for the defendants.

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Judgment for defendants.

Solicitor for the plaintiffs—W. A. Williams.

Solicitors for the defendants—Clapham, Fitch, & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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COURT OF APPEAL.

Jul; 24.

GALE AND ANOTHER v. RHYMNEY AND ABER VALLEYS GAS AND WATER COMPANY.

Water—Supply—Communication pipes—Cutting off connection with main—Trespass—Refusal to supply—Right of action—Penalties—Damages—Injunction—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 43, 43, 49, 53.

If a water company, to whose undertaking the Waterworks Clauses Act, 1847, applies, wrongfully cut a connection lawfully made by the owner of a house between their main and his communication pipe they are guilty of a common law trespass, and the owner may maintain an action for damages and an injunction accordingly, notwithstanding the provisions in section 43 of the Act giving a special remedy when the company wrongfully refuse to supply water.

APPLICATION by the defendants for judgment in an action tried before Phillimore J. and a common jury at Glamorgan.

The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiffs are builders carrying on business at Bargoed, and are the owners of the six houses hereinafter referred to. The defendant Company (hereinafter referred to as the defendants) was incorporated by the Rhymney and Aber Valleys Gas and Water Act, 1898 (61 & 62 Vict. c. ccxlv.), with which Act are incorporated (*inter alia*) the Waterworks Clauses Act, 1847 (except part of section 46 thereof), and the Waterworks Clauses Act, 1863.

2. In the year 1900, it being necessary that six houses which the plaintiffs were then erecting upon land belonging to them at Bargoed aforesaid (within the limits of the defendants' special Act) should be supplied with gas and water, the plaintiffs instructed the defendants to provide and lay on all necessary and proper services for the purpose of supplying the said houses with gas and water, and thereupon the said services were laid and provided by the defendants by their own workmen at the cost of the plaintiffs.

3. Subsequently (in or about April, 1901) the plaintiffs instructed the defendants to provide and lay all necessary and proper communication pipes in order to connect the said services with the defendants' main in the road leading from Gilfach to Bargoed, and thereupon the defendants by their own servants and workmen laid the said communication pipes at the cost of the plaintiffs. The number of pipes so

laid by the defendants was three, namely, one pipe for each pair of houses.

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4. In laying and completing the said services and laying the said communication pipes everything necessary for the supply of water to the said houses (except making the physical connection of the communication pipes with the main) was done by the defendants (by or under the supervision or direction of their own servants) in accordance with their orders, wishes, and requirements, and to their own satisfaction, and upon the footing that there should be one communication pipe for each pair of houses, and in reliance thereupon, and that one communication pipe only to each pair of the said houses was all that the defendants required, the plaintiffs fitted up the said houses with baths, hot-water apparatus, and other necessary fittings and works upon that footing, and thereby incurred very considerable expense.

5. Shortly after the said communication pipes had been laid by the defendants as aforesaid the plaintiffs requested the defendants to connect the said pipes or allow them to be connected with the main, but the defendants refused, and for the first time, and without having given any prior intimation of their requirement, stated that a separate communication pipe must be laid from the main pipe into each of the said houses, and that they would not supply with water any of the said houses until a separate pipe into each house had been laid.

6. The plaintiffs thereupon, after giving the notices prescribed by and in all other respects complying with the provisions in that behalf of the defendants' special Act and the Acts incorporated therewith, connected the said communication pipes which had been laid by the defendants as aforesaid and the main, but the defendants immediately thereafter severed the connection and stopped up the said pipes, and threatened and intend to again sever the connection if the plaintiffs again connect the said pipes with the main, and the defendants also refused and still refuse, unless the said requirement be complied with, to allow the said houses or any of them to be supplied with any water from the main.

7. By virtue of section 69 of the Company's said special Act, alternatively by virtue of section 53 of the Waterworks Clauses Act, 1847 (with the provisions of which same sections respectively the plaintiffs have duly complied), the plaintiffs are, under the circumstances aforesaid, entitled to demand and receive from the defendants a supply of water to the said houses for domestic purposes, but the defendants have refused and still refuse to furnish the same.

8. By reason of the defendants' said refusal the said houses are still without any water supply, and the plaintiffs have in consequence

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PARTICULARS OF SPECIAL DAMAGE.

Loss of rent of six houses from the completion to the date of writ	£50 0 0
Depreciation in value thereof in consequence of there being no water supply	50 0 0
	<hr/>
	£100 0 0

The plaintiffs claim—

(1) A declaration that they are entitled to receive from the defendants a sufficient supply of water to the said houses for domestic purposes.

(2) An injunction to restrain the defendants, their workmen, servants, and agents, from preventing the plaintiffs from connecting the said communication pipes with the defendants' said main and from severing or interfering with the connection thereof if the same shall be again made by the plaintiffs.

(3) Damages.

DEFENCE.

The defendants say that—

1. They admit paragraph 1 of the statement of claim, but they deny every allegation contained in paragraphs 2, 3, and 4, as if the same were here set out and traversed seriatim.

2. They admit that they would not supply with water any of the said houses until a separate pipe into each house had been laid; they admit that they severed the connection of the said pipes with the main, and that they refused and still refuse to allow the said houses to be supplied with water from the main; but save as aforesaid they deny every allegation of fact contained in paragraphs 5, 6, and 7, as if the same were here set out and traversed seriatim.

3. They deny that the plaintiffs have suffered the alleged or any special damage, and will further contend that the special damage claimed is too much.

4. In the alternative, by section 83 of their special Act, the defendants are not bound to supply with water more than one house by means of the same communication pipe, and they may if they think fit require that a separate pipe be laid from the main pipe into each house supplied by them with water, and the defendants on the occasions referred to in paragraphs 2 and 3 of the statement of claim verbally informed the plaintiffs of the said section, and that the defendants could require such a separate pipe for each of the said six houses.

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5. The defendants at the request of the plaintiffs sent their servants to lay the several pipes for the said six houses, and the defendants' plumber duly laid three separate pipes for three of such houses, when the plaintiffs verbally requested and authorised the said plumber not to lay three more pipes for the three remaining houses, but to connect up the said houses with the said pipes already laid.

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6. The said plumber thereupon connected up the said three remaining houses with the said three pipes already laid at the express request and upon the express authority of the plaintiffs and as the plaintiffs' agent or servant and without the authority and not as the agent or servant of the defendants.

7. The said six houses have not each such a separate pipe to the main, and the defendants are entitled to refuse to furnish them with the said water supply.

8. The defendants will further contend that no action will lie in respect of the matters complained of.

REPLY.

The plaintiffs say that—

1. They join issue upon the defence save as to admissions.

2. The defendants ought not to be admitted to plead or rely upon section 83 of their special Act or to say that they are entitled to refuse to furnish the plaintiffs' said houses with the water supply because of the several acts and matters done by the plaintiffs and defendants respectively as stated and set forth in the third and fourth paragraphs of the statement of claim.

The material facts, so far as they do not appear from the pleadings, were as follows :—

In 1899 the plaintiffs had applied to a man named Knight who was in the employment of the defendants for leave to have one communication pipe from the main for the six houses with a branch service pipe leading to each house from such communication pipe. Knight refused to permit this arrangement, but eventually Knight gave permission to lay one communication pipe from the main for each pair of houses; and the pipes were accordingly laid in this way. It appeared that Knight had been the local manager of a small water company which was amalgamated with the defendant Company by the Act of 1898.

At the trial the jury found that Knight had authority to make the arrangement he did; they assessed the damages at £67.

PHILLIMORE J. held that the plaintiffs were not entitled to the declaration asked, but that they were entitled to an injunction restraining the defendants from preventing them from restoring the con-

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nections. He therefore entered judgment for the plaintiffs with £67 damages and an injunction in the terms asked for.

The defendants appealed.

The following sections of the Rhymney and Aber Valleys Gas and Water Act, 1898 (61 & 62 Vict. c. ccxlv.), are material :—

Section 69. The Company shall on the application of any person who under the provisions of this Act shall be entitled to demand a supply of water for domestic purposes furnish to such person a sufficient supply of water for domestic purposes at rates and charges not exceeding the rates and charges hereinafter specified

Section 83. The Company shall not be bound to supply with water more than one house by means of the same communication pipe and they may if they think fit require that a separate pipe be laid from the main pipe into each house supplied by them with water.

The following provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), are material :—

Section 43. If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fire plugs . . . or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit . . . to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply.

Section 48. Any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act who shall wish to have water from the waterworks of the undertakers brought into his premises, and who shall have paid or tendered to the undertakers the portion of water rate in respect of such premises by this or the special Act directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises . . . and lay leaden or other pipes from such premises, to communicate with the pipes of the undertakers

Section 53. Every owner and occupier of any dwelling-house, or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes.

S. T. Evans, K.C. and *John Sankey* for the defendants. First we say that Knight had no authority to make the arrangement he did so as to bind the defendants. [COLLINS M.R. That is a question of fact which the jury have found against you. You are not asking here for a new trial but for judgment.] Secondly, the plaintiffs' sole remedy is to sue for penalties under section 43 of the Act of 1847. That section provides a remedy by way of penalties for refusing to supply water to a person entitled to a supply, and where a statutory remedy is given for a breach of a statutory obligation, an action for damages will not lie. If the judgment appealed from is upheld there appears to be no reason

why the plaintiff should not proceed against the Company nevertheless for penalties. Obviously the Legislature never intended that a company should be held liable to pay compensation twice for loss arising from a breach of duty. Here the plaintiffs were entitled either to take a supply under section 53 of the general Act, or to have penalties under section 43 because the supply was not given. *Atkinson v. Newcastle and Gateshead Waterworks* (1877) 2 Ex. D. 441; 46 L. J. Ex. 775, and *McColla v. Clacton-on-Sea Gas and Water Company* (1889) 5 Times L. R. 690, show conclusively that where a statutory right to claim a penalty is given, the Court has no power to grant an injunction or to make a declaration. [The following cases were also cited: *Johnston v. Consumers' Gas Company of Toronto*, 1898, A. C. 447; 67 L. J. P. C. 33; *Milnes v. Huddersfield Corporation* (1886) 11 App. Cas. 511; 56 L. J. Q. B. 1; *Wolverhampton New Waterworks v. Hawkesford* (1859) 6 C. B. N. S. 336; 28 L. J. C. P. 242; *Pasmore v. Osu:ald-twistle Urban District Council*, 1898, A. C. 387; 67 L. J. Q. B. 635; *Devonport Corporation v. Tozer*, 1903, 1 Ch. 759; 1 L. G. R. 421; 72 L. J. Ch. 411; *Clegg and Company v. Earby Gas Company*, 1896, 1 Q. B. 592; 65 L. J. Q. B. 339; *Attorney-General v. Ashbourne Recreation Ground Company*, 1903, 1 Ch. 101; 1 L. G. R. 146; 72 L. J. Ch. 67, and a passage in *Hayward v. East London Waterworks* (1884), 28 Ch. D. 138 at p. 147; 54 L. J. Ch. 523, where Chitty J. refers to an unreported decision of Jessel M.R. given in *Low v. Lambeth Waterworks Company*.]

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Abel Thomas, K.C., and *Albert Parsons* for the plaintiffs. The respondent is not in a position to fight this case up to the House of Lords to have the question determined whether *Atkinson v. Newcastle and Gateshead Waterworks* was rightly decided or not. We submit that the learned judge, who recognised this, decided the case rightly on the broad ground that the plaintiffs, having proved they had suffered loss, were entitled to judgment for the amount of the verdict in their favour and an injunction. For this reason we abandon the claim altogether for a declaration, and therefore the only question before this Court is whether the Company are right in saying that there is a specific remedy given by the statute in respect of the acts of which we complain. If they had established that contention, then we should not, for the reason given, have argued the question whether or not the right to maintain an action at common law was gone by reason of the fact that a remedy was given by the statute. The statute entitled the plaintiffs to connect the service pipes to the main. The jurisdiction of the justices is confined to hearing a dispute as to the manner in which that connection should be made. That is not the

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point here. The connection was made subject to the sanction of the defendants' authorised servant. The Act gives no right to either party to go before justices to recover penalties in respect of the severance of a legally made connection. Therefore the parties are thrown back on their common law rights. This cutting-off was in fact a trespass at common law. [COLLINS M.R. Have you pleaded trespass?] Yes; paragraph 6 in the statement of claim is the one we rely on as showing a claim at common law. Therefore the action is maintainable, and an injunction could properly be claimed. Section 43 gives a penalty for neglecting or refusing to furnish a supply of water, but the penalties specified in that section were never intended to cover all the subsequent sections of the Act. That is quite clear, because in section 45 there is a penalty given for the refusal of the undertakers to lay communication pipes which would be clearly in that case unnecessary. The principle laid down in *Sheffield Waterworks v. Williamson* (1878) 4 C. P. D. 410; 48 L. J. M. C. 145, applying here, the judgment appealed from should be upheld.

S. T. Evans, K.C., in reply. This is not an action based on trespass for the wrongful cutting off of the plaintiffs' pipe. It is an action on the pleadings for refusing to supply water to the houses. Even assuming that there is no express statutory power enabling the Water Company to sever the connection in a case like the present, the Company are entitled to protect themselves, and can do so in no other way. Moreover, here by their special Act they can refuse to supply water to a house unless there is a separate communication pipe to it. Except by cutting off the connection how could they refuse a supply, which under the circumstances they are not compellable to give? This is simply a refusal to supply, and, the Act having prescribed by section 43 of the Act of 1847, what in that case the rights of the parties are, the plaintiff by bringing this action has sought the wrong remedy, and the learned judge should therefore have dismissed the action and entered judgment for the Company.

COLLINS M.R. This is an application for judgment in an action between the owners of certain houses and a water company which was tried before Phillimore J. and a jury. The Water Company had cut off the connection which had been properly made with their main under the provisions of an Act of Parliament, and they claimed that they were entitled to sever the connection. They set up the defence that they were entitled to sever the connection because there was a provision made by themselves—not a statutory provision—for the better working of their undertaking, that service pipes should be laid only under certain conditions between the houses and the mains, one of the

conditions being that each house should have a separate and exclusive connection with the main. In the present case the Company's representative had assented to a row of houses which the plaintiffs were erecting being supplied by one service pipe to each pair of houses; and the pipes were laid down under his supervision and with his assent. The Company at the trial contended strenuously that what had been done under their alleged sanction had in fact been done without their authority, because, if their representative sanctioned the pipes being laid as they were, he had acted beyond his authority, he having no power to sanction any such arrangement. This was really the point upon which the action went down for trial; and the jury found that the representative had, as a matter of fact, sanctioned the mode of connection which had been made, and also that he had power to authorise such connection. Whether he actually had authority, or whether he was held out by the Company as having it, does not in the least matter, as it was found by the jury that he had authority, and, there being ample evidence to support that finding, we could not interfere with it, and therefore Mr. Evans very wisely did not seriously argue the question of authority here. We therefore start with this finding of the jury that the assent of their representative bound the Company, and consequently the result is that we have to consider the question on the footing that the connections between the houses and the main were properly made under the provisions of the Act of Parliament.

Now the rights of the parties in respect of that matter are regulated by sections 48 and 49 of the Waterworks Clauses Act, 1847, which general statute is incorporated in the Company's special Act. Section 48 provides that the owner or occupier of a house shall bring his service pipe into physical continuity with the main and shall, subject to obtaining the consent of the Company as to the mode of connection, himself make the connection; and section 49 provides that in case of dispute as to the manner in which the pipe shall be made to communicate, it shall be settled by two justices. There was no such question raised here as to the manner of connection, and the owners, acting within their statutory rights, actually did connect their service pipes with the main of the Company. In this state of things the defendants, disputing the right of the owners to have one service pipe for every two houses, took the law into their own hands and cut the connection. It cannot be contended, under those circumstances, that there has not been a breach by the Company of their obligation, for there is no section—Mr. Evans could point to none, though he was specially invited to do so—enabling the Company to disconnect the pipe. This is very important—in fact, crucial—in this case, because

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the answer to the action was not that the Company did not do a wrongful act, but that the particular remedy is to be found in certain special provisions of the Act, and that that remedy provided by the special provisions is the only one that can be enforced against them.

In support of that proposition the defendants relied upon section 43 of the Act of 1847. [His Lordship read the section and continued :—] That section was the subject of the decision in the well-known case of *Atkinson v. Newcastle and Gateshead Waterworks Company* (1877) L. R. 2 Ex. D. 441 ; 46 L. J. Ex. 775, which raised the question of the liability of the water company for not keeping a proper pressure in the mains, and in which their duties to supply individual owners and occupiers were dealt with. Mr. Evans said that in effect the present action was one by an owner against a water company for neglecting or refusing to furnish a supply of water to his houses, and that as section 43 prescribed certain penalties for such an offence, the only remedy was under that section. But that contention depends entirely upon the proposition that the cause of action is one for which penalties are prescribed. The argument does not arise at all unless the Act prescribes a penalty, and although there has been addressed to us an argument that even if the Act did prescribe a penalty that would not oust the remedy by injunction, it does not become necessary for us to pronounce an opinion upon that part of the case, unless it is shown that the action brought is an action for something for which the penalty is provided by the statute. As I have pointed out, there is no provision either in the special Act or in the general Act imposing any penalty on the Company if they wrongfully cut off the water. They have certain powers to cut off the water under certain specific conditions, but these powers do not apply to this case ; and this particular matter of cutting off the water wrongfully, as they did cut it off here without any actual foundation in law or in fact for so doing, is not protected by the infliction of a penalty. Therefore they simply stand at common law. They have accepted a certain obligation which is imposed upon them in return for certain advantages and privileges conferred upon them, and rightly, under the power of the statute, the owners connected their water pipe. The Company, misconceiving their position altogether in the matter, took the law into their own hands and committed a trespass upon the plaintiffs' property. They cut off a pipe which was the plaintiffs' pipe, and it seems to me also they cut it off on premises of which the plaintiffs were the occupiers. Clearly, that was a cause of action at common law, and why are the plaintiffs not to maintain their remedy at common law and in equity for that wrong done—a wrong done for which there is no defence. The only answer made is this :—The Company say that the object for which

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the plaintiffs connected their pipe to the main was that they might have a supply of water, and that what the plaintiffs are really suing for, by a roundabout way, is that the Company are not supplying them with water; and that, inasmuch as the plaintiffs are suing the Company for not supplying water, the Company can set up the existence of the statutory remedy. That is to say, the Company contend that, although the plaintiffs are not suing them for not supplying water, but for the wrong which they did the plaintiffs in unwarrantably trespassing on and interfering with the plaintiffs' property, they must be taken to be suing for another cause of action. I decline altogether to go through that process of reasoning or adopt the view that, by a roundabout method, the plaintiffs are really suing to get a supply of water. What they are suing for is for damages for the high-handed trespass committed by persons who had no right to do it. They are suing for that, and the jury has found it was a wrong done. Why are the plaintiffs not to have their damages? No statutory provision can be pointed out which ousts them from those damages; the only question is what those damages are. There was evidence that these houses, or one or more of them, while they were in this condition, cut off from the source of supply of water, were sold, and there was evidence that the difference in value between a house not connected, though there is a right of connection, and the house in actual connection with the main, is substantial. The damages were not put at a very high figure, and there was no cross-examination as to damages, and the evidence before us—it is not for us to inquire into minutiae, and I see no reason why the evidence should not be believed—is that substantial damage was caused by the fact that the Company, without any right whatever, had disconnected the plaintiffs' premises from the water supply of the district. The jury assessed the damages at £68, and Phillimore J. has given judgment for that amount, and he has coupled with it an injunction to which great exception has been taken. The right to the injunction rests upon the same ground, and was met, or sought to be met, on the same grounds as the other part of the case. Phillimore J. has granted an injunction treating the matter simply as a breach of a common law obligation carrying with it the rights, both at law and in equity, incident thereto. The plaintiffs having the statutory right I have referred to under sections 48 and 49 of the Act of 1847 to connect their pipes with the Company's main, Phillimore J., in view of the conduct of the Company in what they have done and have said they were going to do, has enjoined them from preventing the plaintiffs from exercising their statutory right of re-connecting their service pipes with the main. I can see no objection whatever to that injunction. The grounds upon which it was objected to do not apply, because, as I have pointed out, the wrong

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was not one for which a statutory penalty is enacted, and the case is, therefore, entirely outside the whole range of authorities, at the head of which stands *Atkinson v. Newcastle and Gateshead Waterworks* (1877) L. R. 2 Ex. D. 441; 46 L. J. Ex. 775. At the same time, although it is not necessary for us in this case, for the reasons I have given, to consider or determine whether, where a case does fall within the ruling in that case, the remedy by injunction would be ousted. I am not called upon to give any opinion upon that matter, but I should require a great deal more argument, and much more time to consider, before I came to the conclusion that the remedy by injunction was ousted. That is all I desire to say upon the matter. I have not decided the point, and I am not prepared to decide it upon the argument in this case.

For these reasons, I think the appeal fails, and that the judgment of Phillimore J., and the grounds upon which it was given, were perfectly right.

MATHEW L.J. I am of the same opinion. The defendants are compelled to admit in this Court that an arrangement was come to between their proper officer and the plaintiffs as to the way in which the plaintiffs' houses should be connected with their main. On the faith of that arrangement, which was held by the jury to be binding on the defendants, the plaintiffs incurred the expense of laying their pipes and making the communication with the main. That having been done, and done obviously with the intention at some future time of demanding a supply of water from the defendant Company, the defendants, under a misapprehension as to the power and authority of their officer, took the law into their own hands and cut off the communication, and refused to be bound by the arrangement which the jury have held they ought to have submitted to. Now what is the cause of action? Assuming the defendants are in the wrong, they were clearly guilty of an act of trespass. A considerable loss, far beyond the expense of restoring the communication, has been put upon the plaintiffs. The plaintiffs had built the houses, and intended to let them for the purpose of habitation. What the defendants did was really to put it out of the power of the plaintiffs to let their property, and inflict a slur upon their property, and of course the plaintiffs found themselves embarrassed in the efforts they made to sell or let the houses which they had built. Under those circumstances the case was a simple one. A trespass was committed under circumstances which inflicted, and which it must have been foreseen would inflict, a serious loss on the plaintiffs. The plaintiffs, therefore, are entitled to be indemnified. The question which went down to be tried was

whether in fact the arrangement was binding. In reference to that, as I have said, the plaintiffs have succeeded. When they had succeeded, their victory was sought to be snatched from them by reference to the penalty clauses in the Act of 1847. It was said the Company might have trespassed in doing what they did; but they did it for the purpose of withholding a supply of water, and the remedy for that is a proceeding for penalties. The plaintiffs answer that that is not the point—that no demand had been made upon the Company for a supply of water. Under those circumstances it seems to me that the case was a simple one. An argument was presented to us as to the extent to which the jurisdiction of the Court is ousted by reason of the penalty clause in the Act of 1847. With that argument it is not necessary to deal. But I am far from saying that although there may be a clear right to penalties the Court would not be entitled, in order to prevent irreparable wrong, to interfere by injunction or declaration. It is suggested that if so there would be a double remedy. When the time comes for deciding that question, probably an argument, and a persuasive argument, will be addressed to the Court that if the plaintiff adopts the one course of proceeding, and elects to proceed with it, he would not be at liberty afterwards to proceed for penalties. I, however, pronounce no opinion upon that.

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I am quite satisfied with the verdict of the jury on the question of fact in this case, and the damages appear to have been very moderately claimed. As to the rest of the judgment, it appears to me that there can be no objection to it, and therefore the appeal must be dismissed.

COZENS HARDY L.J. I entirely agree. I feel very much indebted to Mr. Evans and Mr. Sankey for their able arguments, but in the view which I take the greater part of those arguments really do not arise for our consideration. We start with this fact, having regard to the finding of the jury, that the connection, as originally made by the plaintiffs with the main was lawfully made with the consent of the Water Company. On that part of the case I will say nothing. I adopt entirely what has fallen from the Master of the Rolls with reference to the position of Knight and his acts with reference to the matter. But then it is said that, although that connection was lawfully made, this is merely an action for non-supply of water pursuant to a statutory obligation, that the statute which creates the obligation imposes a penalty for the non-supply of water, that proceedings to recover the statutory penalty are the only remedy available, and that damages for non-supply are not recoverable. That, I think, put shortly, is the argument of Mr. Evans and Mr. Sankey.

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I assume that to be the law, having regard to *Atkinson v. Newcastle and Gateshead Waterworks* (1877) L. R. 2 Ex. D. 441; 46 L. J. Ex. 775, and I only desire to add this, that I do not wish to be taken as assenting to the view that the Court cannot by injunction restrain a water company from a threatened breach of the statutory duty towards a consumer. It is unnecessary to decide that now, and I do not wish that that should go as having been even indirectly assented to by the Court. But, as I said before, the question does not arise. A common law wrong has been committed by the Water Company by cutting off the plaintiffs' pipe unless some statutory justification can be found for it. Now there are various sections in the Waterworks Clauses Act, 1847, which do authorise expressly, and therefore justify, the cutting of a pipe, and justify that which would otherwise be a trespass. But counsel, although they have been asked, cannot point to any section which justifies their doing that in this case. That being so, it seems to me we have simply here a common law wrong of which the defendants have been guilty, and in respect of which damages can be recovered. Those damages do not seem to me to be excessive or in any way improper. But the plaintiffs have now at this moment a statutory right under section 48 of the Act of 1847 to connect their communication pipe with the main. Having regard to the line taken by the defendants, I feel no doubt that there was ample jurisdiction in the Court to grant the injunction which Phillimore J. granted, namely, an injunction to restrain the defendants from preventing the plaintiffs from connecting their communication pipes with the main; in fact, to prevent the plaintiffs from doing that which by statute they have an express right to do. This has been spoken of as a mandatory injunction. It is nothing of the kind; it does not require the defendants to do anything; it is only to restrain them from preventing the plaintiffs from doing that which the plaintiffs have by statute the right to do at their own cost. I think, therefore, that the judgment was perfectly right, and the appeal must be dismissed, and with costs.

Appeal dismissed.

Solicitors for the Water Company—Wrentmore and Sons, for Frank James and Sons, Cardiff.

Solicitor for the plaintiffs—Frederick Kinch, for Lyndon, Moore, & Co., Newport.

Reported by Erskine Reid, Esq., Barrister-at-Law.

HOUSE OF LORDS.

CITY OF LONDON ELECTRIC LIGHTING CO., LTD. v. LONDON CORPORATION.

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May 14;
August 7.

Contract—City of London—Members of Corporation “directly or indirectly interested or concerned in” contract—Avoidance of contract—Electric lighting—Novation—City of London Sewers Act, 1848 (11 & 12 Vict. c. clix.), ss. 38–42, 116—City of London Sewers Act, 1851 (14 & 15 Vict. c. xcl.), s. 53.

Section 42 of the City of London Sewers Act, 1848, which contains provisions rendering null and void contracts made by or on behalf of the Commissioners of Sewers of the City in which any Commissioner or member of the Court of Aldermen or Common Council of the City is interested, is not, on the true construction of that Act, confined to any particular class of contract, and the section accordingly avoids a contract for the electric lighting of the City made by the Commissioners with a company in which, at the date of the contract, any Commissioner or member of the Court of Aldermen or Common Council was a shareholder. But a contract with the Commissioners, valid at its inception, is not rendered void by the section merely because the contract has, with the consent of the Commissioners, been transferred to a company in which Commissioners or members of the Court of Aldermen or Common Council were shareholders at the time of the transfer.

Decision of Appeal Court reversing (5) affirmed.

Decision of H. Court (affirming) Tr. well 5) affirmed.

CROSS appeals from a decision of the Court of Appeal, reported 1901, 1 Ch. 602; 70 L. J. Ch. 334.

The action was brought by the plaintiffs, the City of London Electric Lighting Co., Ltd., for a declaration that three contracts dated respectively May 19, 1890, May 28, 1890, and February 5, 1891, were valid and subsisting and binding on the defendants.

The contract of May 19, 1890, was a contract made between the Brush Electric Lighting Co., Ltd., and the Commissioners of Sewers of the City of London for the lighting by the Brush Company of the “central district” of the City.

The contract of May 28, 1890, was a contract between the Laing, Wharton, and Down Construction Syndicate, Ltd., and the Commissioners of Sewers for the lighting by the Laing Syndicate of the “eastern district” of the City.

The contract of February 5, 1891, was a contract between the Brush Company and the Commissioners of Sewers for the lighting by the Brush Company of the “western district” of the City.

The Brush Company and the Laing Syndicate respectively had

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powers for electric lighting in the districts to which the contracts related under Provisional Orders duly confirmed.

The plaintiff Company was formed and incorporated under the Companies Acts in 1891 for the purpose (*inter alia*) of acquiring the Provisional Orders and contracts above mentioned; and by deeds of that year the Provisional Orders and contracts were assigned to the plaintiff Company, and subsequently in the same year a resolution was passed by the Commissioners of Sewers consenting to the assignment of the Provisional Orders, but silent as to the contracts. The Board of Trade gave their consent to the assignment of the Provisional Orders.

The functions and property of the Commissioners of Sewers were transferred to the defendants by the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

At the date of the contracts with the Brush Company there were among the shareholders of that Company certain persons who were Common Councillors of the City of London, one of whom was also a Commissioner of Sewers.

At the date of the contract with the Laing Syndicate none of the shareholders in that syndicate were in this position; but at the date of the transfer of that contract to the plaintiffs several Commissioners, Aldermen, and Common Councillors were shareholders in the plaintiff Company.

Under the circumstances, the defendants repudiated all three contracts as being void under section 42 of the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), which provides as follows:—

“ Provided also, and be it enacted, that no person, being a Commissioner, or a member of the Court of Aldermen, or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorised to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a Commissioner, or a member of the said Court of Aldermen or of the Common Council, shall be so interested or concerned therein, shall for every such offence forfeit and pay the sum of One hundred pounds to any person who shall sue for the same, to be recovered in any of the Superior Courts by action of debt or on the case.”

The plaintiffs thereupon brought the present action, which was heard before Farwell J., who gave judgment in favour of the plaintiffs, and made the declaration prayed.

The Court of Appeal (Rigby, Vaughan Williams, and Stirling L.JJ.) reversed this decision as to the two contracts with the Brush Company,

holding that these contracts were avoided by section 42 of the Act of 1848; and they affirmed the decision of Farwell J. as to the contract with the Laing Syndicate.

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The plaintiffs appealed to this House in regard to the contracts with the Brush Syndicate, and the defendants brought a cross appeal as to the contract with the Laing Syndicate.

Cripps, K.C., and Roskill for the plaintiff Company.

Asquith, K.C., Danckwerts, K.C., and A. J. Walter for the defendants.

The House took time for consideration.

Aug. 7, 1903. THE EARL OF HALSBURY, L.C. My Lords, in this case a declaration is sought to establish the validity of three contracts, entered into between the City of London Electric Lighting Co., Ltd., and the Mayor and Commonalty and Citizens of the City of London, and the question sought to be raised by the parties is whether or not the contracts, or any of them, entered into between them, are valid and binding on the defendants. The defendants have repudiated them, not, as I understand, that they have any objection to the substance of the contracts, but being advised by counsel that the contracts were invalid they felt bound to test that question in a court of law. Farwell J., before whom the question came, was of opinion that they were valid. The Court of Appeal has declared two of them to be invalid, allowing the third to stand.

The whole question turns upon section 42 of the City of London Sewers Act, 1848. [His Lordship read the section and continued :—] I so far agree with Farwell J. that I think the first thing to see is whether the Act of Parliament is clear or is fairly susceptible of two constructions, but I regret to have to add that I think it is clear and is not fairly susceptible of two constructions. In a very ingenious and elaborate judgment the learned judge decides in favour of the validity of the contracts in question upon the ground that they are not what he calls "construction" contracts; but I am unable to concur with the view that the section is only applicable to construction contracts. If such a distinction can at all be made, the disqualification under the statute which I have quoted does not apply.

The Mayor and Corporation of the City are now (since 1897) in the place of those who at the date of the contract were the Commissioners of Sewers of the City. By the Act of 1897 all their duties and liabilities are now vested in the City itself. That the Aldermen, Commissioners, and Common Councilmen have a disqualifying interest in the contracting companies cannot be denied unless the distinction insisted on by the learned judge can be made out.

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In respect of two of the three contracts, it is admitted that a Common Councilman, a Commissioner of Sewers, and a Lord Mayor for the time being—in that character both an Alderman and *ex officio* Commissioner—were shareholders; and in respect of those two contracts, heartily as I regret the conclusion at which I am forced to come, I cannot doubt that these contracts by reason thereof are invalid. I have striven to escape the stringency of the language, since I think that no one will doubt that the contracts were fairly and properly made with a due regard to the public interest; but I cannot escape from the language of the statute. It is, to my mind, too clear to enable me to adopt the subtle reasoning of the learned judge below. The distinction which the learned judge has discovered may justly be made in this respect—that some of the contracts undoubtedly are construction contracts, and some of them are not; but the defect of the reasoning I think consists in this—that the distinction which the learned judge has discovered is one not made by the statute. The words are “directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorised to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever.” I am unable to interpose any qualification. Looking at the language of the statute and the object and the policy which apparently dictated it, I cannot doubt that it meant what I think it has said in plain terms.

It seems to me that the contracts, an interest in which is prohibited, are contracts made or entered into by or on behalf of the Commissioners for any matter or thing whatsoever—that is, in addition to contracts for the execution of works or for furnishing materials.

My Lords, I am unable to get over the stringency of these words, and I must hold them to be applicable to the two contracts in respect of which Farwell J. held them to be valid.

With respect to the third contract, I agree with Stirling L.J. that a different question arises where at the time of the making of the contract no Commissioner, Alderman, or Common Councilman was a shareholder; and I agree with him that under the circumstances stated in detail by the learned judge the contract has not become invalid because, at a subsequent date, several Commissioners, Aldermen, and Common Councilmen became shareholders.

The result is that I think the judgment of the Court of Appeal is right, and that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD DAVEY. The judgment of Farwell J. in this case is based on

the division which he thought was to be found in the Act of 1848 of the contracts authorised by that Act, into two classes or categories. One class of contracts he called "construction contracts," and he considered that the provisions of section 42 related only to contracts of that character. The phrase "construction contracts" as used by the learned judge has a very elastic meaning, for it includes contracts for supply of materials or labour. The distinction as stated by him was between contracts for the execution of works or supply of materials to the City which will become their own property, and contracts for the supply of such things as water, gas or other illuminants by persons owning the works from which the supply is derived; and these contracts he calls "contracts of supply."

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I must confess that, in my opinion, this division of contracts is not warranted by anything in the Act of 1848, and is purely fanciful and arbitrary, and in fact there is no real difference for legal purposes between the two classes of contracts. Gas, electricity, and water are all of them, it is true, *res quae ipso usu consumuntur*, but so are materials for road making or paving, although the rate of consumption is somewhat slower.

Following out his theory of two classes of contracts, the learned judge holds that section 33 applies only to what he calls construction contracts, and that the words "or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect" are to be read as *ejusdem generis* with the preceding words. The words which follow requiring every contract to be in writing, and to specify the works to be done and the material or labour to be furnished, and the prices to be paid for the same do, I think, lend some support to the view—if it were possible (which, in my opinion, it is not) to find a *genus* which would embrace contracts for the supply of paving stones and road materials and exclude contracts for the supply of gas, electricity, or water. I think, however, that it is quite inadmissible to cut down or restrict the generality of the very large words which I have quoted. I agree with Rigby L.J. that one can hardly imagine words better calculated to exclude any *ejusdem generis* construction. Farwell J. thought that section 116 alone gave the power to make contracts for lighting the streets. I do not so read the Act. I think the power to contract is conferred on the Commissioners by section 33, and the meaning of section 116 is that, instead of doing the work of lighting the streets themselves, they may contract with gas companies and other persons to do it for them. Having arrived at the conclusion that section 33 applies only to "construction contracts," he holds that section 42 also applies only to the same class of contracts. But if the *ejusdem generis* construction could be applied

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to section 33, I can find no reason for applying it to section 42, in which the words are "any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorised to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever." It is easy to say that, if the words were intended to apply to all contracts, the words specifying particular kinds of contract are unnecessary. But that is not a very strong argument when applied to the language of Acts of Parliament. The enumeration may show the kind of contract the draftsman had immediately present to his mind, but the latter words equally show that he intended the enactment to apply to all contracts of every kind. If you look at the intervening sections, I think it clear that section 34, which is the only section in the Act defining the mode and form in which contracts by the Commissioners are to be executed, and section 41 are general sections applicable to all contracts for any of the purposes of the Act. If section 34 is general, section 33 must be so also, and if section 41 is general, I think that section 42 also must apply to every contract.

Another argument put forward by the appellants is based on section 53 of the Act of 1851. I have had some difficulty in appreciating the argument. A section in a later Act cannot be used for the purpose of construing an earlier enactment, though it may repeal or vary it. There is certainly no express repeal, and there is no repugnancy between the two sections from which the repeal of the earlier one might be implied. Section 42 of the Act of 1848 imposes a penalty on parties interested in any contract made by the Commissioners and avoids a contract in which any of the specified parties are interested. Section 53 of the Act of 1851 deals with a different subject-matter rather than with the same subject in a different way. It makes any of the specified persons ineligible to sit or vote as a Commissioner while the contracting with any company in which he is interested, or the promotion or carrying out of any work, undertaking, or speculation, is under the discussion of the Commissioners. A person may be a Commissioner when the negotiation for the contract is being conducted and resign his seat (as he would probably do) before the contract is actually made, or he may have become a Commissioner after the contract is made, and in that case he is prohibited from sitting or voting while the carrying out of it is under discussion. In neither of these cases would the earlier enactment apply, but the later one would apply to both.

I fully appreciate the stringency and drastic character of the enactment in section 42 of the Act of 1848. It applies to any Common

Councillor, whether he is a Commissioner or not, and the remotest interest in the contract will not only expose the interested person to a penalty of £100, but will also avoid the contract. But the stringency of the section is not a reason for a court of law to decline to give effect to it or construe it otherwise than according to the plain meaning of the words. I cannot, therefore, but agree with the judgment of my lamented friend Rigby L.J. in holding the contracts relating to the western and central districts void.

The complicated history of the contract for the eastern district has been very carefully analysed and stated by Stirling L.J. It appears that no person within the jurisdiction was interested in the Laing Syndicate, with whom the contract was made, but certain persons were shareholders in the Company to which the contract was afterwards transferred. I am certainly not disposed to extend the operation of section 42 beyond what the words require, and I do not think that a contract which was valid in its inception is avoided by a person within the prohibition subsequently acquiring an interest in it. The Lord Justice also finds that there was no novation so as to place the appellant Company in the position of contractors directly with the Corporation. It is true that the appellant Company has become the undertakers within the meaning of the Provisional Order and is now the only Company able to exercise the powers thereby conferred. That, however, will not in itself place them in a contractual relation with the Corporation. I agree with the Lord Justice that in giving their consent to the transfer of the undertaking to the appellants the Corporation carefully preserved their rights under the original contract and have not discharged the original contractors from liability for its performance. I think, therefore, with him that there has been no new contract made between the appellant Company and the Corporation as regards the eastern district.

I am therefore of opinion that both appeals should be dismissed with costs.

LORD ROBERTSON. My Lords, on the cross appeal I am unable to discover a contract entered into between the Commissioners and the City of London Electric Company. That the Company are with the consent of the Commissioners (and their successors, the Corporation) doing the work of the original contractors, does not prove that the Commissioners have contracted with them. The Commissioners could only contract in the manner prescribed by the Statutes creating their powers, and there is no such contract. This being so, the City of London Company not standing in a contractual relation to the Commissioners,

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there is no room for any argument about a supervening nullity in a contract originally valid, and we have no occasion to deal with that argument.

Turning then to the two contracts with a Company in which one at least of the Commissioners was a shareholder at the times of their execution, the question is whether they are not hit by the 42nd section.

It cannot be disputed that the general words which express the third category in section 42 are so wide as to comprehend all contracts, unless there be something outside those words to restrain their latitude. That restraint is found by the appellants in the theory, for it is no more, that section 42 is coterminous with section 33, and that section 33 is limited to a certain class of contracts. Now on section 33 there is a great deal to be said, and it has been well said, for the view that the generality of the third category is taken away by the concluding words of the section. But then those concluding words do not (and could not from the subject-matter) occur in section 42, and accordingly the general words of the third category, as they stand in section 42, are left without any qualification of their generality, and must have their natural effect.

But I do not think that the argument in favour of their full latitude ends here. Section 42 is introduced by the words: "Provided always and be it enacted," and section 42 is thus to be read as a qualification of the preceding section 41. So read, it is the condition of an indemnity which is necessarily and admittedly applicable to contracts of every description, and is therefore itself naturally and necessarily universal. In this light the two sections mean this:—The Commissioners shall not be personally liable for any of their contracts, provided that in none shall they have a personal interest and that any contract so tainted shall be null. So viewed the 42nd section treats of a subject to which the suggested distinction among contracts (as construction contracts and other contracts) is irrelevant. It is true that in section 42 the system of enumeration adopted in section 33 is again used, although no enumeration was necessary and words of absolute generality, without any antecedent enumeration, would have been more appropriate. This, however, is only criticism of the drafting, and the phraseology adopted ends just where danger to the generality would have begun. I therefore think that the context and subject-matter of section 42 entirely justify the literal interpretation of its terms. And the relation between section 41 and section 42 seems to me specially important because it breaks the connection between section 33 and section 42 which is at the root of the appellants' argument.

On the scope of section 42, moreover, I think that the respondents

succeeded in showing that in at least two other instances besides section 116 the Commissioners are authorised to enter into contracts which do not fall under section 33 and which it is difficult to conceive to have been intended to escape the application of section 42.

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Section 53 of the Act of 1851 seemed at first to carry the appellants some way; but a closer examination greatly reduces its importance. That section mixes up a number of persons, things, and times and applies general words to them all. It is only by picking out the shareholder and applying to him one of the things at one of the stages that the appellants' argument arises; and when it does arise it does not present a repugnancy with the wide interpretation of section 42 of the Act of 1848 but rather a superfluity. The explanation of the Court of Appeal seems to me to be adequate to satisfy the language even when minutely examined. The section does not in my judgment raise any implication sufficient to overcome the considerations to which I have already adverted.

It is quite true, as the appellants have pointed out, that the complicated questions arising out of shareholding in limited companies are very crudely dealt with by the provisions of Statutes passed before that system had been established. But the Acts of 1848 and 1851 both deal with the case of Commissioners being shareholders in companies, and it is impossible to deny that a shareholder in a limited company comes under section 42. This is enough for the decision of the present case.

Both appeals dismissed with costs.

Solicitors for the Company—Ashurst, Morris, Crisp, & Co.

Solicitor for the Corporation—The City Solicitor.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Note.

Provisions directed, like section 42 of the City of London Sewers Act, 1848, to preventing members of a local authority from being interested in contracts with the authority, are made with reference to almost all local authorities.

As a rule, however, such provisions are much less stringent in terms than those in that section. Thus section 12 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and section 46 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), which contain the most important provisions of the kind, while they disqualify, subject to important exceptions, persons interested in contracts with the authorities to which the sections apply for memberships of such authorities, do not expressly avoid contracts with those authorities in which members of the authority are interested, nor do they even in terms prohibit members of the authority from being interested in such contracts.

The above case accordingly does not at all show that a contract with an authority to which either of the enactments referred to applies, is rendered void by the fact

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that a member of the authority is interested in the contract. On the contrary, the reluctance expressed by the members of the House of Lords to hold the contracts there in question void, as they felt themselves constrained to do, perhaps rather supports the view that the mere fact that a member of the authority was interested in the contract when it was made, so that he became disqualified by the contract under these enactments, would not, at all events in all cases, avoid the contract.

On this subject reference may be made to *Foster v. Oxford, &c., Railway* (1853), 13 C. B. 200; 22 L. J. C. P. 99: 17 Jur. 167; *Melliss v. Shirley and Fremantle Local Board* (1885), 16 Q. B. D. 446; 55 L. J. Q. B. 143; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214; and *Read v. Punter* (1898), 14 Times L. R. 455.

High Court of Justice.

KING'S BENCH DIVISION.

Ex parte WILES.

1903.

December 21.

Poor rate—Recovery—Tender of part of rate—Distress warrant issued for full amount—Commitment—Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2, Sched.

On an application for a distress warrant for the recovery of poor rate the justices have jurisdiction, at their discretion, to issue a distress warrant for the full amount of the rate, notwithstanding a tender in court of part of it by the ratepayer; and, in default of payment and of sufficient distress for the whole, they have jurisdiction, if they think fit, to issue a warrant of commitment.

Rex v. Gillespie (1903) 2 L. G. R. 59, explained.

MOTION *ex parte* for a rule *nisi* for a writ of *certiorari* on behalf of Samuel Wiles, a working tailor, to bring up and quash a warrant of commitment made against him by the justices of the Kingston Bench, and for a writ of *habeas corpus* to bring him up from Wandsworth Gaol, where he was imprisoned.

A demand had been made upon Wiles for payment of a poor rate of 35s. He expressed himself as willing to pay 30s. but not the other 5s., because he considered that the 5s. was on account of the part of the rate which would be applied towards the maintenance of voluntary schools. It was alleged that Wiles had tendered 30s. in court, but the justices had issued a warrant of distress for the whole 35s. It was also alleged that when the bailiffs went to distrain upon his goods he again tendered the 30s. but that they refused it; and further that they reported to the justices that there was no sufficient distress for the full amount of the rate. Application was then made to the justices under the Distress for Rates Act, 1849, for a warrant for his commitment, upon the ground that he was a person summoned who had not paid the rate or any part thereof, and had refused to do so. This warrant was issued, and Wiles was committed to prison for 21 days.

J. A. Compston in support. The applicant is now in Wandsworth Gaol, and it is desired to question the legality or regularity of the warrant of commitment upon the ground that the justices are only empowered to issue a warrant of distress for the full amount if and when the whole rate is in arrear. Here there has been no refusal to pay the rate or any part thereof, for 30s. has been tendered. It has been alleged that there was no sufficient distress for the whole

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35s., but there can be no question that there was ample distress for the balance of 5s., and the warrant of distress ought to have been issued for the balance. The justices were wrong in issuing a warrant of commitment for the whole amount even if they were right in issuing a distress warrant.

LORD ALVERSTONE C.J. We are clearly of opinion that there should be no rule in this case. This is an application apparently founded upon a misunderstanding of our recent decision in *Rex v. Gillespie* (1903) 2 L. G. R. 59. In that case we held that the learned magistrate had a discretion in issuing his distress warrant, and that where part of a poor rate had been *bonâ fide* tendered in court, the overseers could not compel him to issue a distress warrant for the whole of their claim, but that in his discretion he could issue it for the balance admittedly due. But this is quite a different case. Here the justices have in the first instance issued a distress warrant, and then a warrant of commitment, and in doing so they were acting strictly within their jurisdiction and within their rights. We are now asked to say that because the applicant had tendered part of the total sum due the justices had no jurisdiction to issue a warrant of distress for the full amount. We are clear that they had in their discretion a perfect right and full jurisdiction to do so, and certainly that there should be no rule.

LAWRANCE J. I am of the same opinion.

KENNEDY J. I agree.

Rule nisi refused.

Solicitors for the applicant—C. and E. Woodroffe.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

WILCOX v. STEEL.

Market Disturbance—Rival market—Accommodation—Intention of seller.

1903.

Kekewich, J.

Mar. 23, 24.

Court of Appeal,

Dec. 2, 3.

The plaintiff was the lessee of a market enjoying the right every Wednesday to buy and sell horses and all sorts of cattle, tolls being taken from those selling there. The defendant, an auctioneer, who had held sales of cattle and horses in the market, paying tolls to previous lessees, himself on market day in the neighbourhood of the plaintiff's market held a sale of a number of young unbroken horses which had been consigned to him for sale, which sale he invited people in the market to attend. There was evidence that the defendant's object in holding this sale was not to evade payment of the market tolls but that the horses would not have been consigned to him for sale at all if they were to be sold in the plaintiff's market.

Held (reversing Kekewich J.), that the acts of the defendant amounted to a disturbance of the plaintiff's market.

In the case of a mere sale outside the market, the question whether it was the intention of the seller to evade the market tolls is of importance in determining whether there has been a disturbance of the market or not, but where the sale really amounts to the establishment of a new rival market, taking advantage of the concourse of people attending the lawful market, the intention of the seller is irrelevant.

THIS was an action with witnesses in respect of an alleged disturbance by the defendant of the market rights of the plaintiff, who was the lessee of Southall Market.

By a Royal charter granted on November 11, 1698, King William III. granted to Francis Merrick and his heirs free license and authority to hold, upon certain lands in Northcott, at Southall, in Middlesex, "one market in or upon every Wednesday for ever and also two annual holidays or fairs for ever to buy and sell horses and all sorts of cattle," together with "all liberties, privileges, powers, customs, tolls, stallage, piccage, and other commodities" to the said market and fairs respectively appertaining or belonging.

By a lease dated March 24, 1902, taken from the Earl of Jersey, the plaintiff Wilcox was tenant in possession of Southall Market and Farm, with all the above-mentioned powers and privileges. The plaintiff continued to hold the market every Wednesday, as had been done continuously, and took tolls from persons selling there.

The defendant Steel, who was an agricultural valuer and auctioneer

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had been in the habit for years past of holding weekly sales of cattle and horses in Southall Market, paying or compounding for the market dues to the lessee of the market for the time being.

Upon taking his lease the plaintiff, being advised that he could not prevent the defendant from selling in the market, himself took out an auctioneer's licence and commenced to hold auction sales.

About the same time the defendant acquired a piece of land in North Road, Southall, distant about 300 yards from the entrance to Southall Market, and prepared it with fences and otherwise for the purposes of his own sales.

On August 9, 1902, the defendant commenced to advertise that on "Wednesday, August 20, 1902," he would hold a sale of 50 Welsh horses, cobs, ponies, and colts "at his Auction Mart, in the North Road, Southall," and the writ in this action having been issued on the 14th August, 1902, the sale was held by the defendant on the day named. It was not, however, held on the piece of land acquired by the defendant as above mentioned, but on a neighbouring field lent him for the purpose.

The plaintiff claimed a declaration that the establishment of his mart by the defendant constituted a disturbance and invasion of the market at Southall granted by the charter of King William III. and of the plaintiff's rights thereunder; an injunction to restrain the defendant from establishing or holding a market for the sale of horses or other sorts of cattle at Southall and from using or permitting to be used any portion of the premises in North Road or any other premises in any such manner as to interfere with or prejudicially affect the rights of the plaintiff in the market granted by or established under the charter or to disturb the plaintiff's market; an injunction to restrain the defendant from advertising or causing to be advertised any portion of the said premises or any other premises as a market for the sale of horses or other sorts of cattle or as a place used or to be used in any such manner as to interfere with or prejudicially affect the rights of the plaintiff; and consequential relief.

The plaintiff alleged that the defendant had acted with the view of setting up a rival market and disturbing the plaintiff's market, and that on the Wednesday in question the defendant, having concluded a sale of cattle and horses in Southall Market, induced dealers there to leave the market and accompany him to his advertised sale.

The defendant contended that the sale in question was one held by him annually for the purpose of selling wild and unbroken Welsh cobs, ponies, and colts consigned to him personally by the breeders, and not sent to the market for sale, and denied that such a sale could be conducted in Southall Market owing to the nature of the live stock sold

and the want of suitable requirements. He further complained that in ^{1908.} March, 1902, the plaintiff warned him that he intended in future to ^{Wilcox v. Steel.} conduct the auction sales in Southall Market by himself as auctioneer, and objected to any such sales being conducted by the defendant.

The defendant accordingly counter-claimed for (1) a declaration that the plaintiff was not entitled to prevent the defendant from conducting auction sales in Southall Market, the defendant paying all proper market dues for tolls, stallage, and other matters; (2) a declaration that the plaintiff was not entitled to levy tolls on geese, chickens, pigeons, game, and other live stock not being horses or other cattle, or on harness, carts, waggons, vans, or on any dead stock whatever; and (3) damages and repayment of tolls paid by the defendant to the plaintiff in respect of live or dead stock not being horses or other cattle.

It appeared at the trial that in 1898 and 1900 the defendant had held a sale in Southall Market of consignments of unbroken Welsh horses, but that after 1900 the lessee of the market for the time being had forbidden such sales as the animals had caused a disturbance. Evidence was also given that the consignor of the animals had objected to their being sold in the market as their feet were injured by the hardness of the soil.

T. R. Warrington, K.C., and *E. Clayton* for the plaintiff. What the defendant has done amounts to the establishment of a rival market, which is an infringement of the plaintiff's market rights under the charter. This is so, even if there is evidence that accommodation at the market proper is insufficient: *Great Eastern Railway v. Goldsmid* (1884), 9 App. Cas. 927, *per* Earl of Selborne L.C. at p. 946; 54 L. J. Ch. 162. The defendant cannot evade by saying that his sale was not at the same hour as that of the Southall Market; he advertised it for the same day, and in Southall Market invited customers to go to his sale in the North Road; for similar conduct, see *Bridgland v. Shapter* (1839) 5 M. & W. 375; 8 L. J. Ex. 246. Upon the counter-claim, the plaintiff was entitled to charge the tolls; "toll" is a generic word, and may include stallage: *Newport Corporation v. Saunders* (1832), 3 B. & Ad. 411; 1 L. J. K. B. 147, which shows that the owner of a market may maintain an action of *indebitatus assumpsit* for stallage without showing any contract, in fact, between him and the occupier of the stall.

P. O. Lawrence, K.C., and *T. Ribton* for the defendant. The circumstances of this case do not show any intention to establish a rival market within the meaning of the decision in *Great Eastern Railway v. Goldsmid* (1884) 9 App. Cas. 927; 54 L. J. Ch. 162. Neither is

1908. there such a disturbance of the plaintiff's rights as to justify an injunction : *Elwes v. Payne* (1879) 12 Ch. D. 468 ; 48 L. J. Ch. 831.

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KEKEWICH J. These cases are apt to resolve themselves into questions of fact. For example, in *Goldsmid v. Great Eastern Railway* (1883) 25 Ch. D. 511 ; 53 L. J. Ch. 371 (affirmed (1884) 9 App. Cas. 927 ; 54 L. J. Ch. 162) all three judges in the Court of Appeal took pains to say that they were not called upon to determine what was a disturbance of the market. Fry L.J., at page 557, says : " It is enough in this case to say in my judgment there has been a disturbance of the market " ; and he and Cotton and Lindley L.JJ. give overwhelming reasons why in that case there was a disturbance. They treated it as a question of fact, and to my mind this is a question of fact. There can be no doubt that selling horses—I mean selling horses even periodically, not to say frequently, in a field within a distance of only a few hundred yards from the market—would be a disturbance of the market. It is a market for the sale of horses. No man can sell horses so as to keep them out of the market and prevent their being sold in the place appropriated to their sale. The question is whether that has been done.

This action was originally framed on different lines from those taken at the trial. What really happened was this : the plaintiff, on acquiring this franchise, thought that he himself would exercise the privilege of selling by auction in the market to the exclusion of everyone else, including the defendant. And, more than that, he thought he could demand tolls for things which are not really within his franchise. The main difficulty was the first mentioned. There the defendant was put somewhat in a fix. He had sold in this market for a considerable time, I think for over 20 years—at any rate for a long time. He had been accustomed to sell on every market day. Now he was told, and told in unmistakable terms—I am bound to say not unkindly—but still he was told what the plaintiff proposed to do, and that he himself would not be able to sell, at any rate, those things which he would have a right to sell without disturbing the market. That to my mind is the most important fact, really, of the whole case, because it shows that the first act on the part of the defendant was provoked by the plaintiff, and after all was not intended to be an objectionable action on his part. The plaintiff very soon withdrew his claim to sell by himself ; he found that that would not hold, and he no longer desired to do so. Certainly on the third, if not the second, market day he allowed the defendant by deputy to sell ; and even on the first day the defendant seems to have sold, though perhaps under protest. The plaintiff gave way upon that, but he never seems, so far as I can make out, to have told the

defendant plainly that he might be restored to his old position, though I think the letters point to that, and might have been construed in that way. But there was the difficulty between them. One has got rid therefore of what at first sight is a very important fact against the defendant, if it were a fact, that he had taken this property just outside the town for the purpose of doing that which was not lawful for him to do. That has altogether gone.

Now we come to what he did do which is complained of. He sold a certain number of horses. Now about that of course there is no question, because he advertised them himself as "50 Welsh horses." Then "cobs, ponies and colts" are written underneath; and they are said to be, I think, from two to five years old. But they are described and properly described as horses. Even if they were cobs, or ponies, or colts they would still be horses within the meaning of the charter, and could not properly be sold except in the market. He sold these in 1898; and again in 1901; and he sold them again in 1902, which of course is the first time of which the plaintiff could complain, because he only took the market from the spring of that year. He did sell, or rather attempted to sell, because it was not very successful, these 50 Welsh horses (I call them horses) in this field just outside the town. It was not the place he acquired for the purpose I have just mentioned, but a field which was lent to him for the purpose by the occupying farmer.

The real question is whether in any way that was an invasion of the market. In a technical sense perhaps it really was, because the franchise is to sell horses, and he sold horses. But that on the authorities is not enough; you must find as a matter of fact whether there was an invasion of the market.

Now I am satisfied, on the evidence, as a matter of fact, that if the defendant had in 1902 informed the gentleman who consigned those horses to him that he would sell in the market, because in the market only could he sell them, those horses would never have been consigned to him for sale at all. I am aware of course, that the plaintiff says that one of his fields was available, and I will assume—I think I ought to assume on the evidence—that it was sufficiently available—if not a particularly good place for the purpose, still a place which might have been used for the sale of those horses. But nevertheless the fact, I think, remains perfectly clear on the evidence, that there was an objection on the part of the consignor of these horses to sell in the market because of the wild character of these animals who would rush about and give a good deal of trouble in a small space. They objected, and I conclude as a matter of fact that they would not have been consigned for sale except in the field in which the sale had taken place in 1901, and which was in truth used in 1902.

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That being so the case reduces itself to this question. If a man sells, within reasonable limits, horses for the sale of which the franchise is granted, is he to be amenable to an injunction notwithstanding that if he had not sold them where he did he would not have sold them at all? In other words, is that an invasion of the market?

Now as for any motive on the part of the defendant setting up a rival market and wishing to disturb the market, that is, I venture to say, ridiculous. There is no better guide to a man's conduct than his self interest; and this man's self interest was clearly to appreciate the market, and not to depreciate it. If he could have sold the horses in the market, I think his self interest would have compelled him to do so. It was because his self interest did not allow of his doing that, that he summoned his customers, after the ordinary business of the day was over, and asked them to accompany him to the field, where no doubt he told them they would get all they wanted at the cheapest possible price. There is no motive. It is only once a year, a fact which is not by itself conclusive, but not to be forgotten, and it was a sale of animals which would never have come unless they were to be sold in that particular place.

I think it is quite consistent with the authorities, and more than consistent with principle, to hold that it is not really an invasion of the market which would make him liable to an injunction or damages.

Then comes the question of costs. Upon that I confess I have felt very great doubt. Neither party is perfectly right as regards the question of fact in their conduct, though neither of them has done anything intentionally wrong; neither of them can say that he has been right all along the line with regard to the points submitted to the Court. But the plaintiff was wrong in the first instance, and I think started the whole difficulty by saying that the defendant was not to sell; and he has also been wrong in insisting upon tolls for those commodities which were not tollable; and when I add to that the general rule, which is of almost universal application, that the successful party ought to be successful in the matter of costs, as in other things, I see no reason for departing from it in this instance; and I think the defendant winning must have the costs also.

His Lordship accordingly refused the injunction, and made a declaration in favour of the defendant on the counter-claim (1) that the plaintiff was not entitled to prevent the defendant from conducting auction sales in Southall Market, the defendant paying all proper market dues for tolls, and (2) that the plaintiff was not entitled to levy tolls on things not being horses, cattle, sheep, or pigs, but that the defendant was not entitled to bring such

things into the market without the consent of the plaintiff as the occupier of the soil.

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The plaintiff appealed from the order refusing the injunction.

T. R. Warrington, K.C., and *E. Clayton*, for the appellant, repeated their arguments in the Court below, and cited in addition, *Dorchester Corporation v. Ensor* (1869) L. R. 4 Ex. 335; 39 L. J. Ex. 11; *Macclesfield Corporation v. Chapman* (1843) 12 M. & W. 18; 13 L. J. Ex. 32; and *Yard v. Ford* (1670) 2 Wms. Saund. 172; 1 Lev. 296.

P. O. Lawrence, K.C., and *T. Ribton* for the respondent, urged the same arguments as in the Court below, and contended that to hold the acts of the defendant in this case to amount to a disturbance would be to go beyond any case yet decided. In addition to the cases cited in the Court below, they referred to *Brecon Corporation v. Edwards* (1862) 1 H. & C. 51; 31 L. J. Ex. 368.

E. Clayton was called on to reply upon the question of the nature of the relief to be granted and on costs only.

VAUGHAN WILLIAMS L.J.—I do not suppose that any one doubts that when market franchise was originally established it was very useful and beneficial to the public, and the various authorities which are collected together in the notes to the case of *Yard v. Ford* (1670), 2 Wms. Saund. 172, show the nature of the decisions which were given in earlier times when markets were of such great benefit. But as times have gone on the tendency has been rather to limit than to extend the law of market. In the present case the question is whether, upon the facts proved, there has been an invasion of the plaintiff's market. Upon that I have arrived at a conclusion different from that of Kekewich J. I think that the facts do establish a disturbance of the plaintiff's market. What Kekewich J. says on this point is this: "If a man sells, within reasonable limits, horses for the sale of which the franchise is granted, is he to be amenable to an injunction notwithstanding that if he had not sold them where he did he would not have sold them at all? In other words, is that an invasion of the market?" Kekewich J. is referring there to the fact that these horses would not have been consigned for sale by the defendant at all, because of the wild character of the animals, if they had to be sold within the market. He continues thus: "Now, as for any motive on the part of the defendant setting up a rival market and wishing to disturb the market, that is, I venture to say, ridiculous. There is no better guide to a man's conduct than his self interest; and this man's self interest was clearly to appreciate the market, and not to depreciate it. If he could have sold the horses in the market, I think his self interest would have compelled him to do so."

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It was because his self interest did not allow of his doing that, that he summoned his customers, after the ordinary business of the day was over, and asked them to accompany him to the field, where no doubt he told them they would get all they wanted at the cheapest possible price. There is no motive. It is only once a year, a fact which is not by itself conclusive, but not to be forgotten, and it was a sale of animals which would never have come unless they were to be sold in that particular place." I agree with the learned judge that the Court has to consider partly what was the intention of the defendant in doing the acts complained of. That is plain from the judgments of the learned judges of the Court of Exchequer pronounced in the case of *Brecon Corporation v. Edwards* (1862), 1 H. & C. 51; 31 L. J. Ex. 368. But in my judgment the present case does not depend really upon motive or intention. Sometimes it is alleged that invasion of a market consists merely of a sale outside the market. That was so in the case of *Brecon Corporation v. Edwards*, and the learned judges of the Court of Exchequer, and particularly Wilde B., pointed out that a sale by sample on a market day near to, but without the limits of a market, was not a disturbance of the market, unless it was done designedly and with the intention to evade payment of toll. In such a case as that, the question of intention is a matter of the very greatest importance. But that is not this case at all. What the defendant did here was not merely to sell outside the market. What he did was to establish on this particular market day a new market rivalling the lawful market. When once you arrive at the conclusion that the new market established by the defendant on a market day had the necessary effect of taking advantage of the concourse of people coming to the lawful market, the question of intention is, in my opinion, no longer relevant or important. If you once ascertain that the defendant is establishing that which is in the nature of a rival market, it is quite immaterial that he had no intention of doing so. If in truth and in fact the defendant is setting up a rival market and setting it up on a market day and thus taking advantage of the concourse of people at the lawful market, it seems to me that he is clearly invading the rights of the grantee or lessee and is really taking advantage of his market. Having arrived at that conclusion, I think that we ought to give effect to it by our order. But I do not think we need give effect to our conclusion by granting an injunction. In my opinion this is not a case in which we ought immediately to grant an injunction. We cannot forget that it was the conduct of the lessee of the market which really provoked to a large extent that which the defendant has done. Under those circumstances it seems to me that the justice of the case will be met if a declaration be made to the effect that the conduct of the defendant

in selling on the occasion in question in the manner he did was unlawful, and constituted a disturbance of the plaintiff's market. 1908.
Wilcox v. Steel. Then we will give the plaintiff liberty to apply hereafter if the defendant should repeat the offence or seek in any way to disturb the plaintiff's rights as lessee of the market. If he does so the plaintiff will be at liberty to apply for an injunction. One reason why I think that this course is the right course to pursue, is that notwithstanding what was said in the witness-box, there is no ground for fearing that the defendant is likely to repeat the wrongful acts of which the plaintiff complains. We can really infer from the facts of the case that, provided the plaintiff, as the lessee of the market, sets up no rights which he is not entitled to set up with regard to his market, there will be no repetition of the acts complained of by the defendant. If the defendant does repeat his acts we place the remedy in the plaintiff's hands, for we give him liberty to apply for an injunction. With regard to the costs, in my opinion, this is not a case in which there ought to be any costs of the trial before Kekewich J. This appeal, however, was necessary, and therefore the plaintiff, as the appellant, ought to have the costs of the appeal, and as the defendant's costs of the action have already been paid by the plaintiff, those costs ought to be repaid by the defendant. As to the costs of the counterclaim, I see no reason why the defendant should not retain them and simply pay the costs of the appeal.

ROMER L.J. I also think that there has been a wrongful interference with the plaintiff's rights. What are the main facts of this case? In all cases of this description you must look at the facts in order to see whether what has been done does or does not amount to an invasion of the plaintiff's market. [His Lordship referred to the facts of the case, and continued :—] It seems to me that what the defendant was doing was to establish a rival market upon the market day, and that that was a disturbance of the plaintiff's market. There is no question here of pecuniary damage. The only question is whether the acts complained of by the plaintiff amounted to a disturbance of his market, and whether those acts are likely to be repeated. We have decided that there has been such a disturbance. But there appears to be no likelihood of a repetition by the defendant of his wrongful acts. I quite agree with what Lord Justice Williams has said, that at present a declaration will be the proper remedy, and that on this occasion there is no reason for granting an injunction. As to the costs, they will be as stated by my Lord.

STIRLING L.J. I am of the same opinion. [His Lordship discussed the facts of the case, and continued :—] The first question to be considered is whether those facts establish that there has been an

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infringement of the plaintiff's rights as the lessee of a market. It is sufficient for the purpose of this case to adopt what was said by Lord Justice Lindley in *Goldsmid v. Great Eastern Railway* (1883) 25 Ch. D. 511 at p. 548; 53 L. J. Ch. at p. 371: "Without giving any definition of a market, the authorities show that the grantee of a market has some exclusive rights, and those exclusive rights, without attempting to define them positively and negatively, include an exclusive right of inviting the public to come and buy and sell in the place where the franchise has authorised the market to be held." It seems to me that the advertisements and posters issued by the defendant constituted in themselves strong evidence of an intention on the part of the defendant to invade the plaintiff's rights by selling horses, which were the subject-matter of the plaintiff's market, on the market day and during the market hours, at a place near the market. I also think that what was done by the defendant was an actual infringement of the plaintiff's monopoly. The defendant by addressing himself to the concourse of people gathered at the plaintiff's market, and taking advantage of that gathering, has done injury to the plaintiff. It is true that there are certain extenuating circumstances in that horses had been attempted to be sold in the market on a former occasion when the market was in the hands of a former lessee, and it appeared that the horses got loose and damaged themselves. But that did not authorise the defendant to sell outside the market without the consent of the plaintiff as the present lessee. Then it is said that the owners of the horses had given instructions that they were not to be sold in the market. That, however, is no answer. If the instructions given to the auctioneer by persons entitled to give the same were to that effect he ought to abstain from taking such orders. Lastly, it is said that the market accommodation is not sufficient. It appears that the market is in some places paved with asphalt and in some places with bricks. In some places the surface is very rough, and the ponies not being shod are liable to be hurt. The objection that the market is insufficient has been urged in several cases. I should like to refer to what was said by Lord Tenterden C.J. in *Mosley v. Walker* (1827) 7 B. & C. 40; 5 L. J. (O.S.) K. B. 358: "If indeed it could have been proved that any complaint or remonstrance had been made to the lord on the subject, as he has the power to hold the market in any part of Manchester, he being the lord of the manor and owner of the soil, and that after complaint and remonstrance on the part of persons frequenting the market he had persisted to hold the market in this place when he might have holden it elsewhere, there might have been some foundation for the argument addressed to us on the part of the defendant; but in the absence of any such proof I think that the Court ought to maintain this ancient right." And in the

case of *Goldsmid v. Great Eastern Railway* (1883) 25 Ch. D. 511, at p. 555; 53 L. J. Ch. 371, Fry L.J., dealing with the various authorities, ^{1908.} *Wilcox v. Steel*. sums them up by saying this: "I think, therefore, that the objection of want of sufficient space in the market lies in the mouth of the person who has himself experienced that insufficiency, and has been unable to sell when he has wished so to do, but that it does not lie in the mouth of another person. I think that if A. has been turned back from a market because there is no room he can defend himself; but that the turning back of A. does not justify B. in selling elsewhere than in the market." It seems to me that on the facts of the present case the remarks to which I have referred of those two judges are applicable here, and that the plaintiff is entitled to relief. I agree with the order which has been proposed by my Lord.

Appeal allowed.

Solicitors for the plaintiff—S. L. MacAndrew; Ashurst, Morris, Crisp & Co.

Solicitors for the defendant—Woodbridge and Sons.

High Court of Justice.

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Oct. 28 ;
Nov. 4.

KING'S BENCH DIVISION.

BATSON AND ANOTHER v. LONDON SCHOOL BOARD.

Land—Acquisition—Ultra vires—Land sought to be acquired compulsorily for ultra vires purpose—Land entered upon and used—Conveyance not executed—Rights of parties—Education—School board—Pupil teachers' centre—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85—Education Board Provisional Order Confirmation (London) Act, 1900 (63 & 64 Vict. c. exxvii.), s. 4.

A school board proposed to provide at the cost of the school fund buildings for a purpose (i.e. that of a pupil teachers' centre) upon which, as was subsequently held, a school board has no power to expend that fund: Dyer v. London School Board, 1902, 2 Ch. 768 ; 72 L. J. Ch. 10.

With this object the board acquired the leasehold interest in certain premises under a lease containing covenants for the maintenance of the existing buildings with a proviso for re-entry on breach. The board then obtained compulsory powers for the acquisition of the land, served notice to treat for the freehold, and made a deposit and gave a bond under section 85 of the Lands Clauses Consolidation Act, 1845, so that, had the purposes for which they proposed to acquire the land been legitimate, they would have been entitled to enter upon and use the land ; but the freehold interest was never conveyed to them. The board took possession of the premises, pulled down the existing buildings, and disregarded a notice from the freeholders, under the Conveyancing and Law of Property Act, 1881, complaining of the pulling down of the buildings as a breach of the covenants in the lease.

Held—1. That, as the object for which the board were endeavouring to acquire the land was ultra vires, they had not obtained any right to possession of the land by their proceedings under section 85 of the Lands Clauses Consolidation Act, 1845, and, the lease being forfeited for breach of covenant, the freeholders were entitled to possession of the premises. The board were not, even on the supposition that the proceedings were a mistake on their part, entitled to treat the land as superfluous land acquired under the Lands Clauses Acts. Nor was the fact that their property was, under the Education (London) Act, 1903, about to be transferred to a body who would have power to provide a pupil teachers' centre material.

2. That, although the purposes for which the leasehold interest was acquired were ultra vires, the board were bound by the covenants in the lease, and were liable in damages for the breach thereof.

Tiverton Railway v. Loosemore (1884) 9 App. Cas. 480 ; 53 L. J. Ch. 812, distinguished. Ayers v. South Australian Banking Co. (1871) L. R. 3 P. C. 548 ; 40 L. J. P. C. 22, distinguished on the first point and followed on the second.

ACTION tried before Channell J. without a jury, in which the plaintiffs claimed (1) to recover possession of "The Elms," 21, Hilldrop Road, Islington, then in the possession or occupation of the defendants as assignees or reputed assignees of a lease of the premises dated August 26, 1863; (2) damages by reason of the breach of certain covenants in the lease.

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By an indenture of lease dated August 26, 1863, "The Elms" was demised and leased by the plaintiffs or their predecessors in title to one John Oxley, his executors, administrators, and assigns, for 99 years from September 29, 1852, at the yearly rent of £10, and subject to covenants and conditions as to the repair and maintenance of the dwelling-house and premises, and to a proviso for re-entry in case of breach or non-performance of covenants.

In June, 1899, the premises were assigned to the defendant School Board, their successors and assigns, for the residue then unexpired of the term of 99 years.

By a Provisional Order made by the Board of Education under the Elementary Education Acts, 1870 to 1899, the defendants were (*inter alia*) authorised, for the purpose of the Elementary Education Acts, 1870 and 1873, to put in force, with reference to the land, house, garden, and premises known as "The Elms" aforesaid, the powers of the Lands Clauses Acts for the purchase and taking of land otherwise than by agreement.

The Provisional Order was confirmed by section 1 of the Education Board Provisional Order Confirmation (London) Act, 1900 (63 & 64 Vict. c. cxcvii.). By section 4 of that Act it was provided that "if the School Board for London under the powers by this Act conferred purchase the land house garden and premises known as the Elms No. 21 Hilldrop Road in the parish of St. Mary Islington and more particularly described in the schedule to the Provisional Order by this Act confirmed (Plan No. 6) such land house garden and premises shall not during the period ending the 29th day of September, 1951, be used by the School Board for London otherwise than for the purposes of a pupil teachers' centre."

By section 13 of the Elementary Education Act, 1873, the defendant School Board had power to accept and expend gifts for educational purposes, elementary or otherwise.

On January 24, 1900, the defendants gave the plaintiffs notice that they required to purchase the premises, and that they were willing to treat for the purchase, and as to compensation to be made to all parties for the damage that might be sustained by reason of the execution of certain works thereon.

No agreement for compensation being arrived at, and the plaintiffs

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not consenting to allow the defendants to enter the premises, the latter, on May 30, 1901, gave the plaintiffs a bond for £450 for the value of their interest, as determined by a surveyor appointed under the Lands Clauses Consolidation Act, 1845, and paid that sum into the Bank of England by way of security under section 85 of that Act.

Before giving the bond the defendants, as assignees of the lease above mentioned, entered upon, took possession of, and used the hereditaments and premises, and after the date of the bond they pulled down and removed the whole of the dwelling-house, stables, and buildings comprised in the lease, and proceeded to erect on the site thereof a large new building to be used as a pupil teachers' centre.

No conveyance to the defendants of the freehold interest in the hereditaments had ever been executed by the plaintiffs, in whom it was legally vested, nor had the plaintiffs ever received any compensation.

By an order of the Court of Appeal of August 5, 1902, it was ordered and adjudged that the defendant School Board be perpetually restrained from making any payment out of the school fund for the building of any school other than a public elementary school. This order was the result of proceedings taken in the Chancery Division in respect of "The Elms," by Joseph Dyer and others, on behalf of themselves and other ratepayers, for a declaration that the London School Board could not lawfully expend the rates levied under the Elementary Education Acts for the provision of land or buildings to be used solely as premises in which pupil teachers were to be educated and trained, and for an injunction to restrain the School Board for applying any part of the rates contrary to the declaration: see *Dyer v. London School Board*, 1902, 2 Ch. 768; 72 L. J. Ch. 10.

Before the commencement of the present action, on December 29, 1902, the plaintiffs served upon the defendant School Board notice pursuant to the Conveyancing and Law of Property Act, 1881, that they, the defendants, had broken and had continued to break the covenants in the lease of August 26, 1863, and had committed and were committing such breach or breaches by having pulled down and destroyed and continued to keep pulled down and destroyed the dwelling-house and other erections and buildings on the demised land, and having erected certain buildings to be used as a pupil teachers' centre. The defendants took no steps to comply with this notice nor to remedy the breaches of covenants in the lease.

The plaintiffs alleged that the defendants never had any funds which they could lawfully expend on the purchase of either the freehold or the leasehold interest in the premises or on the erection or maintenance of a pupil teachers' centre, and were not at the date of the notice to

treat entitled to put in force the provisions of the Lands Clauses Acts in relation to the compulsory purchase thereof. 1908.

By their defence the defendants declined to admit that the building was to be used as a pupil teachers' centre. They denied that they had no funds which they could lawfully expend in the purchase of both the freehold and leasehold interest in the hereditaments and premises; and said that they were entitled to put in force the provisions of the Lands Clauses Acts.

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By reason of the provisions of the Education Board Provisional Order Confirmation (London) Act, 1900, and of the powers thereby conferred on the defendants, and of the notice to treat, and of the bond referred to in the statement of claim, the defendants submitted that they were entitled to do all the acts complained of, and that the plaintiffs were not entitled to treat any of the said acts as breaches of covenant or as wrongful injuries to their reversion, or to claim possession of the hereditaments and premises.

Danckwerts, K.C., and *Courthope Munroe* for the plaintiffs. The defendant School Board being a body with purely statutory powers cannot acquire premises for any purpose other than that authorised by their Act of Parliament. Here they have in fact become assignees of the lease and as such liable upon the covenants entered into by the original lessee. It is common ground that covenants have been broken and that the plaintiffs have given proper notice of such breaches under the Conveyancing and Law of Property Act, 1881. What the plaintiffs now desire is possession of the premises; the damages may stand over. It is not within the powers of the defendants to spend money raised by rates in the establishment of a pupil teachers' centre, and they possess no other funds out of which they can pay for these premises: *Reg. v. Cockerton*, 1901, 1 K. B. 726; 70 L. J. K. B. 441; *Dyer v. London School Board*, 1902, 2 Ch. 768; 72 L. J. Ch. 10. Although the defendants' proceedings were *ultra vires*, yet the assignment to them of the residue of the term in these premises was effective: *Ayres v. South Australian Banking Co.* (1871) L. R. 3 P. C. 548; 40 L. J. P. C. 22. At the outside they are inchoate purchasers without power to complete and cannot rely upon the Lands Clauses Consolidation Act, 1845.

Asquith, K.C., and *Llewellyn Davies* for the defendants. The real question is what is the effect of the provision in section 4 of the Education Board Provisional Order Confirmation (London) Act, 1900. It is submitted that the defendants did in fact purchase those premises by giving notice to treat and entering into possession. Having purchased, there is nothing to prevent their selling the premises. The

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limitation is merely one of user by the School Board. The new authority which are to replace the School Board under the Education (London) Act, 1903, are empowered to do the very thing the School Board cannot do here. The entry by the defendants under section 85 of the Lands Clauses Consolidation Act, 1845, was lawful, and whatever rights the plaintiffs may have are confined to compensation. The principle of the decision in *Tiverton Railway v. Loosemore* (1884) 9 App. Cas. 480; 53 L. J. Ch. 812, covers the present case, so far as regards the defendants' right to possession.

Danckwerts, K.C., in reply. *Tiverton Railway v. Loosemore* is not in point, for there the railway company had in fact the right to give notice under the Lands Clauses Acts. Here the defendants had no such right. Where public bodies have special powers conferred on them by Parliament for effecting a particular purpose they cannot exercise those powers for any purpose of a collateral kind: *Galloway v. London Corporation* (1866) L. R. 1 H. L. 34. The defendants are not in the position of purchasers of the plaintiffs' interest. The purchase was for a particular purpose, and they can only exercise their powers for that purpose and no other. They can only take the lands for the purpose authorised by statute. This was a purpose they had no power to carry out. [*Llewellyn Davies*. It is not admitted nor has it been shown that at the date of the purchase by the defendants of the leasehold interest in 1899 there was any intention on their part of using the premises as a pupil teachers' centre.]

Cur. adv. vult.

November 4, 1903.—CHANNELL J. I took time to consider my judgment in order to have the opportunity of looking at some of the authorities quoted to me, because there was one point which was, I thought, open to some extent to doubt. The main point in the case had been really decided by the Court of Appeal in *Dyer v. London School Board*, 1902, 2 Ch. 768; 72 L. J. Ch. 10; but there remains the question of the particular rights of the plaintiffs in this action, which was not dealt with in that case.

The plaintiffs bring their action to recover possession of a piece of land, upon which at one time there was a house or houses called "The Elms." That property, with the buildings upon it, was held by the defendants under a lease which had a considerable time to run. The property has now been altered by the houses being pulled down. The lease has the usual covenants and the usual proviso for re-entry, and therefore beyond all doubt the lease has been forfeited. The plaintiffs have given the proper notices under the Conveyancing Act enabling them to re-enter, and therefore so far as the lease is concerned the

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plaintiffs' right to possession is clear; that is to say, the possession cannot be retained from them by the defendants under any right acquired through the assignment of the lease. In order to succeed the defendants must show a right to hold possession as against the plaintiffs otherwise than under that lease. Now they claim a right to hold possession against the plaintiffs by reason of certain proceedings taken under the Lands Clauses Consolidation Act, 1845, and in particular by reason of their having taken the necessary proceedings under section 85 of that Act; and the question I have to decide seems to me to be simply whether or not they have a right under that 85th section. The objection to the proceeding is that which is dealt with in *Dyer's* case, namely, that although by virtue of a Provisional Order, and the confirmation of it by Act of Parliament, the defendants had the power to take this land compulsorily, yet they had that power for certain purposes only, that the purpose for which they in fact acquired it was not a purpose for which they were authorised to take it, and that consequently the proceeding is *ultra vires*. They wanted it ultimately, as is admitted, for the purpose of forming what is called a pupil teachers' centre. In *Dyer's* case it was held that they had no power to apply the school fund formed by the imposition of rates to the erection, formation, and carrying on of this pupil teachers' centre. In 1899 the defendants in fact purchased the leasehold interest. Mr. Llewellyn Davies, at rather a late stage of the argument, pointed out that there was no evidence and no admission that at that time they had formed the intention of using the property as a pupil teachers' centre. I do not think that is at all material. If it were material I think I should have to draw the inference that they did intend it at that time because there is no evidence of any other purpose for which they wanted the property. If they had wanted it originally for an elementary school we should have heard that they had provided an elementary school elsewhere when they had changed their mind as to this particular piece of land. There is nothing of that kind suggested, and therefore I cannot doubt that the defendants' original intention, when they bought the leasehold, was to use the property as a pupil teachers' centre, and of course to apply their school fund to that purpose; because they appear to have been under the impression, until the decisions in *Reg. v. Cockerton*, 1901, 1 K. B. 726; 70 L. J. K. B. 441, and *Dyer's* case, that they had such power. But so far as the purchase of the leasehold interest is concerned, I do not think that is important at all, because I think *Ayers v. South Australian Banking Co.* (1871) L. R. 3 P. C. 548; 40 L. J. P. C. 22 is quite in point to show that as there was a conveyance to them of the leasehold interest, that conveyance would pass the property to them, even although it was a

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breach of trust for them to apply their funds in purchasing it. That case is not very fully dealt with in the judgment. It is rather dealt with on the principle that it would be so inconvenient to hold otherwise. There is little else said in the judgment. But the case really is perfectly plain, because it is obvious, taking the ordinary case of a trustee who is bound by his trust to invest his trust money in consols but instead of that buys railway stock, that, notwithstanding the breach of trust, the property in the railway stock is the property of the trustee, and is not the less so even if the transferor happened to know of the breach of trust. The property would pass, and it is not arguable that it could be otherwise. What the consequence of this breach of trust would be to all parties concerned is of course immaterial in this case. The result therefore of this purchase of the leasehold was that the defendants, the School Board, had the leasehold interest passed to them. I, as I have said, have nothing to do with the question of the breach of trust in applying their funds in the purchase.

After purchasing the lease the defendants, I suppose, failed to come to terms with the plaintiffs. Under the Education Acts the School Board have the powers of the Lands Clauses Acts, so far as regards taking property by agreement; that is to say, the powers of dealing with persons under disability and so on; but they have not compulsory powers to take the land unless they get a Provisional Order, and get it confirmed. In this case they did get a Provisional Order, and they eventually got it confirmed by an Act of Parliament which received the Royal Assent on August 6, 1900. I observe that at that time the original proceedings which led to the decision in *Cockerton's* case had been commenced, but no decision had been given, and I assume the School Board were still under the impression—there being no decision to the contrary, although the matter had been challenged—that they had the large powers which they appear at one time to have considered they had. When that Act of Parliament was passed it confirmed the Provisional Order giving to the School Board power to take various pieces of land, amongst others, this particular piece at Hilddrop Road, with the provision in section 4 that, “if the School Board for London under the powers by this Act conferred purchase the land house garden and premises known as the Elms No. 21 Hilddrop Road in the parish of St. Mary Islington . . . such land house garden and premises shall not during the period ending the 29th day of September, 1951”—that is to say, a further 48 years from the present time—“be used by the School Board for London otherwise than for the purposes of a pupil teachers’ centre.” It is obvious from that, that every one at that time, including the Legislature, was under the impression that the

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land could be used for a pupil teachers' centre; but any difficulty I might have had in the construction of this clause is removed by *Dyer v. London School Board*, 1902, 2 Ch. 768; 72 L. J. Ch. 10, because its construction was there considered, and the Court held that though it was obvious from the wording of that clause that it was understood there was this power, yet it did not confer the power—that it was put in *alio intuitu*, and that what was being dealt with was the protection of the present plaintiffs, the clause being put in probably by way of bargain between them and the School Board for their protection, so that the property should not be used in a manner detrimental to their other adjoining property. If it could have been used for the purpose in question it was to the advantage of both parties to a certain extent to embody that bargain in the Act of Parliament, but the clause had not the effect of conferring any power on the School Board additional to that which they had already. That, therefore, removes one difficulty from my way. The effect of it therefore is this: that when that Act passed it did not give power to take the land for the purpose of the use of it as a pupil teachers' centre. It forbade its being used for any other purpose. Consequently these powers could only be exercised in the somewhat improbable event of someone conferring upon the School Board an endowment for a pupil teachers' centre, because under the Act of 1873 they have power to administer trusts and carry on schools and education other than elementary education, provided that someone supplies them with the funds to do it. The result therefore, undoubtedly, after the decision of the Court of Appeal in *Dyer's case*, is that the London School Board got these powers and these only. Mr. Asquith argued with considerable force and great reason that the Legislature never would have thought of passing an Act of Parliament for the purpose of conferring such very limited powers, and of providing for such an improbable event; and no doubt this is so. Nevertheless, now that the Court of Appeal has decided that it does not confer the larger power, the effect of the Act of Parliament certainly is that the School Board could only exercise the powers of that Act in the event of someone giving them the money with which to build and carry on this pupil teachers' centre.

Under those circumstances the defendants proceeded in January, 1901, to give the plaintiffs notice to treat under that Act. The law is quite clear that bodies which have compulsory powers for one purpose may not exercise them for another purpose, and that if the plaintiffs at that stage, when the notice to treat was given, had applied for an injunction to restrain the School Board from acting upon that notice to treat, they would have had to argue, and argue successfully the point that was a little later on argued in *Dyer's case*. Then the defendants

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went on, and a few months later took proceedings under section 85 of the Lands Clauses Consolidation Act, 1845. Again, if the plaintiffs had at that stage applied for their injunction, they would, of course, have got it. Nothing had happened in the meantime to alter the position of the parties or to prevent that injunction being granted, and the School Board were all this time exercising powers which *Dyer's* case shows they have no right to exercise, and consequently the injunction would have been a matter of course.

In the present action no injunction is applied for, and I have heard no evidence, one way or the other, as to what was taking place between the parties all this time. On the one hand the plaintiffs do not offer me any evidence that they protested in any way, and I suppose they did not. The defendants on the other hand do not offer any evidence that the plaintiffs acquiesced in any-way, and they have not by their pleadings set up either *laches* or any conduct of the plaintiffs out of which might arise any estoppel or right of that character. Under these circumstances, it seems to me that the School Board were acting at their peril. If they had the right they were claiming, they had the benefit of it. If they had not, they had not. It simply stands in that way.

Now in support of the contention of the defendants, I was referred to *Tiverton Railway v. Loosemore* (1884) 9 App. Cas. 480; 53 L. J. Ch. 812, where the House of Lords held that after the expiration of compulsory powers the proceedings which had in fact been commenced under the Lands Clauses Acts must go forward; that the compensation proceedings having been commenced, it was necessary to continue those proceedings, notwithstanding that the time for the exercise of the compulsory powers had elapsed, in order to work out the rights of the parties; and that the landowner could not go back and say his land had never been really completely taken from him, and that, the powers of the railway company having expired, he could have it back again clear from any rights of the railway company. But at the commencement of the proceedings in the *Tiverton* case, when the notices in fact were given, the time had not expired, and there was the right to give them; there was in fact the right to take the land. That case does not really help the defendants.

The only question I have any doubt about in this case is whether or not the position of things is such that I ought to apply to it the same principle as was applied in *Ayers v. South Australian Banking Co.* (1871) L. R. 3 P. C. 548; 40 L. J. P. C. 22. For that purpose it is necessary to consider what is the nature of the right which persons having compulsory powers get under section 85 of the Lands Clauses Consolidation Act, 1845—the nature of the right which is acquired apart from any question of the purpose for which those

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powers are being exercised being *ultra vires*. Now a body of persons proceeding under section 85 are purchasers whose purchase has not been completed, and who have not yet acquired the title to the property. But they have by virtue of that section a statutory right to possession of the property, and a right to use it for the purposes for which they have been authorised to take it, so that they go into possession in the character of purchasers under a statutory right. Therefore the only question I have to consider in this case is whether such a right as that, acquired in that way, ought to be dealt with upon the same footing as in the case of *Ayers v. South Australian Banking Co.*, where the case of property vested in the purchaser was dealt with. That was in point of fact a sort of application of the maxim *quod fieri non debet factum valet*; but to apply that it is necessary that the thing should be a *factum*, that it should be done, that it should be completed. This proceeding was not complete, though it was in the course of going on. The proceedings to take the land had gone a certain way. The difficulty is that they had gone so far that the defendants had in fact pulled down the houses, so that the parties cannot be restored exactly to the position in which they were. But it seems to me I cannot apply to this case the principle which was applied in *Ayers v. South Australian Banking Co.*, because there there was, and, in the cases to which that would be applied, there would be, a conveyance of property to the party acting *ultra vires*.

Here the only thing that in any way can vest this right to possession in the defendants is their own act done adversely to the plaintiffs, without any concurrence by the plaintiffs, and in which the defendants seem, as I have said, to have been acting at their own peril. If they had the right they were claiming to exercise, they had got it; if they had not, the act was simply wrongful.

They do not by that act, by purporting to give notice to treat—which the Court would have held, had it been asked, that the defendants had no right to give—or by taking these proceedings under section 85, which the Court, had it been asked, would have said they had no right to take—they cannot, I say, by taking proceedings of that sort, which in fact they had no right to take, vest in themselves, even *de facto*, any right of possession in the same way as there would have been vested in them a right to the property if there had been a conveyance to them of that property. I must therefore hold that these proceedings in fact conferred no right upon the defendants. The result is that, their rights as owners of the lease having gone by the forfeiture—because by the purchase of the leasehold interest they only took it subject to the rights of the lessors, and inadvertently there has been forfeiture by pulling down the buildings—they get no right under the

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lease and they have acquired no rights under section 85, and of course under no other section of the Lands Clauses Acts. I must hold, therefore, that there is no right in the defendants to possession of this property by reason of their proceedings under section 85.

I was asked to deal with the case upon the supposition that there had been a mistake on the part of the defendants, and to hold that the defendants, having commenced proceedings thinking they had the right, should be allowed to go on and use the land if they can for some other purpose for which it was suggested they can use it, and that they may treat it as land which they had rightly acquired, and which has become useless and which therefore they can sell under the powers of the Lands Clauses Acts. That would, it seems to me, be allowing them to acquire under the compulsory powers, given to them for one purpose, land for the purpose of selling it, and I do not think that is possible.

The only other thing said was that if the defendants were only allowed to keep it a few months, it would, in a few months pass with the rest of the property of the School Board to a new body, and that new body when it came into power would have power to use it for the pupil teachers' centre, and consequently the restrictions in this Act of 1900 would no longer be important, and no longer cause any difficulty. I cannot possibly take that into account. It would again be allowing the defendants to use compulsory powers for a purpose for which these powers are not given, simply because hereafter they or their successors will get the powers which they had not acquired at the time they entered on these proceedings.

That is not a legitimate argument, nor one to which I can accede. The result is that my judgment must be for the plaintiffs for possession of the property, and I think they are clearly entitled to some damages, which it has been agreed shall be assessed in some way and not by me. In my view the plaintiffs are, on the facts, entitled to some damages because I have held that the defendants' act was wrongful, and the plaintiffs must therefore be entitled to damages either for breach of covenant, or in tort. I say no more with reference to that.

Judgment for plaintiffs.

Solicitor for the plaintiffs—F. A. Baker.

Solicitor for the defendants—C. E. Mortimer.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

1908.

MAYO v. SEATON URBAN DISTRICT COUNCIL.

Dec. 9, 10.

Sanitary conveniences—Public conveniences—"Proper and convenient situation"—Nuisance—Detriment to adjoining property—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39.

The urban authority of a seaside resort decided to erect a public sanitary convenience, and selected a site, freely given by the owner, on the slope of the cliffs some 30 feet from the plaintiffs' good-class private houses, and close to public seats used by residents and visitors for the salubrity of the air and the amenity of the view. The plaintiffs, in a quia timet action, complained of a private nuisance likely to arise from noise and smell, and of a public nuisance in respect of the erection of the convenience on the selected site.

Held, on the facts, that no public or private nuisance was to be apprehended, and that the defendant council had reasonably exercised their powers under section 39 of the Public Health Act, 1875, in resolving to erect a convenience of this kind, and in selecting the site in question.

ACTION with witnesses.

Two of the plaintiffs were the owners, as trustees, of two houses, called "Cliff Castle" and "St. Elmo," situate on the sea-front of Seaton, in the county of Devon, and the other plaintiff was the occupier of the latter house, and was joined in that capacity. The defendants were the Seaton Urban District Council. The plaintiffs sought (1) an injunction restraining the defendants from erecting upon a site close to their houses a building containing urinals, water-closets, or other similar conveniences for public accommodation, and (2) a declaration that the selected site was not a "proper and convenient situation" for the purpose.

It appeared that Seaton was a seaside resort, with a resident population of about 1,400. Its salubrity attracted a number of invalid visitors, and throughout the summer, especially on Bank Holidays and in regatta week, the railway service brought crowds of excursionists, who frequented the sea-front and beach. The defendant Council in the summer of 1903 resolved, upon the recommendation of their Improvements Committee, and after a discussion of the matter and an inspection of three sites, to erect a lavatory and water-closets for the use of women and children, under the powers given by section 39 of the Public Health Act, 1875.

There was some evidence of existing nuisance on the site finally selected, and now complained of; the two rejected sites were in the

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town and by the station. The selected site was given as a free gift by the owner of adjacent property, who was a member of the Improvements Committee, and was on the steep slope of the cliff at a spot about 25 feet above the beach and 15 feet below the ground level of the plaintiffs' houses, which were separated from it by a road and a wall. The proposed building was to be about 17 feet by 11 feet, and 11½ feet in height, and was to include two w.c.'s of a type of which the plaintiffs made no complaint. The distance from the convenience to the nearer of the two houses was 32 feet, and 25 feet to the front lawn. The plaintiffs alleged that the erection of the proposed convenience on the chosen site would seriously impair the amenities and depreciate the value of their property, and in particular complained of the noise of flushing the w.c.'s and of a proposed ventilating shaft on the farthest and south-west side of the convenience, the top of which would rise above the roof and be at the level of their garden. They also alleged that, from its vicinity to good-class houses like their own and to the cliff-walk with sheltered garden seats, the nearest of which was 18 feet from the selected site, and which were a favourite resort of invalid visitors and residents, the site was not a proper and convenient one.

Upon a motion for an interim injunction, the defendants had undertaken to pull down and remove the works then begun, and the plaintiffs undertook to expedite the trial and abide by any order as to damages occasioned by such removal and by restoration.

At the hearing of the action, evidence was given on behalf of the plaintiffs by a number of better-class residents and visitors, and on behalf of the defendants as to the deliberation with which the site had been adopted.

Section 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides as follows :—

Any urban authority may, if they think fit, provide and maintain, in proper and convenient situations, urinals water-closets earth-closets privies and ashpits, and other similar conveniences for public accommodation.

Warrington, K.C. (R. Cunningham Glen with him), for the plaintiffs. The selected site is not "proper and convenient" within the meaning of section 39 of the Act, because, having regard to the amenities of this spot and to the two other possible sites, this is one which involves a maximum of inconvenience to the adjacent residents and a minimum of convenience to the visitors for whom it is intended.

P. O. Lawrence, K.C. (G. Lawrence with him), for the defendants, referred to the judgment of Jessel M.R. in *Mason v. Wallasey Local Board* (1876) 42 W. R. 246 n., and *Pethick v. Plymouth Corporation*

(1894) 42 W. R. 246, as authorities to show that where a local authority has acted *bonâ fide* under section 39, and there is no evidence of malice or other improper motive, an injunction will not be granted. 1908.
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KEKEWICH J., at the close of the plaintiffs' evidence, said that but for the Court of Appeal, he should not call for the defendants' evidence, and continued:—Unless the plaintiffs' case is so hopeless that there is no evidence at all, it is now the practice that the Court must hear the witnesses for the defence if there are any to be called. Here I want to be satisfied that the defendant Council fully considered the matter, and to hear whether, having regard to the amenity arising from the user of the seats on the cliff walk, there can be any public nuisance occasioned by the proposed building.

The evidence for the defence having been closed, counsel were not called upon.

R. Cunningham Glen, for the plaintiffs. The Court is not controlled by the discretion of the local authority, but will itself control their exercise of their powers and inquire whether it is reasonable or not: *Vernon v. St. James', Westminster, Vestry* (1880) 16 Ch. D. 449; 50 L. J. Ch. 81. [KEKEWICH J. That was entirely a question of public nuisance.] Yes, but I rely on the remarks made *obiter* by Malins V.C., at p. 459, and by James L.J., at p. 467. The only reason for the selection of this site was its free gift. Even if it was intended to alleviate an existing nuisance, there is nothing in the statute to justify the defendants "in bringing a new and different nuisance to the door of a private individual": per Joyce J. in *Leyman v. Hesse Urban District Council* (1902) 1 L. G. R. 76.

KEKEWICH J. If I had to sum up this case to a jury, it would be my duty to explain to them the law by which they would have to be guided in considering the questions of fact. I do not think it necessary to do that here, because there really is no doubt about the law, and the case has proceeded throughout on the assumption that the law is as it is, notwithstanding some criticisms and arguments concerning decided cases.

The one question of fact which really I have to consider is this, whether the defendants have acted reasonably. They have to act reasonably, first, in determining the question whether there shall be such an erection as we are considering here at all or not, and secondly, they have to act reasonably in determining whether the erection shall be in this or that particular situation; and, in considering whether the defendants have acted reasonably or not, I have to inquire whether they have used or exercised the discretion which is vested in them after proper inquiry; whether there was anything so manifestly objec-

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tionable in the site selected and as compared with other sites possible, that I am bound to come to the conclusion that they have not acted *bonâ fide*, but have selected one particular site without a sufficient or proper exercise of their discretion in that sense. I have also to consider whether there is anything approaching to either a public or a private nuisance. In either of those cases it follows necessarily that they have not acted reasonably, because it is not reasonable for them, and the law does not permit them, to do what they are proposing to do here, so as to create a nuisance, either public or private. There is one further question which I will consider separately, and on which really there is no decisive authority, that is, how far you are to take into account the fact, if it be a fact, that the neighbouring property, and in particular the neighbouring property of the plaintiffs, has suffered detriment.

First, as regards the question whether there should or should not be an erection such as this somewhere in or about Seaton. It is true, as one of the witnesses told us, that Seaton has got on very well for many years without such an erection at all, and it may be that it would get on very well for many years to come without it; but it is impossible to forget that an urban district council, like other councils, other corporations, and other persons, must march with the times; and, applying one's general knowledge, it is impossible not to see that something of this kind ought to be provided for such a place as Seaton. It is a small place, with only 1,400 inhabitants of its own, but resorted to at certain times, not only at regatta times, not only on Bank Holidays, but during the summer months, by persons residing within reach by train. We know that the railway company provides cheap tickets, and that there is from time to time a considerable congregation of persons on the esplanade and beach, many of them being, of course, women and children. It is impossible in the twentieth century to say that Seaton ought to go on, as it has gone on up to this time, without some such erection as is proposed. Speaking, not as a judge, but as a man, I should say that it is the duty of the District Council to provide something of the kind. That duty being cast upon them, or, at any rate, it being desirable in the interests of Seaton, of which they are the guardians, to do something of this kind, they then have, under the 39th section of the Act of 1875, to find a "proper and convenient situation." It is probably the gravest question in this case whether they have done that. What course did they pursue? There is an Improvements Committee, whose duty it is to take into consideration subjects such as this. The Improvements Committee met. It is not suggested that they were persons incompetent, that they were in any way warped in their

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judgment by private considerations. They met, they inspected the only three sites which anybody has had the courage to propose, and they decided on the particular site. Now I will assume that the other two sites would have been proper and convenient. It is not for me to say that they were proper and convenient, or otherwise; I will assume that they were. There is a considerable body of evidence to show that they were, and I will assume that that is so; but the Committee, and the Council who have adopted their report, not without inquiry, not blindly, because they not only adopted it when it was presented to them, but they reconsidered it when the plaintiffs complained, did so and did select this site in the exercise of their discretion. If it is not manifestly an improper site for some reason which we must examine, it is impossible to say that they have not discharged their duty *bonâ fide*, and selected this site as on the whole the best—at any rate, what appears to them to be the best—notwithstanding that others might have some advantages. The only suggestion of personal impropriety—that is to say, want of discharge of what is a quasi-judicial duty in a judicial manner—is that the gentleman who was a member of the Committee offered them the site gratuitously. I am not satisfied that that was the determining point in their conclusions. It may very properly have influenced them because, as they were guardians of the rates, it might have been quite proper, if there was a question between two sites, that the advantage of having a gratuitous conveyance should weigh with them in considering which site they should fix on. I must return to the donor of the site afterwards; but I only refer to him here because I think there is nothing in the suggestion (it is hardly a contention) that the Committee or the Council adopting their report were swayed in their judgment by this offer of a site gratuitously; and further, so long as it did not outweigh their judgment, which I cannot see that it did, I think they were right in taking that fairly into consideration. I cannot sit in appeal on their judgment. It seems to me they have exercised it, and that I must hold that this is a proper and convenient site so far.

Now, what are the objections to it? The first, and one which strikes one as the most important, is that it will create a public nuisance. It seems that this site is at the top of a slope leading from east to west from the beach, and it is approached by a footpath which ascends that slope, and that on that footpath are seats, and those seats and the footpath itself are the resort of the inhabitants of Seaton, and especially of those who go there for the benefit of their health, because it commands a western view, which I am told is very pretty. One of those seats, the topmost, is within a very short distance, really

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a very few feet, of the intended site. That, of course, strikes one at once as an objection. The Council have seen that it is an objection, and they propose to move the seats further down. The seats are under their control; the walk is under their control, and they can move the seats further down, and, as far as I have heard the evidence on the point, the seats will be at least as well situated when moved further down—that is to say, they will command as much view and be as tempting resorts as they are now. The Council also contemplate shading this erection with shrubs. There is some evidence to show that it is not a fertile soil, and that there is some difficulty in growing shrubs. In some way or other, I have no doubt that can be overcome. It would be absurd to suppose here that on the border of the sea in a western county you cannot do something in the way of growing shrubs, or perhaps erecting something which would support climbing plants. In that way, by the combination of moving the seats and doing something to protect this place from view, any public nuisance can, I think, be avoided, and will be avoided. I doubt whether, if it was left alone, it could be called a public nuisance, but certainly any such objection can easily be reduced to a minimum.

Now, as regards the private nuisance. The plaintiffs complain that this will create a nuisance to them and the occupiers of their houses, "Cliff Castle" and "St. Elmo," "St. Elmo" being considerably further off and commanding a very much less view of this site than "Cliff Castle." It is suggested, in the first place, that they will be annoyed by smell proceeding from the ventilating shaft. That, I think, is blown to the winds by the scientific evidence. There is a faint suggestion, too, of nuisance by noise. That too, I think, never had much foundation, and that is gone with the smell. The more important allegation is that from the lawn, and from the upper windows of both "Cliff Castle" and "St. Elmo," you can command a view, not of this place itself, except the roof, but of the approaches to it, and that it is not convenient, not in accordance with the customary habits of English living and comfort, to have your attention continually called to persons, ladies, and children, walking up and down, coming to this place and departing from it. They will not be seen to go in; as I understand the evidence, the view does not command the door; the residents will only see them walking about, and if their minds dwell upon the fact, they will know whither they are going or whence they are coming, and that is said to be a nuisance by itself. I cannot think so. I cannot think that that comes within any definition of nuisance which holds good in this Court. It need not interfere, it ought not to interfere, with the ordinary comfort of life as English people live. But then comes the other question about the detriment

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to property. Now, I have some evidence, I think exaggerated and extravagant, but still some evidence, that the value of this property will be diminished by the erection of this place in the immediate neighbourhood. I must take it on the evidence before me that there will be some detriment in that sense—that is to say, that persons proposing to take a house in Seaton, whether to purchase or to rent, will avoid a house from which they can see what I have just now described. That the real detriment would be what it is said to be I cannot myself believe, but it may be that in that sense, in that way, there will be detriment in value to the house, or both houses. I think there is more than one answer to that. In the first place, if that is true, there must be detriment wherever you erect this place, and I think the Legislature must be taken to have contemplated that when it empowered the urban authority to provide conveniences of this kind. If it is true in the way in which it has been urged, it must be true universally and everywhere, unless, indeed, you banish the erection into the country, which, of course, would be absurd, because it is intended for the convenience of the town. But, besides that, we have, I think, a very important factor in this in the behaviour of the gentleman who is not only a member of the Committee, but is a landowner immediately adjoining the road by this site and above it, which he looks forward to turning to profit in the shape of building land, and he not only does not object to this site, but he has given the site gratuitously. According to the plaintiffs' evidence, he must be very foolish, because it would destroy the value of his property to a large percentage. Now, is it not possible that there is another view, that if the Urban Council improve Seaton, even in so small a matter as providing an erection of this kind, they will make it more popular, and attract persons not only to come and visit the beach, but to stay at the place, and that this landowner may see at a distant, or perhaps not at a distant time the development of his building land? If that is the proper view, it may influence the value of the plaintiffs' land also. And in saying just now, what I wish to repeat, that according to their view there must be detriment everywhere, I do not know why I should consider the detriment rather to houses of this kind, which are inhabited by first-class tenants, than I should consider the detriment to houses which are inhabited by second or third class tenants. After all, as long as there is no nuisance—and I have expressed my opinion on that point—it seems to me that it comes to a matter for the fair consideration of the Urban Council whether this is a proper and convenient site.

I think they have given it fair consideration. They have been examined here and their methods inquired into, their actions have

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all been sifted thoroughly, and I think they come out without any blame. They seem to have discharged their duty—not an easy one—to the best of their ability. I do not think there is any reason why I should interfere with them.

Action dismissed, with costs as between solicitor and client, including an agreed sum for damages under the plaintiffs' undertaking given on the motion for an interim injunction to indemnify the defendants for the costs of the removal and restoration of the works, which the defendants then undertook to remove pending the trial.

Solicitors for the plaintiffs—Bower, Cotton, and Bower, for Mayo and Son, Yeovil.

Solicitors for the defendants—Morris and Bristow, for A. P. Cann Evans, Seaton.

High Court of Justice.

KING'S BENCH DIVISION.

1903.

USK URBAN DISTRICT COUNCIL v. MORTIMER.

Dec. 9

Dangerous buildings—Hoarding erected by local authority—Recovery of expenses—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 75—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 160 257—Practice—Costs of special case where respondent does not appear.

The second paragraph of section 257 of the Public Health Act, 1875, which provides that where expenses for which the owner of premises is liable as in that section mentioned have been settled and apportioned by the surveyor to the local authority, the apportionment shall be binding and conclusive on the owner unless he disputes the same within the time thereby limited, has no application where the local authority are seeking, in accordance with section 75 of the Towns Improvement Clauses Act, 1847, to recover from the owner of a dangerous building expenses incurred by them in erecting a hoarding.

Although as a general practice the High Court does not grant costs against a respondent to a special case who does not appear, there is no rule which fetters the discretion of the Court in the matter, and the Court will in a proper case give costs against a respondent who raises an untenable point and fails to appear to sustain it.

CASE stated by justices of the county of Monmouth, who had dismissed a complaint of Arthur Charles Lucas, clerk to the Usk Urban District Council, that Charles Allen Mortimer, of Usk, the agent for Mr. Sidney Smith and others, on February 13, 1903, at Usk, was indebted to the Usk Urban District Council in the sum of £1 10s. 6d. for expenses incurred upon default of compliance with notice under section 160 of the Public Health Act, 1875, with reference to certain property in Church Street, Usk.

The facts appeared in paragraphs 4 *et seq.* as follows:—

4. At the hearing of the said complaint it was proved and given in evidence before us on behalf of the appellant that on the 13th day of November, 1902, the surveyor to the Usk Urban District Council reported to the Council that the roof of a certain house (for which the said respondent acted as agent) situate in Church Street, in the town of Usk, and within the district of the said Council, was in a dangerous state, and that on the 17th day of November the said surveyor, pursuant to section 75 of the Towns Improvement Clauses Act, 1847, incorporated by section 160 of the Public Health Act,

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1875, served a notice personally upon the said Charles Allen Mortimer calling upon him within three days to take down or repair the said roof, and that in default of his so doing complaint would be made before two justices in accordance with the provisions of the statutes in that case made and provided.

5. It was also proved and given in evidence that the terms of this notice were not complied with, and that the Council, pursuant to the section last aforesaid, caused a hoarding to be erected in front of the said house on the 31st December, 1902, and that the charges of Mr. S. R. Lucas, the person employed by the Council for erecting such hoarding, amounting to the sum of £1 8s., had been paid to him by the Council on the 6th February, 1903.

6. It was also stated and admitted that in the month of January a summons was applied for by the appellant against the respondent, but was not proceeded with, as in the meantime the dangerous building had been made safe by the respondent.

7. It was further proved and admitted that on the 13th day of February, 1903, a formal demand for payment of the said sum of £1 8s., and of 2s. 6d., the cost of the said summons, was made by the appellant upon the respondent.

8. On behalf of the respondent it was contended that inasmuch as the three months had not elapsed since the date of the said demand upon him, as allowed in cases of apportionment by the second paragraph of section 257 of the Public Health Act, 1875, the complaint laid by the appellant was premature (the date of the said complaint being the 6th day of May, 1903), and that the respondent was entitled to go to arbitration as to the amount payable.

The justices upheld the contention thus raised by the respondent, and gave their decision against the appellant in the manner before stated.

The question for the Court was whether the said justices upon the above statement came to a correct decision in holding that so much of the second paragraph of the said section 257 of the Public Health Act, 1875, as allows a period of three months therein enacted was applicable to the case in question.

Section 257 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides as follows:—

Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered . . . from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses . . . the same shall be a charge on the premises in respect of which they were incurred . . .

Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

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S. R. C. Bosanquet for the appellants. The justices were mistaken in upholding the respondent's contention before them that, by the second paragraph of section 257 of the Public Health Act, 1875, he was entitled to three months within which to give the appellants notice that he would dispute their claim for £1 8s., the cost of this hoarding. This is not a case of apportionment within the contemplation of that section upon which he can go to arbitration; and upon the authority of *Folkestone Corporation v. Brooks*, 1893, 3 Ch. 22; 62 L. J. Ch. 863, that section is clearly confined to cases where there can be an arbitration.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. In the absence of any appearance before us on the part of the respondent, we are of opinion that the appellants' contention is clearly the right one. Section 75 of the Towns Improvement Clauses Act, 1847, provides that all the expenses of putting up every such fence as is there referred to, and of taking down, repairing, building, or securing the dangerous building shall be paid by the owner thereof; and section 76 provides that such expenses may be levied by distress. Thus the expenses are to be recovered from the owner, and the only question can be as to the amount. The second paragraph of section 257 of the Public Health Act, 1875, applies to cases where expenses have to be settled and apportioned by the surveyor of the local authority as payable by the owner; but here there is no question of apportionment, and the only question which could arise would be as to amount. I am, therefore, of opinion that the appeal must be allowed.

LAWRANCE J. I am of the same opinion.

KENNEDY J. I agree.

Bosanquet asked that the appeal might be allowed, with costs.

LORD ALVERSTONE C.J. The general practice is that we do not grant costs against a respondent who has failed to appear before us in support of his case, but I know of no rule, apart from this practice, which fetters us in the exercise of our discretion in a case in which the respondent does not appear, but in which it seems to us that the appellant should have them. Under the circumstances of the present

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case we certainly think that the appellants are entitled to them. It is not a criminal case, but rather one in the nature of civil proceedings for the recovery of claim in which the respondent has raised a point which in our opinion is wholly untenable.

Appeal allowed with costs.

Solicitors for the appellants—Le Brasseur and Oakley, for Le Brasseur and Bowen, Pontypool.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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PEARCE v. MERRIMAN.

Nov. 16.

Registration of electors—Occupation qualification—Occupation as tenant—Husband occupying house owned by his wife as her tenant—Rent paid by husband to wife.

A husband who resides with his wife in a house of which she is the owner, but who has agreed to pay, and does pay, her rent for the house, occupies the house as tenant and is therefore, the other necessary conditions being fulfilled, entitled to be placed on Division I. of the occupiers' list.

Hall v. Michelmores (1901) 86 L. T. 17; 18 Times L. R. 33, distinguished.

CASE stated by the Revising Barrister appointed to revise the lists for the Western or Westbury Division of the county of Wilts as follows:—

At a court held before me for the revision of the lists of voters for the Westbury Division of the county of Wilts, objection was duly made to the name of William Pearce being retained on Division I. of the occupiers' list of Trowbridge South.

The entry in question was as follows:—

Name of Elector.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Pearce, William.	Trowbridge.	Dwelling-house.	25, West Street.

The facts of the case were as follows:—

Elizabeth Rickman was tenant for life under the will of her late husband of several houses, in one of which she resided, another being that mentioned in the above entry.

William Pearce, the appellant, married a daughter of Elizabeth Rickman, and he rented No. 25, West Street of his mother-in-law, and he and his wife resided there. The rent was 15s. 10d., payable every four weeks, and for many years up to the death of Elizabeth Rickman this rent was paid to her by the appellant, who also paid the rates, and was inserted by the overseers on Division I. of the occupiers' list, and was entitled to vote and voted at elections.

Upon the death of Elizabeth Rickman in November, 1901, the

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house became the freehold property of the wife of the appellant under the terms of her father's will. William Pearce attended before me, and stated that upon the death of his mother-in-law he considered the question of his right to vote, and to secure that right he agreed with his wife to pay to her the same amount of rent that he had previously paid for the house. He produced a rent book showing the first payment of 15s. 10d., due 28th December, 1901, and a receipt for the same signed by his wife. The book showed similar payments every four weeks up to September, 1903. Between these dates William Pearce and his wife resided in the house as they had formerly done; he continued to pay the rates, and his name was placed by the overseers on Division I. of the list of occupiers.

The notice of objection given to William Pearce stated the grounds to be—

“(1) That you have not occupied the qualifying premises as owner or tenant for 12 months immediately preceding July 15 in this year.

“(2) That your wife being owner of qualifying premises disqualifies you.”

In support of the objection it was urged that William Pearce was not occupier of the house either as owner or tenant, and the case of *Hall v. Michelmores* (1901) 86 L. T. 17; 18 *Times* L. R. 33, was cited in support of this view. On behalf of the appellant, it was urged that the case cited did not govern the present one, as in the former there was no evidence of tenancy, whereas in this case there was evidence of a *bonâ fide* tenancy, and that the mere transfer of his tenancy from his mother-in-law to his wife did not affect his right to be retained on Division I. It was also argued that under the Married Women's Property Act, 1882, a married woman in respect of property acquired after the 1st January, 1883, is entitled to all the rights of, and is in the same position as, a *feme sole*, and is therefore in a position to give her husband notice to quit a tenancy of her property or to obtain possession of her property by means of an ejectment order against her husband.

I was of opinion that the fact that the appellant was the occupier of the premises when his wife became the owner of them was immaterial. The same question would have arisen if on the house becoming the property of his wife he had moved into it from another house, and had claimed as occupier in succession from one to the other.

I was further of opinion that though a wife might let to her husband any of her property of which she gave up the occupation to him, the joint occupation by husband and wife of a house belonging to her was inconsistent with the relation of landlord and tenant.

The right of a landlord to give notice to quit or to eject a tenant could not, in my opinion, exist in opposition to the marital right of a husband to continue to reside with his wife. I therefore came to the conclusion that the agreement that the husband should be tenant of the house to his wife was, under the circumstances, inoperative to constitute him an occupier as tenant, and I therefore held that the objection was valid, and struck out the name of the appellant from the list. 1903.
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I was asked to state a case for the opinion of the Court, and I agreed to do so, and named the Clerk of the Wilts County Council as respondent in the appeal.

If the Court should be of opinion that my decision was wrong, the register is to be amended by the insertion of the original entry as above set out.

Lewis Thomas for the appellant. The point is whether a man can be an occupying tenant of a house of which his wife is the owner. The house became the freehold property of the wife of the appellant under the terms of her father's will. When this took place, he at once considered his position with regard to his vote, and continued to pay his wife the rent he had hitherto paid to his mother-in-law. A rent book was produced, showing that these payments had in fact been made. This is not a joint occupation, but the occupation of the husband. His wife does not live with him there by reason of being owner in fee simple, but by right of marriage. The Revising Barrister has misconstrued *Hall v. Michelmores* (1901) 86 L. T. 17; 18 *Times* L. R. 33. Moreover, the rights of the wife as a married woman are covered by the operation of the Married Women's Property Act, 1882.

The respondent did not appear.

LORD ALVERSTONE C.J. This seems to me to be a case in which a state of things exists which were not particularly discussed in *Hall v. Michelmores* (1901) 86 L. T. 17; 18 *Times* L. R. 33. In that case an attempt was made to support a contention that the mere fact that the wife owned the house was sufficient to make her husband the occupier. There the Revising Barrister had held that the husband was not entitled to be on the register as the occupier of the house; and upon the case coming before us we considered that we could not reverse his decision, because upon the bare facts found there, the house belonged to the wife, and the wife lived with her husband, without any agreement having been entered into between them or rent paid; there was, therefore, no evidence establishing the relation-

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ship of landlord and tenant between them. But in the present case the circumstance is set out that the appellant had considered the question of his right to vote, and in order to secure that right had agreed with his wife to pay her the same amount of rent he had previously paid for the house. The rent book was also produced, which showed regular payments of rent made every four weeks by the husband to his wife. I think, therefore, that we are entitled to take it that that state of things established a tenancy between them. The Revising Barrister, however, considered that the marital relations which existed between them put a stop to any effect being given to this agreement. I am bound to say I do not agree with this view. I am of opinion that the facts establish a tenancy unaffected by any question of marital relations. I think the Revising Barrister ought not to have held as he did, and that therefore the appeal should be allowed.

KENNEDY J. I agree. If there be a real tenancy, the man is entitled to his vote, notwithstanding that the house belongs to his wife, for under the Married Women's Property Act, 1882, she is certainly entitled to stand in the relationship of landlady to her husband.

DARLING J. I am of the same opinion, and, in holding as we do that this appeal must be allowed, we are deciding nothing inconsistent with *Hall v. Michelmore*. In that case there was no evidence of the existence of any tenancy at all between the husband and wife. But in this case there is very distinct evidence of payment of rent and of the keeping of a rent book. The Revising Barrister accepts this, but states in the case that he was "further of opinion that though a wife might let to her husband any of her property of which she gave up the occupation to him, the joint occupation by husband and wife of a house belonging to her was inconsistent with the relation of landlord and tenant." No doubt this would be so if such a joint occupation were established. But where I think the Revising Barrister has gone wrong is in regarding this occupation as a joint occupation. It was not so. The wife was the landlady and the husband was the tenant. He had a right to live in the house as tenant, and she was entitled to live there, because by an entirely different contract she had become his wife.

Appeal allowed.

Solicitors for the appellant—Milner and Bickford, for Wills and White, Trowbridge.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1908.

McNAIR v. BAKER.

Dec. 9.

**Nuisance—Smoke—Metropolis—Chimney of “private dwelling-house”
West End club premises—Public Health (London) Act, 1891 (54 &
55 Vict. c. 76), s. 24.**

A large West End clubhouse is not a “private dwelling-house” within clause (b) of section 24 of the Public Health (London) Act, 1891, which excepts the chimney of any private dwelling-house from the provisions of the section directed against nuisances arising from chimneys sending forth black smoke.

CASE stated by a metropolitan police magistrate who had dismissed a summons issued upon the complaint of Alexander McNair, one of the sanitary inspectors for and on behalf of the Council of the City of Westminster, charging that the respondent on December 4, within the City of Westminster, did unlawfully make default in complying with the requisitions of a notice dated October 13, 1902, and served upon him by the Council of the City of Westminster under the provisions of the Public Health (London) Act, 1891, requiring him to abate a nuisance arising from black smoke having been allowed to issue from a furnace chimney, and to prevent a recurrence of the same, at premises situate and being the St. James's Club, Piccadilly.

The following facts, proved or admitted, were set out in the case in paragraphs 3, *et seq.* :—

3.—(a) The appellant is a sanitary inspector of the City of Westminster, and now acting as complainant herein with the authority of the Mayor, Aldermen, and Councillors of the said City.

(b) The respondent is the secretary of the St. James's Club at 106, Piccadilly, within the City of Westminster, and represented herein the said club.

(c) In consequence of information received by the appellant of the issue of black smoke from the premises of the club, the premises were watched by the appellant in the month of October last. Quantities of black smoke were in that month, and also in the months of November and December, observed to issue from the said premises. On October 1 last an intimation notice was served by the appellant on the said club. The issue of black smoke did not abate, and on October 31 last a statutory notice was duly served on the said club. The issue of black smoke continued on various dates proved before me, and thereupon the before-mentioned summons was issued.

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(d) The said club is managed by a committee, and has occupied the said premises for 30 or 40 years past. Previously the premises were used as the French Embassy. The club consists of 750 members, and its premises comprise the ordinary accommodation of a West End club. There are two dining-rooms for the general use of members, and there are also private dining-rooms, which may be engaged by members without extra payment for special occasions. There are five bedrooms for the use of members, four of which may be hired by members for a week only at one time, and one of which may (at the discretion of the committee) be hired by a member for three, six, or twelve months at one time respectively. The use of the said bedrooms is in these and other respects subject to the rules of the club and the regulations of the committee thereunder. There are eight other bedrooms for the use of the staff of the club. The club is open during particular hours according to the rules. The food is bought by the committee and sold to members.

(e) The rules of the club are to form part of this case.

(f) In the basement of the premises there are several covered-in cooking ranges, a large roasting grate, and a vertical boiler, with furnace attached. The smoke from these various arrangements discharges into one flue, which is the chimney complained of herein. The principal part of the smoke emitted from the said flue originated in the said furnace and boiler. The furnace and boiler were used for heating the premises.

4. On the hearing of the said summons it was submitted to me by the respondent that the said chimney was the chimney of a private dwelling-house within section 24 (b), and was therefore not liable to be dealt with under the provisions of the Public Health (London) Act, 1891.

5. The appellant, by his counsel, contended that the words "private dwelling-house" meant a family residence or home, and that the use of the said premises excluded them from the exemption of the said section, and that as the said chimney sent forth black smoke in such quantity as to be a nuisance, it was liable to be dealt with under the said Act.

6. I found as a fact that the respondent did not abate the nuisance or do what was necessary to prevent the recurrence of the same, or otherwise comply with the said statutory notice. And I further found as a fact that the said chimney of the club sent forth black smoke in such quantity as to be a nuisance. But I held on the construction of the said section of the Act that the chimney was the chimney of a private dwelling-house, and that the premises used by the club

were a private dwelling-house within the meaning of the section, and dismissed the summons, without costs.

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The question for the opinion of the Court was whether, upon the facts set out in the case, the said chimney was the chimney of a private dwelling-house, and whether the premises of the said St. James's Club as used by the club were a private dwelling-house within section 24 (b) of the Public Health (London) Act, 1891.

Section 24 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), is as follows:—

(a) Any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever; and

(b) Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance;

shall be nuisances liable to be dealt with summarily under this Act, and the provisions of this Act relating to those nuisances shall apply accordingly . . .

Macmorran, K.C., and *Hurst* for the appellant. Section 24 (b) speaks of any chimney, not being the chimney of a private dwelling-house. Certainly this is not a chimney used in trade or for a manufacturing process, but club premises are not a private dwelling-house within the words of the section: *Queen Anne Mansions Company v. Westminster City Council* (1901) 46 S. J. 70. Buildings may be erected for and used as residential premises, and yet not be private dwelling-houses: *German v. Chapman* (1877) 7 Ch. D. 271; 47 L. J. Ch. 250; *Hobson v. Tulloch*, 1898, 1 Ch. 424; 67 L. J. Ch. 205; *Hudson v. Cripps*, 1896, 1 Ch. 265; 65 L. J. Ch. 328. But apart from authority, this is not a case in which the Court is asked to say that this club is not a dwelling-house, but that it is not a private dwelling-house: for a private dwelling-house is a wholly different thing from an institution, in a measure public in its nature and maintained for the accommodation of a large number of members.

Boydell Houghton for the respondent. The last three cases cited for the appellant are not authorities on this point, for they are all decided upon the construction of covenants, and involve considerations wholly different from those involved here. This house was formerly Lord Barrymore's, afterwards it was the French Embassy, and has since been occupied for 30 or 40 years by the members of the St. James's Club. If the appellant's construction of the section were to prevail, it would cover the case of a small shop. He must contend that premises must be used as a private dwelling-house only. And it cannot be the true interpretation of the section that the chimney must be the chimney of a private dwelling-house only. The members

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McNair v. Baker only exists for their convenience.

LORD ALVERSTONE C.J. Mr. Boydell Houghton has argued this case in the only way it could be argued in supporting the view that the magistrate has taken a correct view of the section. The magistrate has not found a finding of fact binding on us, but has held, on the construction of the Act, that the chimney was a chimney of a private dwelling-house. He has found that this building was used for the accommodation of some 700 members, that there was cooking going on for them when they came in, and the warming of the whole club, and in addition there were the bedrooms for members which could be hired by them, and further, there were the bedrooms for the servants. We have to say whether this is a chimney of a private dwelling-house or not. Quite apart from the authorities—and the authorities Mr. Macmorran has cited are all in favour of this view—to my mind it is quite impossible to come to the conclusion, as a matter of law, that a chimney such as this is described to be is the chimney of a private dwelling-house. I am not dealing with the original construction, nor the manner in which it might be and was formerly used; but with the use it is put to to-day. After enumerating a number of furnaces and fireplaces that come within the Act, section 24 speaks of “any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance.” In my opinion, it cannot be contended that, looking at the fair construction of that section, this is the chimney of a private dwelling-house, and I think that the magistrate ought to have convicted the respondent. The case must be remitted him to convict.

LAWRANCE J. I agree.

KENNEDY J. I agree.

Appeal allowed.

Solicitors for appellant—Allen and Son.

Solicitors for respondent—Norton, Rose, and Norton.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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ELLIS v. LONDON COUNTY COUNCIL.

Dec. 14, 15.

Buildings—Metropolis—Dwellings on low-lying land—Land situate so as not to "admit of being drained by gravitation into an existing sewer"—Sewer incapable of receiving drainage in time of flood—Penalties—Limitation of time—London Building Act, 1894 (57 & 58 Vict. c. cccxlii.), ss. 122, 200 (9).

Low-lying land does not come within the prohibition in section 122 of the London Building Act, 1894, against the erection, on land in London of which the surface is below high-water mark, and which is situate "so as not to admit of being drained by gravitation into an existing sewer" of the London County Council, of any building to be used as a dwelling-house, except with the permission of that Council, merely because the existing sewer of the Council into which the drainage of the land ordinarily passes by gravitation is on a substantial number of days in each year so surcharged with flood water that the drainage cannot pass into it.

Proceedings for the offence of erecting a building in contravention of section 122 are in time, within the provisions of section 200 (9) of the Act imposing a penalty on any person who "erects . . . or commences to erect" a building in contravention of section 122, if they are taken within six months of the erection of the building, though more than six months after the commencement of the erection.

CASE stated by a metropolitan police magistrate before whom the appellant had been convicted of offences against Part XI. of the London Building Act, 1894, as follows:—

1. On January 26, 1903, ten several informations were laid before me at the Woolwich Police Court by Thomas Chilvers, on behalf of the respondents, for that the appellant, in each of ten cases, between July 29 and November 30, 1902, at the south side of Cedar Grove, Charlton, in the borough of Greenwich, did unlawfully erect, otherwise than in accordance with the provisions of Part XI. of the London Building Act, 1894, a building to which the said Part XI. of the Act relates, to wit, did, without the permission of the London County Council, upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the said Council, erect a building to be used wholly or in part as a dwelling-house, whereby he became liable to the penalty prescribed by section 200 (9) of the London Building Act, 1894. And upon each of the ten informations, and in respect of each of the ten buildings a summons was thereupon issued and duly served upon the appellant.

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2. Upon the hearing of the said ten summonses on the 25th day of February, and the 4th, 11th, and 18th days of March, 1903, before me, sitting as a court of summary jurisdiction at the police court aforesaid, it was proved or admitted—

(1) That the appellant was the owner of, and the person who erected the dwelling-houses situate on a piece of land at the south side of and running at right angles to Cedar Grove, Charlton, in the county and district aforesaid. The position of the houses is shown on the two plans, marked A and B, annexed hereto, and forming part of this case. Such houses constitute a terrace or row, and front on a length of roadway which had some time previously been constructed by the appellant in continuation of the line of Ransom Road, the ground upon which such houses were built being about 5 feet 6 inches lower than the surface of such roadway.

(2) The appellant commenced to erect such buildings as a whole on or about July 14, 1902, and more than six calendar months before the informations were laid, and the said buildings were covered in in the month of November, 1902. Prior to commencing the erection of such buildings, the appellant gave notice in that behalf to the district surveyor of his intention to do so, but no permission of the respondents was obtained by the appellant. Before the buildings were commenced, the appellant was warned by the district surveyor that such buildings would be in contravention of Part XI. of the Act above referred to.

(3) The said row of ten houses have a continuous frontage of about 160 feet to the roadway, and the land on which they are built rises slightly from the north-west end of the row towards the south-east end.

(4) The level of the lowest floor of the ten houses is 7 feet above Ordnance *datum*, and the land on which the houses were built is about 18 inches or 2 feet below such lowest floor, *i.e.*, about 5 feet or 5 feet 6 inches above Ordnance *datum*. Trinity high-water mark is $12\frac{1}{2}$ feet above the Ordnance *datum*, so that such land is about 7 feet or 7 feet 6 inches below Trinity high-water mark.

(5) Provision was made by the appellant for draining the ten houses into a sewer of the borough of Greenwich (hereinafter referred to as the Ransom Road sewer) laid under Ransom Road, having a diameter of 15 inches and falling towards and opening into the respondents' southern main outfall sewer which runs underneath the Woolwich Road. The said outfall sewer is of circular section, having an internal diameter of 11 feet 6 inches,

the invert being 22 feet 6 inches below the surface of the Woolwich Road. The inner or lower side of the arch of this sewer is 5'3 feet above Ordnance *datum*, so that the appellant's land on which the said houses were built is as nearly as may be on the same level as the inner or lower side of the arch of this sewer. The Ransom Road sewer is connected with the said outfall sewer at a point about half-way up its side (*i.e.*, on its horizontal diameter), and the opening or junction is protected by a hinged flap which when the outfall sewer becomes flooded closes (or should close) automatically, and so prevents the metropolitan sewage flowing along the said outfall sewer from passing up into the Ransom Road sewer.

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(6) At the point of inlet into the Ransom Road sewer of the drain provided as aforesaid by the appellant is a manhole marked B on the said plan B hereunto annexed, which manhole is situate 90 feet from the nearest and 250 feet from the farthest of the ten houses, and the length of the Ransom Road sewer from the said manhole to its inlet into the outfall sewer in the Woolwich Road is about 350 feet.

(7) The Ransom Road sewer was constructed and connected with the said outfall sewer in 1894 by the permission and sanction of, and in accordance with the requirements of, the respondents, pursuant to the Metropolis Managements Acts. The outfall sewer is discharged and emptied by means of a pumping station at Crossness on the south side of the River Thames, erected for that purpose and under the control and management of the respondents.

(8) The total length of the drain so provided by the appellant as aforesaid from the farthest off of the appellant's houses to the manhole aforesaid is about 250 feet, and the total fall of the drain in that distance is 5½ feet, *i.e.*, one inch in four feet.

(9) The drains of each of the appellant's houses are laid in the back gardens or yards in concrete at a depth commencing from the furthestmost house of six inches below the surface, which depth increases with the fall of the drain towards the manhole.

(10) The total fall of the Ransom Road sewer from the manhole to the outfall sewer, which is a distance of about 350 feet as aforesaid, is 2 feet 7 inches, *i.e.*, one inch in 11 feet.

(11) The outfall sewer necessarily receives much of the flood water of the Metropolis, so that in times of flood, and even after moderate rainfall, it becomes full and surcharged. The effect of this condition of the said outfall sewer upon the Ransom Road sewer is that at times of flood and moderate rainfall no sewage

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or drainage can pass away from the latter sewer at all, and it necessarily becomes more or less full. An instance of this was proved by Henry Newton, who laid the appellant's drain for him. This witness stated that in October, 1902, a flood took place, and the Ransom Road sewer became so full that water was standing in the said drain at a point about 45 feet south of the said manhole, with the consequence that the cementing of the drain had to be suspended.

(12) The respondents' engineers keep records of the height, determined by means of gauges placed in the outfall sewer, of the level of the water in times of flood, and they proved that on the following dates in the years 1900 and 1901, the flood levels, determined by such a gauge, placed near Church Lane, Charlton (marked on plan A), rose to the following heights above the Ordnance datum :—

1900 January 1	... 7 feet	1901 May 9	... 10 feet.
„ June 25	... 9'58 „	„ July 26	... 8'50 „
„ July 27	... 8'25 „	„ August 14	... 7'50 „
„ October 29	... 5'50 „	„ October 18	... 11'50 „

It will be seen that all these flood levels were substantially above the appellant's land above referred, on which the said houses were built, and that if such flood were free to reach a corresponding level at the appellant's land, the latter would be flooded. The flap aforesaid in the outfall sewer at the inlet into it of the Ransom Road sewer would, however, normally prevent the contents of the outfall sewer from escaping into the Ransom Road sewer.

(13) There was no evidence before me save the one instance stated in paragraph 2 (11) as to how far in times of flood the water in the Ransom Road sewer rose, or to what distance towards or past the said manhole the flooding or surcharging of or in the said Ransom Road sewer or the appellant's drain, existed.

(14) There is no land in the county of London lying so low as to be below the bottom of the said outfall sewer. It was not suggested that the appellant's land could be drained into any existing sewer of the respondents' other than the said outfall sewer.

3. Upon the above facts the respondents contended that the appellant's land did not admit of being drained by gravitation into the said outfall sewer as then existing, and that the offence charged had been proved.

4. The appellant, on the contrary, contended that the offence charged had not been proved, and that it was not proved that his land was so situate as not to admit of being drained by gravitation into an

existing sewer of the respondents. That the Ransom Road sewer was such a sewer. That in fact his land was drained by gravitation into the Ransom Road sewer and also into the outfall sewer. That the respondents ought not to be heard to say that the drainage by gravitation was not proper and efficient by reason of the Ransom Road sewer being constructed and connected with the said outfall sewer, with the permission and sanction of the respondents as stated in paragraph 2 (5), or by reason of the use or management of the outfall sewer, and that the temporary non-escape in time of flood as aforesaid of the contents of the Ransom Road sewer did not prevent the land being so situate as to admit of its being drained by gravitation within the meaning of the section.

The appellant further contended that the informations and proceedings were out of time, having been laid and commenced more than six calendar months after the commencement of the erection of the buildings.

5. Taking the facts as above set out, and considering all the circumstances of the case, I was of opinion and determined :—

(1) That the ten houses above mentioned were erected by the appellant upon land of which the surface was below the level of Trinity high-water mark, and that the same were intended to be used as dwelling-houses.

(2) That during the greater part of the year the said houses admit of being and were drained by gravitation into the Ransom Road sewer, and through that into the southern outfall sewer ; but that for a substantial number of days in the year the drainage of the land upon which such houses are erected could not pass into the said outfall sewer.

(3) That the Ransom Road sewer, being a sewer of the Greenwich Borough Council, is not, but that the southern outfall sewer is, an existing sewer of the respondents' within the meaning of section 122 of the London Building Act, 1894, and that there was no other existing sewer of the respondents into which it was possible to drain the said land.

(4) That it was immaterial whether the impossibility of draining the land into the outfall sewer at certain periods, as above mentioned, was or was not due to insufficient pumping arrangements provided at Crossness by the respondents, or whether it was or was not due to the inefficiency or incapacity of the said sewer, and that for the purpose of the section the sewer and the appliances connected therewith must be taken as they existed at the time the buildings were erected.

(5) That in view of the facts and circumstances set out in para-

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graph 2 (5) above, the land, not being, and not admitting of being, constantly and effectually drained by gravitation into the outfall sewer, did not admit of being drained by gravitation into an existing sewer of the respondents within the meaning of section 122 of the said Act.

(6) That the informations were laid and the proceedings commenced within six calendar months from the erection of the buildings, and therefore within the time prescribed.

6. I, therefore, convicted the appellant in each of the said ten cases, and adjudged him to pay a penalty of £5 on each of the 10 summonses, with the further sum of £20 for costs in respect of the first summons.

7. The question upon which the opinion of the Court is desired is whether I, upon the above statement of facts, came to a correct decision in point of law, and, if not, what should be done in the premises.

The following are the material provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) :—

PART XI.

* * * * *

Section 122. It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark and which is so situate as not to admit of being drained by gravitation into an existing sewer of the Council to erect any building to be used wholly or in part as a dwelling-house or to adapt any building to be used wholly or in part as a dwelling-house except with the permission of the Council

PART XVI.

* * * * *

Section 200. Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act and shall be liable upon conviction in a summary manner to a penalty not exceeding the amount hereafter specified in connection with such offence and to a further penalty not exceeding the amount hereafter stated as the daily penalty in connection with such offence for every day on which the offence is continued after such conviction (that is to say) :—

* * * * *

(9) Every person who erects or adapts or commences to erect or adapt otherwise than in accordance with the provisions of Part XI. of this Act any building to which Part XI. of this Act relates shall be liable to a penalty not exceeding one hundred pounds and to a daily penalty not exceeding fifty pounds for every day after the conviction for the offence on which the building continues so erected or adapted without a licence or on which default is made in observing or complying with any conditions of a licence under that part of this Act.

The Appellant in person. The question is whether any infringement of section 122 of the London Building Act, 1894, has taken place by

the erection of houses, alleged by the respondents to be below Trinity high-water mark, without their leave. It has not been proved that the land on which these houses are built is so situate as to be incapable of being drained by gravitation. On the contrary, it is capable of being so drained, and is so drained, into a sewer approved by the respondents, namely, the Ransom Road sewer, as well as into an outfall sewer. The temporary flooding of the outfall sewer, which may on occasions prevent the escape of water and sewage, does not render this land less capable of being drained by gravitation within the meaning of the section. It was never intended that a particular landowner or building owner shall be prevented from draining into an approved sewer because now and then in the course of the year the water will not go out.

Moreover, these proceedings are out of time, for they have been taken more than six months after the date of the commencement of the buildings. As to the words of section 200 (9), "every person who erects or adapts or commences to erect or adapt," "or" is there a copulative, and not a disjunctive, conjunction. It unites and does not sever. The builder must commence to erect before he does erect: *Metropolitan Board of Works v. Lathey* (1884) 49 J. P. 245.

Avory, K.C., and *Daldy* for the respondents. Upon the point under section 122 no inference must be drawn in the appellant's favour by reason of his having connected his drain with the Ransom Road sewer. "Admit of being drained by gravitation into an existing sewer of the Council" means, in section 122, that the houses and land may be drained all the year round into the sewer as it exists at the time when the houses are built, not that they can sometimes be drained into it. And the magistrate finds that for a substantial number of days in the year none of the appellant's drainage can get into the respondents' sewer. Even a moderate rainfall is apt to cause this state of things as is set out in paragraph 11 (2) of the case.

Upon the point that the proceedings were commenced more than six months from the commencement of the buildings, section 200 (9) does not bear the construction the appellant endeavours to place upon it: *Metropolitan Board of Works v. Lathey* was decided upon a different statute.

The appellant was not called upon to reply.

LORD ALVERSTONE C.J. Upon the point that has been taken that these proceedings were too late, I am clearly of opinion that there is no ground for interfering with the entertaining of the case by the learned

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magistrate. Section 200 (9) says that the person who "erects or adapts or commences to erect or adapt otherwise than in accordance with the provisions of Part XI. of this Act any building to which Part XI. of this Act relates shall be liable to a penalty." It is contended that because Mr. Ellis commenced the ten houses more than six months before the laying of the information, although they were not completed until well within the six months, the six months ran from their commencement. In my opinion that would give no effect to the words "erects or adapts" as distinguished from "commences to erect or adapt." The object of what I may call the double provision is obvious: it may be necessary to wait until the houses are complete in order to see whether they fall within the section or not. On the other hand, there may be a case in which it is quite clear that what is going to be done may be an infraction of the section, and then power is given to take proceedings as soon as work of that character is commenced.

On the other point of the case, I think the learned magistrate has gone too far, that is to say, that he has applied a test which is not laid down by section 122 of the statute. Section 122 says that "it shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark and which is so situate as not to admit of being drained by gravitation into an existing sewer of the Council to erect any building to be used wholly or in part as a dwelling-house."

Now the learned magistrate has found that the ten houses which have been erected by the appellant, are on land of which the surface is below the level of Trinity high-water mark, and that therefore *prima facie* the section applies, and that they are also intended to be used as dwelling-houses. He then finds facts which I need not detail, showing that the houses are on a level which admits of their being drained by gravitation; it is not disputed that if there were no special construction or special use of the sewer in Woolwich Road the houses could be drained by gravitation into that sewer. Then he says this:—"During the greater part of the year the said houses admit of being and were drained into the said southern outfall sewer." Therefore that the condition of the houses is such that they admit of being drained by gravitation is found, because they could not admit of being drained in the ordinary sense of the word for part of the year and not for the whole of the year. But he finds that for a considerable number of days in the year the drainage of the land will not pass into the outfall sewer. Then he goes on to say that he thinks it is immaterial as to why it would not pass. It is in that respect that I think he has applied a wrong construction of the law, because the fact is that this outfall sewer being very heavily charged in times of flood, or in times of excessive or even

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moderate rainfall, so much water comes down the sewer that the flaps, which are made to shut with the pressure of the water, close the mouth of the Ransom Road sewer, so that the water cannot go out owing to the greater pressure of water in the main outfall sewer. That does not show that the house is one so situate as not to admit of being drained by gravitation. What it does show is that on those particular days the sewer is so used by the London County Council that the water will not go out. In my opinion it never was intended that the particular house owner or land owner whose houses are within the terms of the section should be prevented from draining, because on certain days of the year the sewer is so used that the water will not go out. In this respect the question of the level of the houses is immaterial, because if the level of the houses were ten feet higher, still the same objection would apply, namely, that on those days of the year the water would not go out of the sewer because it would be headed back owing to the pressure of the water in the main sewer.

I desire to say that no point is raised as to any improper connection of the drains of the houses with the Ransom Road sewer. I deal with this case solely upon the point raised, namely, that it is objected by the London County Council that because the water in the Ransom Road sewer is on a certain number of days in the year headed back by the water in the outfall sewer, therefore the houses were not capable of being drained by gravitation into the existing sewer. I think the learned magistrate was wrong and that, therefore, the appeal ought to be allowed.

LAWRANCE J.—I quite agree.

KENNEDY J.—I also entirely agree.

Appeal allowed.

Solicitor for the respondents—W. A. Blaxland.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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Nov. 16

KING'S BENCH DIVISION.

DOVER v. PROSSER.

Registration of electors—Occupation qualification—Distinction between ordinary occupation and occupation by virtue of office or service—Schoolmaster.

Upon the question whether a claimant who enjoys the use of a dwelling-house in connection with a post as officer or servant held by him is entitled to have his name inserted in Division I. of the occupiers' list as the full occupier of the dwelling-house, or in Division II. as a person entitled under the service franchise, the test is whether the occupation of the dwelling-house is in fact necessary for the performance of his services, or whether he is permitted but not required to occupy it. Accordingly a schoolmaster permitted to occupy a dwelling-house adjoining the school building, but who might live elsewhere, so long as he attended to his duties in the school during certain hours in the day, is entitled, the other necessary conditions being fulfilled, to have his name inserted in Division I.

CASE stated by the Revising Barrister for the Medway Division of the county of Kent, as follows :—

The appellant duly claimed to have his name inserted in Division I. of the list of voters as a full inhabitant occupier, and not only as a person entitled under the service franchise as a Parliamentary elector.

The name of the appellant appeared, duly qualified and registered, as a Parliamentary elector in the list in Division II.

One John Archard by his agent duly objected to the claim, and maintained that the appellant's name was only entitled to be registered in Division II. of the list.

After hearing evidence in support of and in opposition to the claim, the Revising Barrister disallowed the same and found as facts : (1) That the house occupied by the appellant was occupied by him in virtue of his service as a schoolmaster and not otherwise ; (2) that no deduction from his salary was made in consequence of his residing in the house ; and (3) that if a new schoolmaster were to be appointed in the stead of the appellant, he would presumably be entitled to reside in the house then occupied by the appellant, and that the latter would be required to vacate the house. The Revising Barrister accordingly directed that the claim should be struck out, and that the appellant's name should be retained, as before, only in Division II. of the list, on the ground that on the evidence the appellant's claim to be registered

as a full inhabitant occupier, entitled both to the Parliamentary and to the county franchise, was bad in law.

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The appellant's agreement of employment as schoolmaster was as follows :—

Memorandum of agreement made the Eighth day of March, 1901, between George Billing, Charles Reginald Smith, Frank West, and William Cuthbert Lewis, managers of the Platt St. Mary's National School, at Platt, in the county of Kent, on behalf of themselves and their successors (all of whom are hereinafter referred to as the Managers), of the one part, and Arthur John Dover, of———, schoolmaster (hereinafter called the teacher), of the other part, whereby it is agreed as follows :—

1. The teacher shall serve as schoolmaster of the said school from the 13th day of July, 1901, and shall teach the scholars and conduct the said school in accordance with the requirements of the Committee of H.M. Privy Council on Education, and in accordance with the regulations (if any) from time to time established by the Managers, and shall teach and instruct the pupil teachers of the school for the hours and in the various subjects required by the regulations for the time being of the said Committee of H.M. Privy Council on Education, and shall give such religious instruction to the children at the times appointed on week days, and shall also instruct the pupil teachers in religious knowledge for not less than an hour every week if so requested by the clergyman of the parish.

2. As remuneration for the services of the teacher the Managers shall pay to the teacher the sum of £105 per annum by 12 monthly payments on the last day of each month.

And also half the pupil teachers' grant earned by each pupil teacher, such sum to be paid on receipt of the annual Government grant.

And also shall provide a house and garden for occupation by the teacher and his family with efficient drainage and good water supply, and shall keep the same in good tenantable repair and condition, and shall pay all rates, taxes, and outgoings in respect thereof, and shall also provide the necessary fuel and light to be consumed in the school-house.

3. On the termination of this agreement, the Managers shall pay to the teacher a proportionate share of the teacher's remuneration, from whatever source derived, calculated down to the date of such termination.

4. The Managers, in the management of the said school, shall perform and do with due diligence all acts and things necessary and proper to qualify and entitle the school to earn and the Managers to receive all grants and fees which the school may be competent to

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5. The trust deeds, charters, bye-laws, rules, or other instruments defining the foundation and governing the management of the school, and so much of the minutes of the proceedings of the Managers as relate to the appointment, remuneration, dismissal, and duties of the teacher, shall be open to the inspection of the teacher at all reasonable times, and he shall be entitled to make copies thereof or extracts therefrom without charge.

6. The holidays of the said school shall not be less than eight weeks in each year.

7. This agreement may be terminated after three calendar months' previous notice in writing has been given by either party hereto to the other, and if such notice be given by the Managers it shall be given in accordance with a resolution passed at a meeting convened by notice sent to every Manager four days at least before the meeting, stating that the termination of the teacher's agreement will form part of the business of such meeting; but this agreement shall not be terminated by the Managers unless the cause be stated to the teacher in writing, and such termination shall not be valid if the cause or causes assigned relate to the performance or abstention from any duties other than those connected with the subjects named on the time table of the school or with the instruction of the pupil teachers.

Provided that nothing shall prevent the termination of this agreement in the event of the archbishop or bishop of the diocese deciding the teacher's conduct to be inconsistent with, or detrimental to his position as a teacher in a Church school.

By leave of the Court a letter signed by the Chairman of the Managers of the school to the effect that the appellant was not required to live in any particular house was taken as being in evidence.

H. Lynn and T. A. Organ for the appellant. No part of the appellant's duties as a schoolmaster was performed in the dwelling-house in which he resided, but the fact of the permission to reside there was considered in his salary. The rooms used as a school are distinct from the dwelling-house, although they form part of the same structure. The matter turns in a great measure upon the wording of the Revising Barrister's finding in the case. There is no express finding that the appellant is required to reside in any particular house; nor is this the case of such a person as a coachman required to live over the stables as part of his service. The last paragraph of the judgment of Wills J. in *Marsh v. Estcourt* (1889) 24 Q. B. D. 147; 59 L. J. Q. B. 100, is singularly in point here, and shows the essential differences between a

requirement to live in a particular place for the performance of duties and a permission to live there as a reward for services, but without any requirement. *Hughes v. Chatham Overseers* (1843) 5 M. & Gr. 54; 13 L. J. C. P. 44, is to the same effect. *McClean v. Prichard* (1887) 20 Q. B. D. 285, is somewhat against this proposition, but is distinguishable from the present case. Here there is no compulsion whatever upon the appellant to reside in this particular house; he can live fifty miles away so long as he is in the school from 9 a.m. to 4 p.m.

[*Petersfield Petition* (1874) 2 O'M. & H. 94, and *Smith v. Seghill Overseers* (1875) L. R. 10 Q. B. 422; 44 L. J. M. C. 114, were also referred to.]

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. In this case we are of opinion that the appeal must be allowed. The governing test in such cases as this, is whether or not the occupier of the particular house and premises which the person claiming to be a voter did in fact occupy was necessary for the performance of his services, or whether he was permitted but not required to occupy them. That where there is a mere permission, but not a requirement, or obligation to reside in a particular house, the occupier is not precluded from claiming to be placed as a voter on Division I., follows from the judgment of Wills J. in *Marsh v. Estcourt* (1889) 24 Q. B. D. 147; 59 L. J. Q. B. 100, where he says at p. 151 of the Law Reports:—"In the case referred to by the learned counsel for the respondent the occupation was admitted to be occupation by virtue of service. Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service." That I think goes far enough.

In the same way Mellor J. in the *Petersfield* case (1874) 2 O'M. and H. 94, at p. 98, instances the case of a gamekeeper who had such and such weekly wages and a cottage situate in the midst of his master's preserves which he occupied for the very purpose of his duties as a gamekeeper; in such a case the keeper would not occupy as a tenant but in fulfilment of the requirements of his duties. I draw attention to these decisions because it is clear there are two classes of cases, and the question now before us is within which category the present claim falls. The Revising Barrister has not stated as a fact that the appellant might reside elsewhere, but I think he has stated it sufficiently to allow such a fact to be implied, because he says in the finding No. 3: "If a new schoolmaster were to be appointed in the stead of the appellant he would *presumably* be entitled to reside in the house then occupied by the appellant."

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Supposing the appellant found the rooms too small for his accommodation, there is nothing in the agreement to compel him to reside in them, nor anything compelling him, as schoolmaster, to reside in that particular house. I am of opinion, therefore, that the Revising Barrister did not mean to find as a fact that the appellant was required to reside in the particular house, or that his duties as schoolmaster required him to do so, or necessitated such residence.

Under these circumstances the case falls within the authority of *Marsh v. Estcourt* and others of that character, and the appellant is entitled to the vote, and therefore entitled to have his name inserted in Division I. as a full inhabitant occupier.

KENNEDY J. I agree.

DARLING J. I agree.

Appeal allowed.

Solicitors for the appellant—Baker and Nairne.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

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Dec. 7, 8.

LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.

Metropolis—Gas—Testing on Sundays—“Daily”—Right of County Council to sue—Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. cxxx.), ss. 7, 9, 15.

The London County Council, as successors of the Metropolitan Board of Works, were empowered by a series of Acts of Parliament, commencing in 1869, to appoint gas examiners to make “daily” testings of the defendant company’s gas in respect of illuminating power and purity. There was no express exclusion of or reference to Sundays in any one of the Acts, but it appeared that throughout the period from 1869 to 1903, when the London County Council first claimed the right to test on Sundays, the practice had been to test on week days only.

Held, that the primâ facie meaning of “daily” is “every day of the week,” and that no artificial meaning for the word had in the circumstances of this case been created by the practice which had hitherto obtained.

Yewens v. Noakes (1880), 50 L. J. Q. B. 132, distinguished.

Held also, that an action lay by the London County Council as plaintiffs to enforce the right of the gas examiners to test on Sundays.

Decision of Joyce J., 1903, 2 Ch. 532; 1 L. G. R. 501; 72 L. J. Ch. 536, affirmed.

APPEAL by the defendant Company against a decision of Joyce J., reported 1 L. G. R. 501.

The action was brought by the London County Council claiming a declaration that the gas examiners appointed by them under the powers vested in them by the South Metropolitan Gaslight and Coke Company’s Act, 1876 (39 & 40 Vict. c. ccxxix.), and the Local Government Act, 1888, were entitled at each appointed testing place to make daily (including Sundays) such number of tests as the gas referees had prescribed or should prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing place by the defendant Company were such as were respectively prescribed under the special Acts of the defendant Company.

The defendant Company, which was originally formed in 1834, had carried on its business under a series of Acts of Parliament, the material sections of which (some now repealed) are as follows:—

The South Metropolitan Gaslight and Coke Company’s Act, 1869 (32 & 33 Vict. c. cxxx.), s. 3, defines “day” to mean (except

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in that section) "twenty-four hours, reckoned from nine o'clock in the forenoon of one day to nine o'clock in the forenoon of the next following day, so much of each day as is before nine o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week."

Section 15, also still not repealed, provides: "The Board of Trade shall, as soon as may be after the passing of this Act, appoint three competent and impartial persons, one at least of them having practical knowledge and experience in the manufacture and supply of gas, who shall be called the gas referees (and who are in this Act referred to as the referees), and in case of a vacancy happening among them by death, resignation, or otherwise, shall appoint a competent and impartial person to fill the vacancy, one at least of the three being always qualified as aforesaid."

Section 30 provides for the appointment of gas examiners by the Metropolitan Board of Works, now the London County Council.

The following sections of the same Act, though repealed by the Act of 1880, were material to the question in the case:—

Section 32: "A gas examiner shall at each testing place test daily the illuminating power and purity of the gas supplied by the Company, and in the event of the same being ascertained to be defective in either particular he shall forthwith give notice thereof to the Company."

Section 33: "There shall be testings of illuminating power made three times at least each day, and at intervals of not less than one hour, between the hours of five o'clock and ten o'clock in the afternoon in the months of October to March, both inclusive, and between the hours of eight o'clock and eleven o'clock in the afternoon in the months of April to September, both inclusive, and nothing in this Act shall authorise the referees to prescribe fewer testings than those directed by this section."

Section 36: "Each gas examiner shall on each day make and deliver a report of the result of the testings conducted by him on the immediately preceding day to the Metropolitan Board of Works, and to the chief gas examiner and to the Company, and the books kept by a gas examiner for recording the results of the testings by him shall be open at all reasonable times to the inspection of the Company without payment."

Section 55: "If on any day the gas supplied by the Company from any station is of less illuminating power than it ought to be under this Act, the Company shall forfeit a sum equal to the value of the defective power, estimated at the rate of twenty shillings for every half-candle of defective power, on every one hundred thousand cubic

feet or any fractional part less than one hundred thousand cubic feet of gas, whether cannell or common, respectively delivered from the station on the day of default."

Section 56: "If on any day the gas supplied by the Company from any station is of less purity than it ought to be under this Act, the Company shall forfeit a sum not exceeding fifty pounds for each station in respect of which they are so in default."

Similar provisions with the use of the words "daily" and "each day" were contained in sections 41, 44, and 49 of the South Metropolitan Gaslight and Coke Company's Act, 1876 (39 & 40 Vict. c. cccxix.).

The Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. clxxxi.), contains the following material provisions:—

Section 7: "A gas examiner shall at each testing place make daily such number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing place by the Company are such as are respectively prescribed under the special Act. Provided that the tests for illuminating power shall be taken at intervals of not less than one hour.

"And in the event of the gas being ascertained to be defective in any such particular, such examiner shall forthwith give notice thereof to the Company."

Section 9: "The average of all the testings at any testing place on any day of the purity of the gas supplied by the Company at such testing place shall be deemed to represent the purity of such gas on that day at such testing place.

"Provided always, that if on any one day the gas supplied by the Company at such testing place is of less purity than it ought to be under the special Act, the average of all the testings made at such testing place on that day and on the preceding and on the following day shall be deemed to represent the purity of such gas on such one day at such testing place."

Section 15: "If on any one day the gas supplied by the Company at any testing place is of less purity than it ought to be the Company shall forfeit a sum not exceeding fifty pounds for each occasion on which they are so in default.

"Provided always, that the controlling authority of any testing place having recovered one forfeiture in respect of excess of impurity in the gas supplied by the Company at one testing place on any day shall not be entitled to any further forfeiture in respect of excess of impurity in the gas supplied by the Company at any other testing

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place of such controlling authority on the same day; and provided also, that the average of the testings made at such testing place on that day and on the preceding and on the following day shall be deemed to represent the purity of such gas on such one day at such testing place."

It appeared that throughout the whole period from 1869 no testing had ever been made by either the Metropolitan Board of Works or their successors, the plaintiffs, on a Sunday. The plaintiffs now desired to test on Sundays, and the defendant Company denied their right to do so.

Joyce J. decided in the plaintiffs' favour, and made a declaration accordingly: see 1 L. G. R. 501.

The defendant Company appealed.

Upon the opening of the appeal two points were raised which were not taken in the Court below, in addition to the question of the meaning of the word "daily," namely, first, that a new obligation or duty had been created by statute and a penalty imposed for a breach of it, and that therefore the penalty was the only remedy, and the plaintiffs were not entitled to enforce the discharge of the duty by means of an action, and that the Court had no jurisdiction to entertain the action; secondly, that, if an action could be maintained, the London County Council were not the proper plaintiffs. The action was brought to enforce the performance of a public duty, and in such a case the Attorney-General was the proper plaintiff.

On the first of these new points counsel for the appellants referred to the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), which, by section 1, is to be construed together with the Gasworks Clauses Act, 1847, as one Act, and by section 34 provides: "The undertakers shall give to the gas examiner and to his assistants, and to every local authority within the limits of the special Act, and their agents, access to the testing place, and shall afford all facilities for the proper execution of this Act; and in case the undertakers make default in complying with any of the provisions of this section they shall for every such default be liable to a penalty not exceeding five pounds to the local authority or to the persons making the application"; and counsel for the respondents relied on the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), which by section 2 incorporates the Gasworks Clauses Act, 1847, and by section 3 applies to the defendant Company, and by section 55 provides: "Provided, that no special remedy or provision for giving relief to any person given by this Act shall prejudice or diminish the general jurisdiction of any of Her Majesty's Superior

Courts of Law or Equity over or with respect to the acts or defaults in respect of which the special remedies or provisions are so given."

In reference to the second of these new points counsel for the respondents referred to a number of sections in the Act of 1880, which it is unnecessary to set out in detail, as showing that the Metropolitan Board of Works, and now the London County Council as their successors, were entrusted with the complete control and management of the testings and testing stations.

Warrington, K.C., Lord Robert Cecil, K.C. (L. Rostron with them), for the appellant. The points taken by the appellants are—

(1) That on the true construction of section 7 of the Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880, the word "daily" means on working days, and does not include Sundays; (2) that the Court has no jurisdiction to deal with the case, as the action is brought to restrain interference with the gas examiners' right of access to testing places, such right being conferred by section 34 of the Gasworks Clauses Act, 1871, which prescribes a penalty recoverable before the magistrate for its infringement; (3) that the County Council have no cause of action, as the gas examiners, whose rights alone are alleged to be infringed, are not their servants or their agents. Section 7 of the Act of 1880 is substantially a re-enactment of section 41 of the South Metropolitan Gaslight and Coke Company's Act, 1876, which was substantially a re-enactment of section 33 of the same Company's Act of 1869. Therefore "daily" testing has been imperative by statute ever since 1869, but until the autumn of 1902 it has been the universal practice of the gas examiners to test on every week day, but never on Sundays or Bank Holidays. Sunday has been regarded as a *dies non*. This fact is admitted, and the only possible explanation is that in practice the word "daily" in these Acts has acquired the meaning of "on working days" only. Under those circumstances the principles laid down by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*, 1891, A. C. 531, at p. 591; 61 L. J. Q. B. 265, and Thesiger L.J. in *Yewens v. Noakes* (1880) 50 L. J. Q. B. 132, at p. 135, viz., that when Parliament in an Act which repeals and re-enacts a prior Act in *pari materia* uses an expression which in the prior Act has in practice acquired a particular meaning, they must be assumed to use that word in its received meaning, should be applied to this case, and the word "daily" in the Act of 1880 should be construed according to the meaning which had in practice been given to it in the earlier Acts. The policy of the Legislature is against ordering labour on Sundays: see the Sunday Observance Act, 1677 (29 Car. II. c. 7). The plaintiffs' claim involves "Sabbath-

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breaking": 4 Blackstone's Commentaries, p. 63. The Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), s. 43, expressly excludes Sundays. The construction contended for by the appellants has been adopted by the Company, the Metropolitan Board of Works, and in a metropolitan police-court. It is conceded that the *prima facie* meaning of the word "daily" is to include Sundays, but a word in a statute may by the force of surrounding circumstances be construed in some other than its *prima facie* meaning: see remarks of Turner L.J. in *Hawkins v. Gathercole* (1855) 6 De G. M. & G. 1; 24 L. J. Ch. 332. The expression "daily" is not one that admits of only one interpretation. It may mean "on working days," as in "Daily News," "Daily Cause List." If it was intended to include Sundays, words would be put in to that effect. It is conceded that the Company supply gas on Sundays as on week days, and that the consumer is as much entitled to good gas then as on any other day. But in point of fact the greater part of the gas supplied on Sunday is made in the week, and is subject to the week day tests, and the public have gone without Sunday testing for 34 years without complaint.

The second point was not taken below, but the Court are bound to regard a question of jurisdiction whenever taken: *Barraclough v. Brown*, 1897, A. C. 615; 66 L. J. Q. B. 672. In that case the House of Lords would not even make a declaration. Section 34 of the Gasworks Clauses Act, 1871, gives the gas examiners a right of access to the testing places, and makes the undertakers liable to a penalty of £5 for interfering with this right. This Act applies to the South Metropolitan Gas Company: *Commercial Gas Company v. Scott* (1875) L. R. 10 Q. B. 400; 44 L. J. M. C. 171; *South Metropolitan Gas Company v. Noakes* (1889) 61 L. T. 556; *Dudley Gas Company v. Warmington* (1881) 50 L. J. M. C. 69, and by sections 2 and 4 of the Act of 1880 that Act and all the previous Acts applying to the Company are to be construed together as one Act. Therefore section 34 of the Act of 1871 applies to the testing carried on under the Act of 1880, and according to the well-known principle of *Devonport Corporation v. Tozer*, 1903, 1 Ch. 759; 1 L. G. R. 421; 72 L. J. Ch. 411, and *Institute of Patent Agents v. Lockwood*, 1894, A. C. 347; 63 L. J. P. C. 74, the only remedy open to the County Council is to sue for the penalty given by section 34 of the Act of 1871, and the High Court has no jurisdiction to grant relief, or even to make a declaration: *Barraclough v. Brown* (*supra*). The effect of the incorporation of Acts has been discussed in *Attorney-General v. Leeds Corporation* (1870) L. R. 5 Ch. 583; 39 L. J. Ch. 711; *Attorney-General v. Great Eastern Railway* (1873) L. R. 6 H. L. 367; and *Canada Southern Railway v. International Bridge Company* (1883)

8 App. Cas. 723. Thirdly, this action is brought solely to protect the rights of the gas examiners. The gas examiners, though appointed and paid by the London County Council, take their orders from the gas referees and the statute itself: see Acts of 1876 and 1880. They are, therefore, not the servants or the agents of the London County Council, and the latter have no cause of action, as the Attorney-General alone can sue for the protection of public rights.

Hughes, K.C., and *T. T. Methold* for the respondents. The obligation to supply and the obligation to test must be co-extensive. Neglect to enforce does not take away a right. The Act of 1880 is a legislative order to the London County Council as to their duty of testing. In the absence of express provision to the contrary, Sunday is to be regarded as the same as any other day of the week: *Peacock v. The Queen* (1858) 4 C. B. (N. S.) 264; 27 L. J. C. P. 224, per Byles J.; *Rawlins v. West Derby Overseers* (1846) 2 C. B. 72; 15 L. J. C. P. 70; *Ex parte Simpkin* (1859) 2 E. & E. 392; 29 L. J. M. C. 23; *Calder and Hebble Navigation v. Pilling* (1845) 14 M. & W. 76; 14 L. J. Ex. 223. The purity test takes about 15 hours to carry out, and must be commenced between 9 a.m. and 5.30 p.m. so as not to extend over more than one day as defined by section 3 of the Company's Act of 1869. There is no ground in this Act to suggest that "daily" does not include Sundays.

As to the jurisdiction, there is an obligation imposed without a penalty by the Gas Company's Act of 1869, and the imposition of a penalty by the later Act of 1871 does not take away the right of action already existing. The three classes of cases in which a liability may be established by statute are pointed out in *Wolverhampton New Waterworks Company v. Hawkesford* (1859) 6 C. B. (N. S.) 336, 356; 28 L. J. C. P. 242, 246. The penalties imposed by sections 55 and 56 of the Act of 1869 do not apply to the refusal of access to the testing stations. The control and management of the testing stations were vested in the Metropolitan Board of Works. Further, whatever force there might otherwise be in the second point is entirely taken away by section 55 of the Act of 1860, which is as applicable to this Company as is section 34 of the Act of 1871: *Commercial Gas Company v. Scott* (1875) L. R. 10 Q. B. 400; 44 L. J. M. C. 171.

As to the third point, the London County Council have the control of the testing. As the controlling authority, it is their duty to see that the examiners do what is necessary, and the only way is to ensure that the examiners have proper access to the testing stations at all convenient times. Otherwise the Act becomes a dead letter. It is not for the London County Council to say in what way the tests are

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to be carried out, but subject to that the examiners are under their control: see the Act of 1880, ss. 2, 5, 6, 10, 11, 12, 13, 14, 15, and 16. *Warrington, K.C.*, in reply, admitted that the second point taken for the appellants could not be sustained in the face of section 55 of the Act of 1860.

VAUGHAN WILLIAMS L.J. On this appeal we have nothing to do with the question whether the practice of having no tests on Sundays is a convenient practice or a practice which is advantageous to the public. That is not the question for us. The practice of having no tests on Sundays has existed for a long time, but that is no reason why the Court should depart from the plain construction of the Act of Parliament, unless the practice had been of such a nature that the Court ought to impute to the Legislature the knowledge of it when it passed the subsequent Act which has been referred to. In my judgment the present case is not such a case. All the Court has now to do is to construe section 7 of the Act of 1880. Now I cannot doubt that, according to their natural and their *prima facie* meaning, the words "make daily such number of tests" mean making tests every day inclusive of Sunday. I am not at all saying that one might not have an Act of Parliament in which these words were used and yet might admit of being differently construed, either by reason of the subject matter of the Act itself or by reason of the contents of the Act taken as a whole. But that is not the case here. Both under the general Act, the Gasworks Clauses Act, 1847, and under subsequent Acts, including the Company's special Act of 1880, the obligation to supply gas of the proper illuminating power and proper purity is a continuing obligation which has to be performed every day in the week; and in the nature of things there is just as much necessity for having the illuminating power and quality of the gas tested upon a Sunday as on any other day. Under those circumstances, having regard to this continuing nature of the obligation on every day, including Sundays, I cannot doubt that the words to "make daily such number of tests," and so on, are words which apply to Sundays as well as to any other day of the week.

That being so, the only question is whether the Court ought to construe those words differently by reason of the practice which has in fact been maintained all these years since, at all events, 1869, and it may be, for aught I know, since 1847. Cases have been cited to show that sometimes you are not only entitled, but bound, where you find an Act of Parliament passed with reference to a matter upon which there has been a succession of Acts running upon the same lines, to take into consideration the previous practice under those

Acts. The strongest case, probably, of this sort is *Yewens v. Noakes* (1880) 50 L. J. Q. B. 132, on appeal from the Exchequer Division. In that case there was living in a house not only the caretaker himself, but also his wife and family, and the question being whether that occupation came within the exemption from inhabited house duty in the Customs and Inland Revenue Act, 1869 (32 & 33 Vict. c. 14, s. 11), Thesiger L.J. said, "Whilst it is true that we ought not to construe an Act itself by looking at the practice which has taken place in carrying the Act out, it is equally true that we are entitled to construe a subsequent Act not only with regard to the actual words used, but also to the practice which had grown up and existed at the time the subsequent Act was passed." That, no doubt, is a strong authority for saying that such practice may, in a case like that which Thesiger L.J. is describing, be taken into consideration in construing an Act of Parliament, and I do not propose to depart from that proposition or to whittle it down in any degree. But what does the Lord Justice mean? Does he mean every practice by persons who had a statutory duty thrown upon them, and who for a considerable number of years, or a long period, have neglected to perform that which, according to the natural construction of the words, would be their duty? I think not. I do not think that the Lord Justice meant to say that one is always to impute to the Legislature a knowledge of the neglect of their duty by those who have a statutory obligation imposed upon them. If such an imputation is not to be made in all cases, in what cases is it to be made? I think it is to be made in those cases in which it is reasonable to impute such a knowledge to the Legislature. A case in which it is very usually done is this: It has often happened that upon the antecedent or earlier Acts in similar frame and dealing with the same subject matter, the actual question of the interpretation of a section or of particular words in such Act has come into Court for decision, and the Court has put a construction upon the words in the earlier Act; and then you find that the Legislature uses the same words in the later Act. In that case, however doubtful in itself the construction of the words, it cannot be supposed that the Legislature passed the subsequent Act without knowledge of the previous decision upon the same words in previous Acts. Take again the actual case in *Yewens v. Noakes*. The knowledge there sought to be imputed to the Legislature was the practice of a public department in respect of inhabited house duty. One can quite understand that the practice of public departments might be supposed to be within the knowledge of the Legislature, but in my opinion we ought not to carry that view so far as to say that the Legislature must have had within its knowledge

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and view the practice of the examiners as to holding no tests on Sundays. Under these circumstances it seems to me that we have no choice but to affirm the decision of Joyce J., and to hold that these words in the Act of 1880 include Sundays as well as every other day.

Other points have been made which it is not necessary to go into, because matters were called to our attention by counsel for the respondents which dispose of those points. I am not sure myself that the pleading is so drawn as to cover the case which is now made on behalf of the County Council; but even if it is incorrect in form, I think we ought to disregard that, because counsel for the respondents has stated, without any contradiction from the other side, that the question which both parties intended and wished to have decided here was whether or not these testings could and ought to be held under the statutes on Sundays. That being so, we shall make any necessary alteration in the form of the prayer in the statement of claim. I think we are bound to hold that the testings ought to be made, and must be made, under the terms of the statute, on Sundays as well as on week days.

ROMER L.J. I am also of opinion that this appeal fails. Upon what I may call the main question, it appears to me to be clear that the decision of Joyce J. is correct. Whether we look at the defendant Company's special Act of 1869, or at the Act of 1876, or at the Act of 1880, it appears to me to be clear, on the construction of those Acts, that the word "daily" means what it says, and does not exclude any particular day like Sunday. On the Acts themselves, if there were nothing but the Acts to construe, I do not really think that any substantial argument on behalf of the appellants could be or has been addressed to us. The gas has to be supplied on Sundays as well as on other days, and there is just as much reason why the gas should be good and of proper purity and so forth on Sunday as on any other day. Why, then, should it not be tested on that day as well as on any other day? Nor can I see why, under these Acts, any distinction should be attempted to be drawn between any days in the week—between, say, the day from Tuesday morning at nine o'clock to the following Wednesday morning at nine o'clock, and the day from Saturday morning at nine o'clock to the following Sunday morning at nine o'clock, or the day from Sunday morning at nine o'clock to the following Monday morning at nine o'clock. I take the hour of nine because, under the Acts, the days are defined with reference to the interval between nine o'clock on one day and nine o'clock on the following day.

The only question—and this is the real basis of the argument for

the appellants—is whether the plain meaning of the Act of Parliament can be departed from in the later Acts because a practice had grown up of not making the tests on Sundays, or because, as I understand, a police magistrate may have decided a case which implied that testing on Sunday was not, in his opinion, obligatory under the Act. I think the answer is, Clearly not. There is nothing from the fact of that practice and that decision which would justify us in saying that when the Legislature passed the Acts of 1876 and 1880 it did not intend to enact what it had previously enacted in 1869, and to have the word “daily,” as used in those subsequent Acts, used in exactly the same sense as it is used in the Act of 1869.

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With regard to the other two points which were for the first time taken on this appeal, I can only say as to one of them that I am clearly of opinion that the County Council is entitled to sue. It was suggested that the County Council had no sufficient interest in the subject matter of this action to justify its being made plaintiff. But the County Council is the controlling authority under the Acts, and, in particular, it has the control and management of the testing stations committed to it. And why? Clearly in order to enable it to carry out the duties and obligations cast upon it as a controlling authority. Now it appears to the County Council that, gas being delivered on a Sunday, it ought also to be tested on a Sunday, according to the words of the Act; but it finds that the gas examiners, the testing operators, are not allowed by the defendant Company to go to the testing stations, which are under the control and authority of the County Council. The County Council, having the control, finds that but for the interference of the defendant Company the testing would go on, the testers being quite willing and ready to go there. In fact, wishing to act according to its duty as controller of the testing stations, it is prevented from allowing the testers to go there because the defendant Company chooses to say that no tests shall be made on the Sunday, and that no person, except the Company itself, shall have any access to the testing stations on Sundays. It appears to me that the County Council has sufficient interest, obligations and rights, to justify it in coming to this Court and seeking for an injunction to restrain the defendants from practically excluding the County Council and the testers from the testing stations; and that, in substance, is the nature of this action, the real question being that which we have decided, namely, whether, according to the Act of Parliament, the testings ought to go on at all on Sundays.

The second technical point which was here taken on behalf of the appellants seemed to me to have something of substance in it until it was disposed of by reference to section 55 of the Act of 1860.

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It appears to me, therefore, that this appeal wholly fails, and should be dismissed.

STIRLING L.J. I am of the same opinion. I agree with what has been said by Joyce J. in the Court below and by my brethren here upon the main question which is raised by this action, namely, whether the word "daily" includes Sunday; and I do not think that I can usefully add anything to what has been said by them.

With regard to the points which have been raised for the first time in this Court, the point of most substance is that which would exclude the jurisdiction of the Court by reason of the penalty being attached by section 34 of the Gasworks Clauses Act, 1871, to a refusal on the part of the Gas Company to give proper access to the testing stations. But when section 55 of the Metropolis Gas Act, 1860, is referred to, it appears that the jurisdiction of the Court is preserved, and it was really admitted by counsel in reply that that section affords an answer to the argument based on the Act of 1871.

The other question is whether the London County Council is the proper plaintiff in the present action. Now I agree with what has been said by my Lord that that is not an objection to which effect ought to be given having regard to what took place at the hearing in the Court below. I also agree with what has been said by Lord Justice Romer, and, if it were necessary to decide it, I should be of opinion that the London County Council is the proper plaintiff. The Act of Parliament entrusts to the County Council the control and management of the testing places, materials, and apparatus provided by the Company, and it seems to me that, so far from the Company being entitled to control those places, the view taken by the Acts—especially the Act of 1880—is that everything which is necessary to be done for carrying into effect the directions of the Act with respect to testing shall be dealt with by the controlling authority, namely, the London County Council, and not by the Company. That to my mind is made very strong by section 10 of the Act of 1880, which, whilst it gives the Company the power if it thinks fit to be represented by an officer at each testing, provides: "The controlling authority shall state at what times it is proposed to make such testings on any particular day upon receiving a request in writing from the Company in the forenoon of the previous day." That seems to me to show that it is for the Company to apply to the controlling authority, the London County Council, for the purpose of giving effect to this portion of the Act, and that the Company has no power of excluding the controlling authority and the persons authorised by them from the testing stations which have been established under the Acts.

It seems to me that in this case there was a clear interference by the defendant Company with the control and management which is by statute vested in the London County Council. I think, therefore, that the appeal fails, and ought to be dismissed.

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Appeal dismissed.

Solicitors for the appellants—Hicklin, Washington, and Pasmore.

Solicitors for the respondents—W. A. Blaxland.

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COURT OF APPEAL (No. 2).

Oct. 31.
Nov. 6, 7.

WILKINSON v. LLANDAFF AND DINAS POWIS RURAL DISTRICT COUNCIL.

Sewers—Open channel for surface water—"Drain"—"Sewer"—Nuisance—Scavenging and cleansing—Cleansing of cesspools—Liability of local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 19, 21, 42, 42.

A channel or open drain for surface water was constructed between a road and the adjoining pathway and received the surface water from this road and rain water from adjacent houses. In front of two houses in the road was a cesspool receiving the sewage from these houses from which sewage accidentally overflowed or percolated into the channel and caused a nuisance. The local authority had contracted for the cleansing of cesspools in the district under section 42 of the Public Health Act, 1875.

Held, by Phillimore J., that the local authority having committed the cleansing of this cesspool to a contractor were not liable for its not being properly emptied.

Held also, by Phillimore J. and by the Court of Appeal, that the open channel was a "sewer" within the definition in section 4 of the Public Health Act, which vested in the local authority under section 13, and that they were responsible for its cleansing under section 19.

Kinson Pottery Co. v. Poole Corporation, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819, discussed.

APPEAL from the decision of Phillimore J. at the trial of the action.

The action was brought in the Chancery Division claiming damages and an injunction against the defendant Council on account of their neglect to cleanse a certain cesspool and to remove sewage matter from a channel in Millbrook Road, Dinas Powis.

The plaintiff was the occupier of a house called "Thornleigh," in Millbrook Road, in the defendants' district. There were other houses in the same road. The road was under the control of the defendants, and between the carriageway and footway, which was raised slightly above the road and formed of stone, gravel, and ashes, was a channel, gutter, or surface drain, which carried off surface water from the road and rainwater from the roofs of the adjacent houses. The channel was not curbed and was formed where the slope of the road met the raised footpath. There were gratings or gullies in the channel for the discharge of water into an underground conduit.

In front of two houses in Millbrook Road, called "Rosedene" and "Thistledene," was a cesspool taking the sewage matter from these houses. The defendants, under section 42 of the Public Health Act,

1875, had entered into a contract with a contractor for the cleansing of cesspools in this part of their district. There had been some difficulty in keeping the cesspool in front of "Rosedene" and "Thistledene" duly cleansed, and the occupier of "Thistledene" had served a notice on the defendants under section 43 of the Act requiring them to cleanse the cesspool.

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In consequence, as was alleged, of the neglect of the defendants to cleanse the cesspool sewage accumulated therein and overflowed or percolated into the channel, and, by reason, as was alleged, of a difference in level between the grating or gully opposite "Thornleigh" and this channel, accumulated there and caused a nuisance which made the plaintiff's child ill. It was in respect of this illness that damages were claimed by the plaintiff.

The action was tried at the Cardiff Assizes in March, 1903, before Phillimore J., who gave the following judgment:—

I have considerable doubt in this case but upon the whole, I think, my judgment must be for the plaintiff to a limited extent.

On the facts I think, and I so hold, that the plaintiff has made out the chain of circumstances which led to his child being ill and that he has been put to some expense. I daresay that a great deal of trouble was taken to empty this cesspool, and I strongly believe that it is much too small a cesspool for the work that it is supposed to do and that very likely the local authority would be within their rights in requiring that it should be made very much larger by the owners of the houses to which it belongs. Very likely owing to their very cleanliness and their habit of using both water and soap and water they fill it up very quickly. It is obvious that it is filled up extremely quickly and that it must be a great difficulty to any local authority or contractor to keep it empty. But I have no doubt after hearing the evidence that, whatever attempts were made to keep it clear, it was not kept below the level of the cement. Therefore, I think that, from time to time sewage matter in that cesspool has been allowed to rise above the line of the cement and has trickled through the earth under the wall and the orifice where the little rain water pipe is, and has got over the path into the channel which runs between the path and the crown of the road, and formed in pools wherever there is any irregularity in that channel, and unfortunately half-way in front of the plaintiff's door, and that his child had an illness in consequence. I think the plaintiff has put his damages at a reasonable figure when he says £30.

But several very difficult questions of law arise. I come to the conclusion in favour of the defendants that there is no duty on their part to keep this cesspool empty. I read section 43 as a remedy only given to the householder whose cesspit is not properly emptied, and it

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is out of the question here to argue that if there is any duty on the local authority to empty the cesspool the common law will make them liable in damages for not doing it ; but I can find no duty on them to empty this cesspool at all. They are not within London, as to which there are special provisions. I do not know that it makes any difference but they are not an urban authority—they are merely a rural authority—and section 42 which applies apparently both to urban and rural authorities, only requires the authority to cleanse a cesspool when the Local Government Board orders it. But here there has been no such Order by the Local Government Board. They may voluntarily undertake the liability, and they may voluntarily arrange that some contractor should do it for them. They have not undertaken it, but they have employed a contractor to do it for them. That being the case, it seems to me that their only liability, so to speak, is a political one. If they do not get a contractor who will do the work properly the members of the district council will be turned out and properly turned out at the next election. If they have a contract with a substantial man and a proper contract, I do not think they are liable for anything which the contractor fails to do.

Then it is suggested by counsel for the plaintiff that this is not a contract but that the contractor is their servant. It seems to me that this is as full a contract as one could possibly expect in the circumstances. A regulated power of a certain kind is given to the inspector of the district council and certain cumulative powers are given to him, but the contractor contracts absolutely to remove as often as necessary from every cesspool all refuse and filth. I think, therefore, this is a proper contract and that there is no liability under section 42. Therefore I think there is no legal responsibility upon the district council as things are now to keep this cesspool free from overflowing. Having once started upon the process of employing a contractor, I presume that they must always find a contractor or undertake it themselves. They have found a contractor and that is all they have to do.

Then I thought that the case was gone for the plaintiff, but his counsel has taken a point in reply which I think was open to him.

He says :—" We have this channel between the raised ash path and the crown of the road running a certain distance with gullies from time to time in the channel conveying what flows down it into subterranean pipes, and I say this is a 'sewer' within the meaning of section 4 of the Public Health Act." It is quite possible that the result of amalgamating the highway authority and the sanitary authority by reason of the Local Government Act, 1894, has produced a consequence which Parliament never intended. No doubt, originally,

highway drains at the side of the road were expressly intended to be excepted from the definition of "sewer" by the words "except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." But now, at any rate, the two authorities are one, and, at any rate, here it is admitted that the channel is vested in the local authority, and I think it is a sewer. It is rather an artificial extension of the word "sewer" but after all the word "sewer" did not originally mean that which carries sewage. "Callis on Sewage" is a book known to some of us as a great authority on the subject and it does not deal with anything which relates to foul matter at all, but it deals with great arterial drains for draining marshes, wet places, and low-lying lands, and that was the meaning of "sewer." The Commissioners of Sewers in London were not originally commissioners for dealing with sewage at all. Therefore I think the fact that the channel here does not carry excrementitious matter at all does not prevent it being a sewer.

I think that the result of the cases of *Kinson Pottery Co., Ltd. v. Poole Corporation*, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819; *Newcastle-upon-Tyne Corporation v. Houseman* (1898) 63 J. P. 85; *Sykes v. Sowerby Urban District Council*, 1900, 1 Q. B. 584; 69 L. J. Q. B. 464; and *Baron v. Portslade Urban District Council*, 1900, 2 Q. B. 588; 69 L. J. Q. B. 899, is such as to induce me to hold that this channel artificially formed first of all by the raising of the crown of the road and the depression towards the ends, and secondly by the artificial footpath, having from time to time gullies in it leading into subterranean pipes and receiving directly (if there is any importance in it, which I am not quite sure) the water from that pipe which carries off the surplus in the catch water drain at the back of these houses, is a "sewer."

Then, it being a sewer, it is the duty of the District Council to keep every sewer belonging to them (and it is admitted that it belongs to them—it is not like the case of a sewer which may be in private hands) so constructed, covered, ventilated and kept as not to be a nuisance or injurious to health and properly cleansed and emptied. I do not think there is any very great hardship in saying that if the Council employ so careless a contractor that overflow from the cesspool escapes into their channel by the side of the road they should be bound at least to see that the channel carries it off as quickly and as inoffensively as possible. At any rate I conceive that the law is such that they are bound so to do. I do not think that they were bound to keep the cesspool clear, but I do think that if the matter from the cesspool gets into this channel and they get knowledge and notice of it, as in this case they certainly did, they are bound to keep that

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channel as smooth, as even, and, if necessary, as rapid by flushing or otherwise as to prevent it when it passes by these houses, becoming a nuisance or injurious to health. I think they have not so done, and upon that narrow ground I find for the plaintiff, and I give judgment for him for £30 and for a limited injunction.

The injunction asked for is an injunction to restrain the defendants "from permitting any foul or noxious matter to remain in the said cesspool or in the said channel gutter or surface drain so as to cause a nuisance to the plaintiff." I am not going to restrain them from permitting foul or noxious matter to remain in the cesspool, but I do propose to restrain them from permitting any foul or noxious matter to remain in the channel gutter or surface drain so as to cause a nuisance to the plaintiff.

The defendants appealed, and there was a cross-appeal by the plaintiff in respect of the decision as to the non-liability of the defendants for neglect to cleanse the cesspool, which in the event it became unnecessary to proceed with.

Evans, K.C., and *J. Sankey* for the appellants. This channel is not a sewer within the meaning of the Public Health Act, 1875, ss. 19 and 21. It is possible that a thing may be a sewer for certain purposes, but not for all: *Kinson Pottery Co. v. Poole Corporation*, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819; *Graham v. Wroughton*, 1901, 2 Ch. 451; 70 L. J. Ch. 673; *West Riding of Yorkshire Rivers Board v. Gaunt* (1903) 1 L. G. R. 133. [VAUGHAN WILLIAMS L.J. referred to *Rathmines and Rathgar Improvement Commissioners v. South Dublin Union*, 1899, 1 Ir. Rep. 157; and *Holland v. Lazarus* (1897) 66 L. J. Q. B. 285.] It would be straining the meaning of the word "sewer" very far to call this gutter in a country lane a sewer. It is on a highway, and a cart or carriage could not be prevented from stopping over it on the ground that it was blocking up a sewer. The Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 67, may be referred to by way of illustration. It speaks of both gutters and drains as if they were not the same things. This channel is a gutter, it is not even a drain, and it would seem from the definition of "sewer" in section 4 of the Public Health Act, 1875, that it must be a drain before it can be a sewer. If it is a sewer under the Public Health Act every owner or occupier of premises within the district would be entitled to drain into it under section 21. [ROMER L.J. For certain limited purposes.] Phillimore J. thought that having regard to *Kinson Pottery Co. v. Poole Corporation*, *supra*; *Newcastle-upon-Tyne Corporation v. Houseman* (1898) 63 J. P. 85, 87; and *Sykes v. Sowerby Urban District Council*, 1900, 1 Q. B.

584; 69 L. J. Q. B. 464, he was justified in holding this to be a sewer, but those cases do not go so far as that.

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As regards the alleged default in cleansing away the sewage, under section 42 of the Public Health Act, 1875, a local authority are not liable to do this unless required by the Local Government Board, and they can either do it themselves or contract for it to be done, and if they have entered into a *bonâ fide* contract for the doing of the work they cannot be made liable in damages for the neglect of the contractor to do it: *Ellis v. Strand District Board* (1892) 67 L. T. 307. There is no cause of action against the defendants on this ground. As a fact the sewage was cleared away directly complaint was made of its being a nuisance. The District Council did not wait for the seven days allowed by section 43, and no penalties could be recovered against them under that section. On this part of the case Phillimore J. was in their favour.

If the decision of Phillimore J. was right it will have very wide consequences, for agricultural drains conveying water from several fields must be treated as sewers and kept in order by the local authority.

[STIRLING L.J. referred to *Silles v. Fulham Borough*, 1903, 1 K. B. 829; 1 L. G. R. 643; 72 L. J. K. B. 397.]

B. Francis Williams, K.C., and *J. Davies Williams* for the respondent were not called upon.

VAUGHAN WILLIAMS L.J. It is no part of my duty to criticise Acts of Parliament, or to say whether they are closely drawn or loosely drawn, or easy to construe or difficult to construe. I have to construe this Act of Parliament, and in so doing I have to look at the definitions in the Act, and I have also to follow any decisions which have been given as to the meaning of the particular section. In my judgment, we must affirm the decision of Mr. Justice Phillimore. I do not see my way to differ from him either as to the facts which he has found or as to the law which he has applied to those facts.

Now, what are the facts of this case? There are several houses, and the rain-water from the roofs and, I believe, the surface-water from the ground within the curtilage of these houses respectively, undoubtedly all drains into the space at the side of Millbrook Road, and it follows from that that this space, if it does in fact constitute a drain, is not within the definition of "drain" which is excepted from the definition of "sewer" in the Public Health Act, 1875.

That being so, really the only remaining question that I have to decide is whether or not the portion of the highway over or along which this surface-water runs is a "drain." Mr. Justice Phillimore

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has come to the conclusion that it is something that falls within the definition of the word "sewer," which includes "drains of every description" except the interpreted "drain" mentioned before. Counsel for the appellants suggested to us that it did not come within the words "drains of every description," because it was difficult to define its lateral extension. There was no edge to it as against the highway or separating it from the highway. But I do not think that makes any difference. One has to look at the purpose of this graduated hollow made at the side of the road. I cannot doubt that that graduated hollow was made for the purpose of drainage. It certainly was made for the purpose of draining the water from the surface of the road, because it was not only that the water of the surface of the road might run down from the crown to the edge, but it was also for the purpose of holding the water there in a confined space until it reached the gratings which were to convey it into a sewer below. Under those circumstances it seems to me quite plain that this was, as Mr. Justice Phillimore held it to be, something falling within the words "drains of every description" in the definition section. I think it does, as a matter of fact, carry off not only the water from the surface of the road, but also water from these adjacent houses. Under these circumstances it not only comes within the words "drains of every description," but it is also clearly outside the definition of "drain."

I do not myself intend to decide anything more. I am only deciding in this case that Mr. Justice Phillimore was right in finding in fact that this hollow at the edge of the road was used for, and intended to be used for, the purpose of drainage; and that, being used amongst other purposes for the purpose of carrying off the water from these houses, occupied by different owners, it is a "sewer"; and that the local authority are, under section 19 of this Act of Parliament, liable to keep this sewer free from pollution. I do not decide that every agricultural drain into which the surface or under-ground water of two or three fields runs is necessarily within these words "drains of every description." I have not to decide that to-day. All I decide is that this drain, carrying the rainwater from these various houses, is a "sewer," and that the local authority are bound, as it is admitted they are bound, to keep the sewer free from pollution.

It was said that, although it might be a sewer within the meaning of the Act, yet there was a decision in the Queen's Bench Division which decided that a drain might be a sewer for some purposes in the Act, and not a sewer for other purposes in the Act. I only wish to say with regard to that case—*Kinson Pottery Co. v. Poole Corporation*, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819—that in the first place, if it did so decide, I do not agree with it; and in the second place, when the

judgments of Darling J., and in particular of Channell J., are carefully read, it does not seem to me that they did decide anything of the sort ; nor does it seem to me that it was necessary for the purposes of that case that any such decision should be given. I think, under all the circumstances, that this appeal should be dismissed.

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ROMER L.J. I also am of opinion that the finding of fact by Mr. Justice Phillimore, that the channel which we have to consider in this case was a sewer within the definition of "sewer" in the Public Health Act, 1875, was correct. I need only very shortly point out a few leading circumstances which show to my mind that his decision was right.

The channel here is a well-defined channel to carry and take away the surface-water not only from the road, but from the adjacent houses. It is a channel artificially made, and made for the purpose I have indicated ; and, as I gather from the facts, there are gullies at regular intervals along the channel to allow the water passing along this channel to pass to the covered sewer below the surface of the road ; and, as I understand it, there are no less than about twenty houses already draining the surface-water from their roofs by pipes into this channel. Those circumstances, to my mind, show that this is undoubtedly a "sewer" within the definition of the Public Health Act, 1875.

With regard to the suggested evil consequences resulting from this decision—an argument which is always used in these cases—I may shortly observe that it does not follow because this is a sewer within the definition of the term "sewer" in the Public Health Act, that it can be used by any inhabitants of the district for sewage or fæcal matter. From the finding that this channel is a sewer it results that the appeal fails ; for, clearly, it being a sewer, the defendants had a duty cast upon them with regard to cleansing among other matters. That duty they have broken, and the result of the breach of their duty has been damage to the plaintiff, as found by the Judge, and as to that part of the case there is no substantial appeal.

STIRLING L.J. I am of the same opinion. We have to consider the questions—first, whether the channel which has been so much spoken of is a "sewer" within the meaning of the Public Health Act, 1875 ; and secondly, whether the local authority have failed in the duties which are imposed upon them by that Act with reference to sewers.

Now, in order to decide the first question we have to find what is the meaning of a "sewer" as that word is used in the Public Health Act, 1875. Section 4 contains a definition of the meaning of the term "sewer." It has not been contended before us that the channel in question is a drain within the first exception—that is to say, drains to which the word "drain" as interpreted by the Act applies. And it is

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plain that it does not fall within the second exception, because in this case the authority having the management of the roads are a local authority under the Public Health Act, 1875. Therefore the question arises with regard to the widest ambit of the definition, which makes the word "sewer" include "sewers and drains of every description," and the question which we have to decide really comes back to this—a question of fact: Is this channel a drain of any description within the meaning of the Act? Mr. Justice Phillimore, on the facts, which I shall not repeat, came to the conclusion that it was a drain, and therefore a sewer within the meaning of the Act; and I cannot differ from that finding of fact on the part of Mr. Justice Phillimore.

But it has been repeatedly said that that cannot be, because, if so, then every one under section 21 of the Act has a right to drain into it. Now I say, with all respect to those who use that argument, that that is an exaggeration of the effect of section 21. Section 21 does not provide that every owner of property within the district of a local authority shall be entitled as of right to connect every drain which he has with every sewer of the local authority. That distinctly is not the meaning of the Act. All that is given by that section is a right to have his drain connected or made to communicate with the sewers—with some of the sewers, that is to say—of the local authority. The right is given subject to compliance with conditions—amongst others that he is to comply with the regulations of the local authority in respect of the mode in which the communication of the drain is to be made. I do not think, therefore, that anything can be based upon that to prevent the Court from coming to the conclusion that this is a "sewer" within the meaning of the Public Health Act.

Then, that being so, have the local authority in this case failed to fulfil the duties imposed by the Act with reference to sewers within the meaning of the Act? Now that turns on the construction of section 19. What is alleged against the local authority in this case is that that authority failed to keep this channel which we hold to be a sewer so as not to be a nuisance or injurious to health and properly cleansed. What happened was that sewage—fæcal matter—escaped into the channel—escaped, I assume, improperly and contrary to law—and, having escaped there, was permitted to remain and was not removed, so that the sewer was not cleansed and became a nuisance and injurious to health. It seems to me that the plaintiff in this case being a person who had not caused, and who was not answerable in any way for the escape of the fæcal matter in question, the local authority failed in their duty; and it is no answer for them to say that somebody else was guilty of a wrongful act in permitting the escape of that fæcal matter. In that respect this case entirely differs from that which was relied on by

the learned counsel for the appellant of *Kinson Pottery Co. v. Poole Corporation*, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819, because there the person who was setting up the defence was the very person who was answerable for the improper escape of the faecal matter into the sewer; and it was held—and, if I may say so, it appears to have been rightly held—that in that case he could not take advantage of his own wrong. Here no such question arises, and it seems to me that in this respect also the finding of the learned Judge of fact is in accordance with law. In these circumstances I agree with my brethren that the appeal fails.

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Appeal dismissed.

Solicitors for appellants—Cunliffes and Davenport, for Williams and Pinchin, Cardiff.

Solicitors for respondent—Riddell & Co., for E. W. Pocock, Cardiff.

High Court of Justice.

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Dec. 7, 9.

KING'S BENCH DIVISION.

LONDON COUNTY COUNCIL v. PAYNE.

Weights and measures—"False or unjust" scales—Adjustment of scales at customer's request with no fraudulent intention—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25.

Wholesale tea merchants, with a view to expedite the weighing out of tea to their customers—retail tea dealers who desired to be supplied with packets of tea each weighing with its wrapper exactly $\frac{1}{4}$ lb.—and at their customers' request, so adjusted their beam scales that the scales indicated a weight greater by the weight of the intended wrapper than the actual weight of the tea in the scoop. The adjustment was effected, in one instance, by fixing a metal disc on one arm of the scales, in another by attaching a paper bag underneath the goods scoop.

Held, that they were using scales which were "false or unjust" within the meaning of section 25 of the Weights and Measures Act, 1878, and liable to a penalty accordingly.

Lane v. Rendall, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8, considered and followed.

CASE stated by a metropolitan police magistrate as follows:—

1. On January 13, 1903, the respondents appeared before me at the Southwark Police-court to answer two informations which had been laid against them on behalf of the appellants. The first information charged that the respondents, on November 24, 1902, at Boss Street, Tooley Street, in the metropolitan borough of Bermondsey, in the county of London, and within the metropolitan police district, did use for trade a weighing instrument, to wit, a beam scale which was false or unjust, contrary to section 25 of the Weights and Measures Act, 1878 (that is to say, the said beam scale had attached thereto a metal disc). The second information charged a similar offence at the same time and place in respect of another beam scale, which had a paper bag placed under the goods scoop thereof.

2. The said two informations were by consent heard together, and at such hearing before me on January 13, 1903, the following facts were proved or admitted by both parties:—

(a) The respondents carried on business as wholesale tea merchants at premises in Boss Street, Tooley Street, aforesaid.

(b) On November 24, 1902, William Henry Manning, an inspector of weights and measures for the district in which the said premises are situate, visited the said premises, and went into a room there

where the tea was being weighed, and found in that room two beam scales which were in use for weighing out tea.

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(c) The first of the said beam scales had a small metal disc affixed by wire to the arm of the scale on which the scoop for receiving the tea was placed, the effect being that the quantity of tea required to turn the scale with a weight of $\frac{1}{4}$ lb. in opposite pan was less than $\frac{1}{4}$ lb. by the weight of the said disc—that is to say, about 2 or $2\frac{1}{2}$ drachms.

(d) The weight of the said disc was as nearly as might be equivalent to the weight of the paper bag or wrapper in which each quantity of the tea was to be placed, and the tea was so weighed out for the purpose of obtaining upon each weighing such a quantity of tea with its bag or wrapper as would weigh exactly a quarter of a pound.

(e) The second of the said beam scales had a folded paper bag placed underneath the scoop in which the tea was being weighed. This bag was being used for the same purpose and with the same effect as the disc above referred to.

(f) The respondents weighed out the tea in such quantities as aforesaid only for those customers who were retail dealers in tea, and who requested to be supplied with it so packed. Such customers themselves supplied the said bags and wrappers to the respondents for the purpose of the respondents putting up the tea in them. Each of such bags or wrappers had printed upon it an intimation that the weight of the paper was included. At the time of the inspector's said visit other scales in the same condition as the two scales the subject of the informations were being used at the respondents' premises for weighing out tea for such customers as aforesaid, and there were also in use a number of scales for weighing out tea in full weights, and all these last-mentioned scales were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to. The respondents did not sell tea by retail.

(g) The beam scales in question in the condition referred to were respectively used for trade by the respondents with the customers referred to in paragraph (f), and in such cases were respectively physically incorrect to the extent and in the manner above described.

(h) The respondents acted fairly towards their said customers, and only gave them what they asked for.

3. The appellants contended that the said beam scales were respectively false or unjust within the meaning of section 25 of the

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Weights and Measures Act, 1878, and they relied upon the case of *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8.

4. The respondents contended that to constitute an offence under the said section the scale must be false or unjust with reference to the trade use that is in fact being made of it, and they relied upon the cases of *Withall v. Francis* (1878) 42 J. P. 612, and *Crick v. Theobald* (1895) 64 L. J. M. C. 216.

5. But for the fact that the customers had requested the respondents to supply the tea in such quantities and so packed as aforesaid, I should have followed the case of *Lane v. Rendall*, and convicted the respondents; but it appeared to me to be impossible to say that the beam scales were false or unjust in the face of such a request. The cases of *Withall v. Francis* above referred to and *Harris v. Allwood* (1892) 57 J. P. 7, appeared to me to establish the contrary, and I accordingly decided to dismiss the informations.

6. The question of law for the opinion of the Court is whether upon the facts above stated I was right in law in dismissing the informations.

Section 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), is as follows:—

Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited.

Dickens, K.C., and *Daldy* for the appellants. The question is whether the word "unjust" in section 25 is to be regarded as unjust with reference to the trade use assigned to the scale. The magistrate did not keep in his mind the broad distinction between sections 25 and 26, for there is no suggestion of fraud applicable to section 25. It is no answer for the respondents to say that they only use these scales for a particular purpose—it is not denied that they did so; but there is a danger in introducing a limitation into a section which contains no qualification. If scales are used for trade use, they cannot be used in the way it is found in the case they have been used. "Unjust" in section 25 means that which is not true. A scale cannot be true and yet for a particular purpose be allowed to be untrue. It must be accurate in fact, and not merely capable of being used as accurate: *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8; *Great Western Railway Company v. Bailie* (1864) 5 B. & S. 928; 34 L. J. M. C. 31.

[At this point they were stopped.]

Avory, K.C., and *Geo. Elliott* for the respondents. The magistrate is right upon the facts as found in the case. These scales were accurate and just, and complied with section 25. They are not unjust, but they are scales which at one particular moment do not balance. The decision in *Lane v. Rendall* ought to have been that section 25 only applies where the weighing machine is in itself unjust. That case is also distinguishable, for here the customers themselves, being retail dealers only, requested that the tea might be weighed in the way it was. The argument there was that the scales were being used for weighing paper and tea under the name of tea. Here the customer loses nothing, but by arrangement with the seller the receptacle or paper bag or wrapper into which the tea is to be placed is weighed in. It is an arrangement or an adjustment between the purchaser and the seller. There was nothing wrong in the use of the machine and nothing unjust about it so long as the purchaser knew how it was used, and required it to be used in that way: *Withall v. Francis* (1878) 42 J. P. 612. *Lane v. Rendall* is no authority for saying that if the machine itself be just the vendor cannot enter into an arrangement with the purchaser. It cannot be that the machine is made false by putting a paper bag into it, and that it therefore remains false for ever afterwards. "Unjust" in section 25 means unjust to the purchaser, owing to the falseness of the machine.

Dickens, K.C., in reply. Section 25 means that whether there be *bona fides* or no *bona fides* in any arrangement between vendor and purchaser, the former is bound to use true scales.

Cur. adv. vult.

Dec. 9. LORD ALVERSTONE C.J. In this case, I confess, I have felt very great difficulty, and I am very anxious not to appear to lay down any general rule, or any rule which is not applicable to the particular case. I have come to the conclusion after, as I have said, considerable doubt, that the argument of Mr. Dickens is correct, and that the appeal must be allowed. There seem to me to be two classes of cases: the cases where scales are kept used or had in possession—that is, used or kept for use—in a state which makes them false or unjust; that seems to me to be one class of cases which come under section 25. There is another class of cases where honest scales are honestly used in a particular way for the purpose of carrying out a particular weighing operation. The two classes are illustrated by *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8, on one side, and by *Withall v. Francis* (1878) 42 J. P. 612, on the other. I am anxious that I should not be thought to lay down any

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rule that it is an infringement of section 25 honestly to use scales that are otherwise just for the purpose of carrying out a particular operation by temporarily adjusting them for a given purpose, and the difficulty I have really felt is to determine within which class of cases upon the facts this case falls. I have come to the conclusion, for reasons which I will very briefly state, that this case falls within the class of cases in which the person against whom the proceedings have been taken has had in his possession an unjust balance. I think the real difficulty is, upon these facts, to say whether or not what the magistrate has found makes what was being done a mere temporary adjustment of an honest balance for use for a particular purpose, or the having in possession a scale which was inaccurate and unjust contrary to section 25.

I think on these facts it must be taken that not only this scale, but others, open to the same objection, were regularly kept in that condition. It is found that one of them had a metal disc fixed by wire to adjust the weight of the paper. It is found that the other had a folded paper bag placed underneath the scoop in which the tea was being weighed. Or, in other words, the two scales were not in such condition that the material put into the weighing scoop would be justly weighed. I think, possibly, it may not be an unfair method of construing section 25 to say that while there may be a temporary use of scales so as to make them carry out a particular weighing operation which is honest and desired to be done, the instrument in its normal condition as kept must be in a condition to weigh justly—by which I mean accurately—that which is put in it to be weighed. In this case the scales, as kept, will not weigh accurately the tea put into the scoop; they will weigh it *plus* the weight of the paper bag, which is underneath in one case, and the metal disc, which is fastened in the other.

Now the case states at paragraph 2, clause (f), that “the respondents weighed out tea . . . only for those customers who were retail dealers in tea, and who requested to be supplied with it so packed. Such customers themselves supplied the bags and wrappers. . . . At the time of the inspector's said visit other scales in the same condition as the two scales the subject of the informations were being used at the respondents' premises for weighing out tea for such customers as aforesaid, and there were also in use a number of scales for weighing out tea in full weights, and all these last-mentioned scales were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to.”

I think that statement shows that these scales complained of were permanently kept in that condition, and that it required what is here spoken of as supervision and superintendence, so that they might not be used for an improper purpose. Therefore, it seems to me that that points to a condition of things which, though it may be perfectly innocent in itself and really no substantial breach, yet still is a contravention of the statute, because the scales will not accurately and justly weigh that which is put in to be weighed. That the learned magistrate took that view of the facts I think is perfectly clear from the grounds upon which he dismissed the summons. He says in paragraph 5: "But for the fact that the customers had requested the respondents to supply the tea in such quantities and so packed as aforesaid, I should have followed the case of *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8." In other words, he really has rather adopted the argument—with which we were impressed—of Mr. Avory, that the request to carry out this particular weighing operation was an answer to this summons. I say that if I had come to the conclusion that merely and solely for the time when these scales were being used for this particular purpose a temporary adjustment had been made, which was not the ordinary condition of the scales as kept by the respondents, I should have come to a different conclusion. I think the magistrate meant to find here that the scales were kept in such a condition that they would not accurately weigh—would not justly weigh—what was put in them to be weighed; that being so, he has thought that the mere request by customers to have their tea so weighed was an answer to the summons. I have therefore come to the conclusion that the appeal ought to be allowed.

With regard to the authorities, of course, there is *Crick v. Theobald* (1895) 64 L. J. M. C. 216. So far as I can see, that has nothing to do with the case. With regard to *Withall v. Francis* (1878) 42 J. P. 612, that undoubtedly was a case coming within what I have called the temporary use of proper scales for a given purpose, and that is why I am so anxious it should not be thought I am laying down a rule that there was anything unlawful in doing what was recognised by the Court as being lawful in *Withall v. Francis*.

With regard to *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8, although it is a case exactly on the lines I have indicated, I do not think it can be recognised as laying down any rule apart from the facts of that case, because I have not the slightest doubt that in *Lane v. Rendall* the scales were being used for weighing paper and tea under the name of weighing tea; therefore, although no fraud was found to be done for other purposes, yet the scales were being

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in fact kept and used in the unjust condition to which I have already referred—that is to say, not in the condition of weighing fairly and justly the tea that was put into the scale.

This is obviously a technical breach of the section; and I do not suppose it will be suggested for a moment that the respondents, who are weighing tea to be put into bags which are going to indicate that the paper bag is weighed in with the tea, were doing anything in the least morally wrong; but I think that they have brought themselves within the mischief of the section, because after all, as was pointed out in the argument, if supervision is required for scales so adjusted, they may be used at times when that supervision fails for weighing other matters. Therefore I think technically there was a breach of this section, and that the magistrate ought to have convicted, notwithstanding there had been a request by customers to have their tea weighed so that the weight of the bag might be included. I therefore think the appeal must be allowed.

LAWRANCE J. I am of the same opinion, on the ground that in this case, beyond doubt, the respondents were using or had in their possession a scale which was false and unjust at the time of the visit of the inspector. The object of the statute clearly was not that there should be an inquiry, when it has been proved that a scale is being used which is unjust, as to whether any fraud had been committed or not, because if that had been so it would have been easy in every case for the respondents to come forward and say, "In this case no one was taken in." The question is not whether the scale was false and unjust towards the particular customer who was using it, but whether it was false and unjust in fact. No one can doubt for a moment that it was, if used by anyone else upon the premises, false and unjust at that time. No one can doubt, if the disc or paper had been concealed that that would have been a fraud. This view of section 25 is strengthened by section 26, which is really pointed to fraudulent user. Section 25 is not intended to throw the burden upon inspectors of weights and measures to inquire every time whether the purchaser had been taken in or not. The section seems to me to be perfectly clear. It makes it an offence for a person to use or have in his possession for use for trade any weight, scale, &c., which is false or unjust. If the weight or scale is false and unjust, though in a manner not to the injury of the customer—because if that had been so, and it had been concealed, there would have been an offence under section 26—it seems to me to come entirely under section 25, and to come within the judgment in *Lane v. Rendall*. I therefore think that this appeal must be allowed.

KENNEDY J. I am of the same opinion. The information, or

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informations rather, with which the magistrate had to deal, it is to be noticed, each charged the respondents with using for trade a weighing machine, to wit, a beam scale, which was false or unjust. Now, speaking entirely for myself, it seems to me that the object, for a very obvious public reason, which was sought to be attained by this section, and which in fact it does attain as I construe it, is this: that the instrument itself must be in such a condition, whether on a particular occasion or generally, when it is being used for trade, that it gives a just and true, that is a correct, result as regards the weight of the thing being weighed, *i.e.*, the thing being placed in the scales. It seems to me, I confess, that all the argument which weighed with the learned magistrate, and seems to have turned the scale, if I may say so, in his mind, as to the acquiescence or request of the purchaser, is *nihil ad rem*. In my opinion, a trader is liable under the section, however honest his intent, if in fact he uses an adjustment which is not an adjustment of the thing within the scale—that is, the thing to be weighed—but is an adjustment which affects the truth and accuracy of the weighing machine. Therefore, it seems to me that there is a fallacy in the analogy suggested of an adjustment of scales by putting a weight into one scale in order to get a result which could not otherwise be attained, owing, say, to the deficiency of a 3 lb. weight when 3 lb. was what was to be got out at the other side. The truth or accuracy of the machine is not affected so as to make it false or unjust if weight is put into the scale to be weighed as part of the thing to be weighed. I will take the strongest case I can, both of honesty and request. Enter a purchaser, who says, "I want to have tea weighed." The trader says, "Well, I have got a machine for weighing, but it is inaccurate." "Oh, never mind," says the purchaser; "we will get as near as we can." I have no doubt in my mind that if that trader thereupon uses a machine that is inaccurate, and the inspector enters the shop at that moment and sees the operation, the section would apply. It could not be said he was not using a machine which was false or inaccurate. The object was the safety of the public in the user as well as the possession of an accurate machine. An accurate machine is one that shows correctly the weight of the thing put into the scale which is to hold the goods to be weighed. If by reason of any adjustment of the machine it represents something which is not the fair weight of the thing in that scale of the machine, it appears to me that whether such adjustment were made with acquiescence or without acquiescence, on one occasion or many occasions, there would be user of a machine which is false or unjust within the section. There is no reason why you should not put in the

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scale any weights you like where you have got a weight on the other side which is larger than the one you want to obtain. There is no objection to that. If you alter the machine itself so that as it stands its contents are not truly represented on the index on the other side, it seems to me that the section has been contravened, and there has been a user of an instrument which is in fact inaccurate and unjust.

Appeal allowed. Case remitted.

Solicitor for the appellants—W. A. Blaxland.

Solicitors for the respondent—Lamb, Son, and Prance.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

WESTMINSTER CITY COUNCIL *v.* JOHNSON.

WESTMINSTER CITY COUNCIL *v.* FULLER.

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Nov. 10.

Sanitary conveniences—Public conveniences—Land tax—Land Tax Act, 1797 (38 Geo. III. c. 5), s. 4—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 44, 45.

A permanent public underground convenience, constructed under a public street in London by a local authority under section 44 of the Public Health (London) Act, 1891, is not a hereditament had or held by the authority within the meaning of section 4 of the Land Tax Act, 1797, and is consequently not chargeable to land tax.

THESE actions were tried together before Wright J. without pleadings and without a jury upon facts agreed.

In the first the plaintiffs claimed against the defendant Johnson, as collector of land tax for the Regent Ward, No. 1, of the parish of St. James, Westminster, a declaration that the property known as the underground convenience, and situate at Piccadilly Circus, W., in the City of Westminster, was exempt from land tax.

In the second the plaintiffs claimed against the defendant Fuller, as collector of land tax for the Great Marlborough Street Ward, a declaration that the properties known respectively as the underground convenience, Broad Street, W., and the underground convenience, Great Marlborough Street, W., both in the City of Westminster, were exempt from land tax.

In each action the plaintiffs claimed an injunction to restrain the defendant, his servants and agents, from distraining on the property of the plaintiffs for the land tax demanded by the defendant in respect of the aforesaid underground conveniences.

The facts agreed were as follows :—

Pursuant to the London Government Act, 1899, and the Borough of Westminster Order in Council, dated May 15, 1900, the metropolitan borough of Westminster was duly constituted. The borough includes the parish of St. James, Westminster, created by the Metropolis Management Act, 1855. By charter dated October 29, 1900, there was granted and confirmed to the said borough the title of City, and that the Council should be styled the mayor, aldermen, and councillors of the City of Westminster. The said Order and charter are admitted.

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The appointed day as from which the said Act and Order in Council took effect was November 9, 1900.

The Council of the said City, pursuant to and in execution of and in accordance with the provisions of the Public Health (London) Act, 1891, ss. 44 and 45, maintain in the said City a number of public lavatories and public sanitary conveniences for the use and benefit of the public. The said lavatories and conveniences (with one exception) are (though this is not admitted by the defendants to be material) each a source of expense to the Council, and a burden upon the City rates, and, taking the whole of them together, they are a source of expense to the City and a burden upon the City rates. The said lavatories and conveniences are all managed together as one enterprise and by one department of the City administration.

Upon the completion of the improvements authorised by the Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. ccxxxv.), the streets and paved portions of land (including the island) which formed Piccadilly Circus, and also the streets in and about the circus affected or made under the Act, were handed over to and taken charge of by the Vestry of St. James, Westminster, in pursuance of section 18 of the said Act. The whole of the streets and paved portions (including the island) was within the parish of St. James, Westminster, and were partly under the Act and partly prior thereto dedicated to the public use.

During the year 1890-1 the Vestry of St. James, Westminster, in pursuance of the statutory powers conferred by the Metropolis Management Act, 1855, constructed a public convenience in Piccadilly Circus, which was, under their statutory power conferred by the Metropolis Management Act, 1855, and the Public Health (London) Act, 1891, considerably altered and enlarged by the said Vestry during the year 1894. It consists substantially of an underground opening with brick walls 18 inches thick faced with enamel tiles, and a floor of mosaic upon concrete, completely protected from the weather by a roof with pavements forming the floor of an island in the roadway substantially of the same area as the convenience. The convenience is lighted by electricity and gas. The construction as enlarged cost about £5,000. The convenience contains 20 water-closets, 21 urinals, and 14 lavatories. The accommodation is for both sexes, but separate for each sex. It is constructed wholly underground, mainly under the said island, but partly under the carriageway, and has a skylight projecting above the pavement of the island. It is entered by means of two separate staircases, each opening on the pavement of the island. The City Council place two men and two women in charge for the purpose of keeping order, and keeping the place clean, and taking charge of the lavatories, urinals, and closets. A charge of 1d. is made for the use of

the closets, and 2d. for the use of the lavatories, including in the latter case water, soap, towel, and brushes. The charge is made under section 45 of the Public Health (London) Act, 1891, for the purpose of aiding in meeting the expenditure on public conveniences and lavatories in the City, and is so applied, and with the object of placing some check on a too indiscriminate public user. The convenience is open from 7 a.m. to 1 a.m., at other times it is locked up. This convenience produces an income in excess of the expenses, but it is the only one which does. The City officials manage this and the other conveniences. The charges are in no case made with the view to profit, but it is not admitted by the defendants that this is material. The convenience was assessed in the valuation list made in pursuance of the Valuation (Metropolis) Act, 1869, and in force at the time of the assessment hereinafter mentioned, at £250 gross, and in the valuation list now in force is assessed at £200 gross.

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The site of this convenience is in a situation formerly occupied partly by houses and partly by the street. The land tax in respect of No. 6, Piccadilly, had been redeemed prior to the passing of the Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. cccxxv.). The land tax on the other houses had not been redeemed. From the date the Metropolitan Board of Works took possession under this Act of the houses in Piccadilly no land tax whatever has been paid. The said Board paid the Crown the value of the freehold (which was Crown property) of the land covered by the said houses, but no conveyance has been made by the Crown either to the said Board or their successors, the County Council, or to anyone else.

The whole of the space occupied by the said convenience and its walls and foundations is "made ground," consisting of brick and other rubbish produced and placed there in the course of carrying out the improvements by the said Act authorised, and making the streets, island, &c., now there, the levels of the land having been considerably altered by the Board's improvements.

In December, 1900, the City was assessed to the land tax in respect of the said convenience in the sum of £250 for the year ending March 25, 1901. No previous assessment to such tax had ever been made in respect of the said convenience, but the houses which were formerly built upon the site had always been assessed.

The Great Marlborough Street and Broad Street conveniences were constructed by the Vestry of St. James, Westminster, under the Public Health (London) Act, 1891. They were both constructed underground, with walls 18 inches thick, roofed in, and lighted, as in the case of the Piccadilly convenience already described. The Great Marlborough

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Street convenience cost £1,700, and contains six waterclosets, six urinals, and four lavatories, with separate accommodation for both sexes, and is constructed partly under the street and partly under the island therein, and has a small skylight level with the pavement of the island. This convenience is constructed in "made ground," forming part of either the street or the foundation of the street.

The Broad Street convenience, the construction of which cost £2,050, contains nine waterclosets, nine urinals, and four lavatories, with separate accommodation for both sexes. It is constructed wholly underground, partly under the carriageway of the street and partly under an island therein, and has a small skylight level with the pavement of the island. It is entered by means of separate staircases, each opening on to the pavement of the island. This convenience and its walls and foundations is wholly constructed in "made ground," forming part of either the street or the foundation thereof.

The City Council place two men and two women in charge of each of these conveniences, and a charge of 1d. for waterclosets and 2d. for lavatories is made as is the case of the Piccadilly convenience. Neither of these conveniences produce any income sufficient to meet the expenses thereof, and both are a burden on the City rates. The charges are not made with a view to profit, but it is not admitted by the defendant that this is material.

In the case of two of the properties (20 and 21, Great Marlborough Street) opposite the Great Marlborough Street convenience, the land tax has been redeemed. The land tax on the properties 22, 24, 36, and 37, Great Marlborough Street, has not been redeemed. They are and always have been assessed to land tax.

In the case of six properties (46 to 52 Broad Street) which are opposite the Broad Street convenience, the land tax has been redeemed. The land tax on the properties 5, 6, 7, 8, 9, Broad Street has not been redeemed. They are and always have been assessed to land tax. At the date of the redemption of the land tax, in this and the preceding paragraph mentioned, the sites of the streets surrounding the conveniences were streets substantially as at present.

Neither of the above two conveniences are entered in or assessed in the valuation list under the Valuation (Metropolis) Act, 1869, in force at the time the assessment hereinafter-mentioned was made; nor have they ever been entered or assessed in any such list. They are not rated to any rate in the Metropolis.

In December, 1900, the City was assessed to the land tax for the year ending March 25, 1901, in respect of the said Great Marlborough Street convenience in the sum of £80, and in respect of the Broad Street convenience in the sum of £80. No previous assessment to

such land tax had ever been made in respect of either of the said conveniences.

The questions which the parties agreed to be the questions to be decided between them in these actions were whether land tax could be assessed in respect of the convenience in Piccadilly, and whether it could be assessed in respect of either of the conveniences in Great Marlborough Street and Broad Street.

Section 4 of the Land Tax Act, 1797 (38 Geo. III. c. 5), provides as follows:—

And to the end that the full and entire sum by this Act charged may be fully and completely raised, and paid to His Majesty's use ; be it further enacted by the authority aforesaid, that all and every manors, messuages, lands, and tenements and all hereditaments, of what nature or kind soever they be, and all every person and persons, bodies politic and corporate having or holding any such manors, messuages, lands, tenements, or hereditaments shall be charged with as much equality and indifference as is possible, by a pound-rate, for or towards the said several and respective sums by this Act set or imposed

The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), contains the following provisions:—

Section 44.—(1) Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required

(2) For the purpose of such provision the subsoil of any road, exclusive of the footway of any building or the curtilage of a building, shall be vested in the sanitary authority.

Section 45.—(1) Where a sanitary authority provide and maintain any public lavatories, ashpits, or sanitary conveniences, such authority may—

(a) make regulations with respect to the management thereof, and bye-laws as to the decent conduct of persons using the same ; and

(b) let the same for any term not exceeding three years at such rent and subject to such conditions as they may think fit ; and

(c) charge such fees for the use of any lavatories or water-closets provided by them as they may think proper.

* * * * *

Dankwerts, K.C., and *S. Mayer* for the plaintiffs. These underground street conveniences have nothing about them of the nature of the hereditament contemplated by the Land Tax Act, 1797 ; nor is the plaintiffs' possession of them a having or holding of such hereditaments within the meaning of section 4. This is a very different case from that of the *Metropolitan Railway v. Fowler*, 1893, A. C. 416 ; 62 L. J. Q. B. 553, where a tunnel was held to be chargeable to the land tax under section 4. The vesting of the soil of these places in the plaintiffs is only such a vesting of property in them as is necessary for the control, protection, and maintenance of them as conveniences for the public use : *Tunbridge Wells Corporation v. Baird*, 1896, A.C.

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434; 65 L. J. Q. B. 451; *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 47 L. J. Q. B. 446; *Rolls v. St. George-the-Martyr, Southwark, Vestry* (1880) 14 Ch. D. 785; 49 L. J. Ch. 691; *Hinde v. Chorlton* (1866) L. R. 2 C. P. 104; 36 L. J. C. P. 79; *Finchley Electric Light Co. v. Finchley Urban District Council*, 1903, 1 Ch. 437; 1 L. G. R. 244; 72 L. J. Ch. 297.

The second point is that these conveniences are situate on land upon which the land tax has already been redeemed. If this be so, the land cannot become liable again to land tax because it is put to a new use.

The soil in which these conveniences are constructed is "made" ground brought there by the plaintiffs in exercise of their duties in making up the streets, and forming part of the street or of its foundation.

Macmorran, K.C., and *Rowlatt* for both defendants. There is a difference between Johnson's case and Fuller's case, because in the former, which relates to the convenience in Piccadilly, the freehold of the land was acquired under the Metropolitan Street Improvements Act, 1877, so that, apart from the vesting, the site belonged to the Metropolitan Board of Works and now belongs to their successors. In each case these conveniences are tenements which can be let to a tenant and are consequently liable to be assessed to the land tax. The plaintiffs have as exclusive possession as the railway company had of their tunnel in *Metropolitan Railway v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553; and there is no distinction in principle between that case and this. Streets of themselves have no value at all and that is why they are not assessed to the land tax, but when any erection or underground building is placed in them which has a value, it becomes liable. In Fuller's case these constructions were not upon old property but simply in the streets under the Public Health (London) Act, 1891, but the plaintiffs have a sufficiently exclusive possession to render them liable to be assessed to the land tax in respect of them.

Danckwerts, K.C., in reply. The whole question is whether these constructions are hereditaments held by any person, liable to land tax. The Land Tax Act, 1797, contemplates a permanent estate or something in the nature of a permanent estate. There is no analogy between the present case and *Metropolitan Railway v. Fowler*, for here the property is vested in the plaintiffs for a purely limited purpose. They have no exclusive property; all the right they have is on behalf of the public for the public use. They can exclude no one. If the defendants' contention be right the case of sewers and even of the streets themselves could not be distinguished.

Here the soil is vested in the plaintiffs *qua* street ; they have no other title to it.

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WRIGHT J. The Land Tax Act, 1797, provides as far as is material for present purposes, in substance, that tenements or hereditaments had or held by persons shall be liable to be assessed to the land tax ; and the real question is whether the Westminster City Council have or hold these conveniences as hereditaments within the meaning of that statute.

It seems to me tolerably plain that, where section 4 of the Land Tax Act speaks of "having or holding" tenements or hereditaments, that language is used with reference to ordinary unqualified rights of property ; and the question is whether a restricted qualified property which the sanitary authority has in places like these can properly be brought within the words of the statute. The nature of the right which the plaintiffs have is, I think, best described in the language of Lord Halsbury or Lord Herschell in the case of *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434 ; 65 L. J. Q. B. 451. Taking Lord Herschell's words, he says: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." Of course the vesting under the Public Health (London) Act, 1891, is a little different from that because it is a vesting for the purpose of constructing and maintaining these conveniences, but the principle is the same.

Then, in the case of *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205, at p. 211 ; 65 L. J. Q. B. 571, Lord Russell of Killowen C.J. used similar language: "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject matter." *Primâ facie* it seems to me that the Council when they appropriate a piece of land under one of their streets for a purpose of this kind do not acquire under the Public Health (London) Act, 1891, or any other title by which they are authorised to do these works, anything equivalent to a general property. They acquire only such an interest as is necessary for the purpose of discharging their public duty.

Then comes the question, which is of some difficulty, when they actually construct a permanent building of this kind on or under the street, whether or not that ought to be regarded as a tenement or hereditament had or held by them.

It seems to me no distinction can be drawn merely because a

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structure is more or less permanent ; the construction of the structure is permitted to the authority simply for the purpose of and in discharge of their sanitary duties, and I cannot think it ought to be regarded as any more than what I may call a personal property of theirs, merely because it is permanent or its walls are of a certain thickness or peculiar in construction. The principle is that they are allowed to put it down only for limited purposes, and they are not owners in the ordinary sense. In the case of *Metropolitan Railway v. Fowler*, 1893, A. C. 416 ; 62 L. J. Q. B. 553, the facts were entirely different as has been pointed out. There there was a permanent appropriation of the soil for the purposes of the railway, and I do not think there is anything in the language used by the noble Lords in that case which would in any way warrant me in holding that they would take the same view in respect of the entirely limited ownership of the sanitary authority in that which is merely the soil of the streets.

Mr. Danckwerts has pointed out, I think, that the whole of these conveniences, or certainly the greater part of them, are in made ground, that is to say in soil which is put there by the Council merely in exercise of its duties or its powers in making up the level of the street, and therefore it seems to me it is reasonable to consider that whatever occupies a part of that which is put there merely for the purpose of a street ought to be regarded as held on a similar title to the street itself, with the addition, no doubt, that it is also held here under the title of the Public Health (London) Act, 1891, as a public convenience. It certainly is not immaterial to my mind to consider that there seems to me to be no precedent whatever for assessing streets or conveniences of this kind to the land tax ; indeed I think it has been actually held that sewers made by public authorities are not assessable to land tax. However, if I am wrong, I see great difficulties in enforcing this assessment on the other ground which Mr. Danckwerts took, namely, that the land tax on some of this land had been redeemed or extinguished. But that point does not appear to be raised by this case. I accordingly declare that these conveniences are not liable to be assessed to the land tax, and there will be judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs—Caprons, Hitchins, Brabant, and Hitchins.

Solicitors for the defendants—S. F. Miller, Vardon, and Miller.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It will be observed that the judgment in the above case proceeds upon the footing that the rights of the plaintiffs in the conveniences and in the land occupied by them depended entirely upon the provisions of section 44 of the Public Health (London) Act, 1891.

One of the conveniences, though it was afterwards enlarged, was originally constructed before that Act. At that time, though metropolitan vestries and district boards had power to provide public sanitary conveniences under section 88 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), there was no enactment in force, similar to section 44 (2) of the Act of 1891, giving them power to utilise the subsoil of streets for the purpose. No doubt, when the convenience in question was originally constructed the Vestry believed that the vesting of the street in them by section 96 of the Metropolis Management Act, 1855, gave them the necessary power. It was not till some years afterwards that it was held, in *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451; 74 L. T. 335; 60 J. P. 788, that the statutory vesting of a street in the local authority is insufficient to give them such power. Originally the construction of the convenience in question appears accordingly to have been a taking of possession by the Vestry of a portion of the subsoil wrongfully as between them and the owner. But, of course, if they had been left in possession they would in course of time have acquired a good title under the Real Property Limitation Act. Probably the Public Health (London) Act, 1891, by giving the Vestry a right to utilise the subsoil in the way in which they were, in fact, utilising it, had the effect of preventing their acquiring a title by prescription. At all events, no attempt was made in the above case to suggest that the plaintiffs' rights as to this convenience differed from their rights as to those constructed entirely after the Act of 1891.

Apart from local Acts, there is no provision applicable outside London corresponding with section 44 (2) of the Public Health (London) Act, 1891. The above case, therefore, does not seem to be any authority to show that a local authority outside London, who have provided a public convenience in the subsoil of a street, may not be liable for land tax in respect of it.

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KING'S BENCH DIVISION.

JENKINS v. GROCOTT AND OTHERS.

Nov. 16 ;
Dec. 21.

Registration of electors—Lodger franchise—Declaration of claimant—Evidence—Notice to claimant to attend—Powers of revising barrister—Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), ss. 42, 65—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 23, 28 (10), (11), 36.

A revising barrister cannot by notice, written or verbal, make the personal attendance at the revision court of a claimant, whose claim to a vote is objected to, a condition of the allowance of his vote.

Though in the case of a claim to vote as a lodger the declaration annexed to the notice of claim is, by section 23 of the Parliamentary and Municipal Registration Act, 1878, made prima facie evidence of the qualification, the right of the revising barrister to disallow the claim is not confined to the case of such prima facie proof of the ground of objection as is described in section 28 (10) of that Act. That subsection does not prevent the revising barrister from considering any proper evidence against the claim, and, if he thinks right, giving effect to it by a decision adverse to the claim.

THIS was a report made by the Revising Barrister for the borough of Hackney, which was treated as a special case.

The circumstances under which the report was made were as follows :—

On the revision of the lists for the borough of Hackney the claim of William Jenkins to have his name inserted in the old lodgers' list was objected to on the ground of want of sufficient value. The Revising Barrister disallowed the claim on the ground that the claimant had failed to satisfy him that the lodgings were of sufficient yearly value. He was then asked to state a case, but refused to do so.

A rule *nisi* for a *mandamus* commanding the Revising Barrister to state a case was then obtained on affidavits sworn by the claimant and by Mr. Sotherton, one of the political agents. The Revising Barrister thereupon made the report in question to the Court.

The rule *nisi* came on for argument on November 6, 1903. The Court made the rule absolute. But it was arranged that the report should be treated as a special case and set down for hearing on November 16, 1903.

The report was as follows :—

1. The claim of William Jenkins, of 8, Ada Street, Hackney, to vote as an old lodger was duly objected to on the ground that his lodgings

were not of the clear yearly value of £10 or upwards, if let unfurnished. I disallowed the claim because the claimant failed to satisfy me that his lodgings were of such yearly value. I was thereupon asked to state a case by way of appeal on the ground that I had no power to disallow the claim, but I declined to do so.

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2. The claim of William Jenkins stands by itself, and is not as is suggested in the affidavit dated October 13, 1903, of Mr. Sotherton, a test case, and if I was wrong in disallowing the claim no other claim will be affected.

3. I do not propose to notice in detail the statements contained in the affidavits of Mr. Sotherton, and of William Jenkins, but I am unable to accept as accurate the statements contained in paragraph 2 of the affidavit of the former. I therefore think it right to state as briefly as possible the course I adopted, and my reasons for it.

4. Towards the end of the revision of the lists for South Hackney in the year 1902, the Town Clerk (who performs the duties of the overseers for the purposes of registration) drew my attention to the excessive expense that, as he alleged, was being cast upon the rates, owing to the party agents continuing to place upon the register all lodger claimants, whether they possessed the necessary qualification in point of value or not. He alleged that I was admitting the claims of thousands of persons who had no qualification. As a matter of fact, no objections on the ground of want of value were made by either agent.

5. On my enquiring into the matter it was admitted by the party agents that an agreement existed between them to refrain from objecting on the ground of want of value, and to place all lodger claimants on the register whether they possessed the necessary qualification in value or not.

6. I publicly expressed my disapproval of this practice, and stated that if reappointed for the present year I should insist on proof of value. Thereupon the Liberal agent, the deponent Mr. Sotherton, stated that if I did so I should disfranchise thousands of voters. I regarded this statement as an admission that the Town Clerk's allegations were substantially correct.

7. I was appointed revising barrister for the current year in the month of July last. Shortly afterwards I directed the Town Clerk to note in my lists against the name of any lodger claimant, the rateable value of the house in which he occupied lodgings, and to supply the same information to the party agents. This was accordingly done.

8. On or about August 6, 1903, I received from the Town Clerk a letter, asking me to fix some limit of rateable value, below which I should refuse to allow a lodger's claim. I declined to lay down any hard and fast rule based on rateable value, but wrote the letter, a copy

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of which is contained in the exhibit to the affidavit of Mr. Sotherton. I subsequently satisfied myself on referring to the authorities that I was not at liberty to treat rateable value as conclusive in any case.

9. On September 10, 1903, I opened the registration court for the borough of Hackney. The lists for South Hackney were not reached until September 15.

10. On or about September 14 I made a personal inspection of the larger part of the South division, accompanied by the borough registration officer, who had known the constituency for 20 years, and had until lately been the Liberal agent for it. The result of my inspection was that I was satisfied that the character of the constituency was very poor, and the houses very small, many streets consisting entirely of houses that were little better than hovels, and that consequently the question whether or not any particular lodgings were worth £10 a year unfurnished was extremely doubtful.

11. On beginning to revise the lists for South Hackney on September 15, I found that the number of new lodger claims was 1,014 less than last year, owing mainly to the Conservative agent having fallen in with the views I then expressed. He had also objected to several hundreds of the Liberal claims on the ground of want of value. No objections on this ground were made by the Liberal agent.

12. On the same day the claim of William Jenkins was one of the first three objected to. The Conservative agent stated that there was insufficient value. I had not personally visited Ada Street, and therefore asked the registration officer to state what the character of that street was. He said "It is as poor a street as any you have seen, sir."

13. It was proved to my satisfaction that the rateable value of the whole house in which William Jenkins occupied lodgings is £14 per annum, or six shillings less than the rent which in his claim he stated he paid. I then followed my usual practice in the case of disputed lodger claims, which is as follows:—

14. I treat the declaration annexed to the claim (but not the claim itself) as *prima facie* evidence, and unless there is evidence in support of the objection I allow the claim. If, however, the objector is able to raise a reasonable doubt I hold that the *prima facie* evidence in favour of the qualification is displaced (see *Neilson v. Bryan* (1901) *Lawson's Registration Cases* 7, per Fitzgibbon L.J., pp. 9, 10), and that the claimant must attend and prove his claim. I have the less difficulty in treating the *prima facie* evidence as rebutted in South Hackney than elsewhere because it is apparent on the face of the claims, and was expressly admitted by both political agents during this revision, that in the case of old and new lodgers alike the agents fill in all particulars,

including the amount of rent, in the form of claim and declaration, before it is sent to the claimant for signature. The result is that the evidence afforded by the declaration is, in my opinion, highly unsatisfactory in the majority of cases.

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15. The Liberal agent, though he had made no objection on the ground of value, as already stated, called my attention to certain new lodger claims put forward by the Conservative agent which he alleged to be bad for want of value, basing his contention on the rateable value of the respective houses.

16. I ordered all the objections on the ground of value and all the claims so questioned by Mr. Sotherton to stand over to the evening sitting of my court on September 18th. The first part of the Schedule hereto contains a statement respecting lodger claimants during the present year in South Hackney, considered in relation to the rateable value of the houses in which they respectively live. Such statement was prepared for my information by the Town Clerk and was put in evidence before me.

17. On the said September 15th, being of opinion that there were grave doubts as to value in the case of all the claims and objections referred to in paragraphs 15 and 16 of this report, I gave to each claimant a notice in writing, a copy of which forms the exhibit W. J. 3 to the affidavit of William Jenkins. I stated in court that if such claimants respectively satisfied me that they paid rent amounting to £10 per annum, or that their lodgings were of the necessary value I would allow their claim, but not otherwise.

18. At the evening sitting on September 18th, some sixty claimants attended and, by production of their rent books or other sufficient evidence, satisfied me that they actually paid the rent stated in their claims or, at any rate, rent amounting to £10 per annum or upwards. A few of the claimants who were unable to attend wrote letters to the same effect which I accepted as evidence. I allowed the claim of all the above. William Jenkins and some hundreds of other claimants neither attended nor wrote, nor was any explanation of their absence given. I disallowed their claims on the ground that they had respectively failed to satisfy me that they had occupied lodgings of the necessary value.

19. The deponent, Mr. Sotherton, thereupon requested me to state a case by way of appeal, in the case of William Jenkins alone, and handed me a written notice of appeal which is contained in the second part of the Schedule hereto.

20. Having regard to the provisions of sections 42 and 65 of the Parliamentary Voters Registration Act, 1843, and to the remarks of the Court of Appeal in Ireland, in a recent case (see *Hanbidge v. Campbell*,

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Lawson's Registration Cases (1893) at p. 348), I thought I ought not to state a case.

21. Moreover I was of opinion that by stating a case I should be throwing doubt upon the existence of the power of the Revising Barrister to require the personal attendance of the claimant in a case where the *prima facie* evidence of the claimant is displaced, and where there is, in addition, reason to suspect, as I suspected, the prevalence of a wholesale manufacture of unqualified votes. The overseers do not exercise the same supervision in the case of lodger claimants as they exercise in the case of other claimants and indeed have been advised by counsel that they have no power to incur any expenses in investigating lodgers' claims. Practically the only check upon such a manufacture as I have indicated is the power already referred to of the Revising Barrister, and I was unwilling to disparage it. I therefore declined to state a case unless directed to do so by this Honourable Court.

22. I may add that on the evidence now before this Court, I should have had no hesitation in allowing the claim of the said William Jenkins. It is to be observed, however, that no explanation is given why such evidence was not brought before me.

Dated this 4th day of November, 1903.

(The Schedule above referred to.)

PART I.

SOUTH HACKNEY.

Number of houses in which there is one lodger for each rateable value, as under :—

	Rateable value £14 and under.	Rateable value £15.	Rateable value £16 to £19.	Rateable value £20.
Lodgers ..	317	83	554	421

53 houses in which there are two lodgers, rateable value £9 to £20.

35 houses in which there are two lodgers, rateable value £21 to £25.

29 houses in which there are two lodgers, rateable value £26 to £30.

1 house with three lodgers, rateable value £12.

1 house with three lodgers, rateable value £13.

1 house with three lodgers, rateable value £20.

3 houses with three lodgers, rateable value £23.

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To Evan A. Nepean, Esq., Barrister-at-Law, Revising Barrister for the Borough of Hackney.

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I hereby give you notice that I desire to appeal against your decision in the case of William Jenkins, of 8, Ada Street, London Fields, South Hackney, in the County of London, on the grounds that you have no power to disallow his claim to be registered, in view of the decision *re Nuth v. Tamplin* (1881) 8 Q. B. D. 247; 51 L. J. Q. B. 177; which declares that in the absence of rebutting evidence the claim should be admitted, the declaration being *prima facie* evidence of the qualification and that the legal value can only be based upon the market and not rated value, and further require you to name Henry John Eclis, of 24, Fletching Road, Clapton; Charles Jefferies, of 78, Mayola Road, Clapton, and George Grocott, Town Clerk of the Borough of Hackney, as respondents, and as security for payment of the costs incurred in prosecution of the said appeal.

(Signed) G. RATHBONE SOTHERTON,
of 22, Pembury Road, Clapton, in the County of London,
on behalf of myself and of the said William Jenkins,
of 8, Ada Street, London Fields.

Dated this 18th day of September, 1903.

The Revising Barrister added the following addendum to his report before the hearing:—

14A. In case the Court should think fit to review my practice as stated in paragraph 14 of the foregoing report, I desire to amplify the said paragraph.

The question is generally raised by the objector tendering hearsay evidence in support of his objection.

For example, the objector says: "The claimant does not occupy solely but jointly with his brother. I have seen his brother who says so." Or again, "He does not pay 4s. a week but only 3s. His landlord told me so." In all such cases I hold that the recent case of *Dalglish v. Dodds* (1894) 22 Rettie 198, precludes me from disallowing the claim on hearsay evidence, but I think I am justified in saying that the claimant must attend and prove his claim. I therefore adjourn the matter to the evening sitting, giving the claimant notice as in the case under appeal, or summoning him to attend pursuant to section 36 of the Registration Act of 1878, in most cases issuing a notice rather than a summons, as being less offensive. Subsections 10 and 11 of section 28 of the same Act seem to render the giving of notice unnecessary but I consider it fairer to give it.

November 10th, 1903.

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The Exhibit W. J. 3 to the affidavit of William Jenkins, referred to in the report, was as follows :—

“ To Mr. William Jenkins, of 8, Ada Street, N.E.

Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of £10 if let unfurnished. Your claim will or may be disallowed unless you produce, or cause to be produced, to me, at the evening sitting of my court, commencing at 6.30 p.m. on Friday, the 18th of September, your rent book, or other sufficient evidence that your said lodgings are of the clear yearly value of £10 or upwards if let unfurnished.”

The Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), contains the following provisions :—

Section 23. In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification.

Section 28. A revising barrister shall, with respect to the lists of voters for a parliamentary borough and the burgess lists of a municipal borough which he is appointed to revise, perform the duties and have the powers following

(9) Subject as herein and otherwise by the law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection :

(10) If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give *prima facie* proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to :

An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list :

The *prima facie* proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well-founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to :

(11) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to :

Section 36. A revising barrister may by summons under his hand require any person to attend at the court and give evidence or produce documents for the purpose of the revision, and any person who after the tender to him of a reasonable amount for his expenses fails so to attend, or who fails to answer any question put to him by the revising barrister in pursuance of this section, or to produce any document which

he is required in pursuance of this section to produce, shall be liable to pay such fine not exceeding five pounds as may be imposed by the revising barrister

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Robson, K.C., and *Lewis Thomas* for the claimant. The question is whether the revising barrister in rejecting this lodger claim acted on admissible evidence, and whether he gave sufficient weight to the claimant's statutory declaration. Section 23 of the Parliamentary and Municipal Registration Act, 1878, makes the declaration of the lodger *prima facie* evidence of his qualification, and subsection 10 of section 28 shows that such evidence can only be rebutted by such *prima facie* proof as is there mentioned. The revising barrister has disregarded that subsection altogether. The claimant was not bound to be present at the evening sitting of the registration court notwithstanding the revising barrister's written notice to attend. There is no provision in the statute entitling the revising barrister to give any such notice. All he can do is to issue his summons under section 36. Besides, the objector might have gone to the landlord when he did not believe the claimant. The Legislature allows the revising barrister to dispense with proof beyond the claimant's declaration. The revising barrister's own personal knowledge of a neighbourhood cannot affect a claimant who has a right to have his declaration taken as a *prima facie* proof. The evidence required by the barrister ought, if obtained at all, to have been obtained from the landlord of the house at which the claimant lodged. He cannot act on repute. He must find as a fact that the objector has, in the words of subsection 10 of section 28, been prevented from discovering or proving the truth respecting the entry objected to. Therefore the barrister must have evidence before him, and cannot act on repute, and the evidence upon which he acted in the present case was not evidence at all.

Sutton, contra. The point for the revising barrister is whether these lodgings are or are not worth £10 a year unfurnished. Section 23 does not contemplate that the claimant's declaration shall be *prima facie* evidence of the rent he pays, but that he is a person of the proper class to possess a vote. The declaration is annexed to but distinct from the notice of claim. By subsection 11 of section 28, if the barrister is satisfied that the objection is a good one, and the claimant does not appear, he can properly expunge the claimant's name. It is laid down by section 65 of the Parliamentary Voters Registration Act, 1843, that there is no appeal on questions of fact or admissibility of evidence.

Robson, K.C., in reply. The declaration is intended to be in substitution of the claimant's attendance. When the objector has given *prima facie* proof of his objection, then the revising barrister can

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summon the claimant under section 36 of the Act of 1878, but he cannot give him notice to attend.

Cur. adv. vult.

December 21.—KENNEDY J. read the judgment of the Court as follows:—

This is an appeal from the decision of the revising barrister for the borough of Hackney, whereby he disallowed the claim of William Jenkins, of 8, Ada Street, Hackney, to vote as an old lodger for the borough of South Hackney. The material facts appearing in the special case are these. The claimant duly sent in his declaration annexed to his statement of claim. This was under the Parliamentary and Municipal Registration Act, 1878, s. 23, *prima facie* evidence of his qualification. The claimant was objected to on the ground that the lodgings were of insufficient value. The South Hackney list came on for revision in the registration court on September 15. Before that date the revising barrister had made a personal inspection of the larger part of South Hackney with the borough registration officer, who had known the constituency for 20 years. He satisfied himself, he states, that the character of the constituency was very poor and the houses very small, many streets consisting entirely of houses which were little better than hovels, and that consequently the question whether or not any particular lodgings were worth £10 a year unfurnished was an extremely doubtful one. Upon the claim of Jenkins being opposed by the Conservative agent, the registration officer, in answer to a question of the revising barrister, stated that Ada Street was as poor a street as any which the revising barrister had inspected, and it was proved to the satisfaction of the revising barrister that the rateable value of the whole house in which Jenkins lodged was only £14 per annum, that is, 6s. less than the amount of the rent which Jenkins in his claim stated to have been paid by him for the lodgings on which his title to be a voter depended. The town clerk, at the request of the revising barrister, had prepared a statement in regard to lodger claimants considered in relation to the rateable value of the houses in which they lodged, and this was also put in evidence. The statement appears in the schedule to the case. The relevant point in it appears to be that no less than 317 lodger claims were like that of Jenkins in respect of lodgings in houses of a rateable value of less than £14 per annum, and that in the case of 53 claims there were instances of two lodgers claiming in respect of a house whose rateable value ranged from £9 to £20. The revising barrister knew from the statement of the party agents in the previous year that they had by agreement then abstained from opposition to lodger claims. In the present year objection was

made by the Conservative agent in numerous cases on the ground of insufficiency of value and to the claim of Jenkins amongst others. The revising barrister ordered all these cases of objection to stand over until the evening sitting of September 18, stating in court that if the claimants respectively satisfied him that they paid rent amounting to £10 per annum, or that their respective lodgings were of the prescribed value, he would allow the claims, but that otherwise he would not allow them. He also gave to each claimant a notice in writing, which, in the case of Jenkins, ran thus:—"To Mr. William Jenkins, of 8, Ada Street, N.E. Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of £10, if let unfurnished. Your claim will, or may, be disallowed unless you produce, or cause to be produced, to me, at the evening sitting of my court, commencing at 6.30 p.m., on Friday, the 18th of September, 1903, your rent book, or other sufficient evidence, that your said lodgings are of the clear yearly value of £10 or upwards, if let unfurnished." On September 18, according to the case, Jenkins did not attend. He sent no letter or other communication. No explanation of his absence was given. The revising barrister disallowed the claim. These being the facts, the appellant contends that the decision was wrong in a point of law necessary to the decision of the case according to the Registration Act of 1843, s. 42. The same Statute provides that there shall be no appeal on a question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only (section 65). The points of law put forward by the appellant are two. He says, first, that the revising barrister improperly made the personal appearance of the claimant a condition of his allowance of the claim; secondly, that the claimant having by his declaration given that which by the express terms of the Parliamentary and Municipal Registration Act, 1878, s. 23, was *prima facie* evidence of his qualification, and the objector not having given (it is contended) that which is to be deemed to be *prima facie* proof of objection under section 28, subsection 10, of the same Statute, the revising barrister was not in point of law entitled to require of the claimant what he did require by his oral notice given in court on September 15, and by the notice of the same date sent to the claimant in writing, and upon the claimant's failure to comply with these requirements to disallow the claim. As to the first point, we are clearly of opinion that if a revising barrister in such a case as the present made the personal attendance of a claimant a condition of the allowance of his vote he would be doing that which the law does not authorize. No statutory sanction for such a requirement was cited to us, and we are aware of none. The only way in which the claimant's

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personal attendance can be compelled is under the provisions of section 36, which empowers the revising barrister by summons under his hand to require any person to attend and give evidence or produce documents. Section 28, subsection 11, to which we shall refer presently, makes sufficient the appearance of the claimant "by himself or by some person on his behalf." In commenting upon this enactment Mr. Rogers, in the 16th edition of his work on elections, at page 322, speaks of the words as dispensing with the necessity of personal attendance of the person objected to if he is represented by some one in court. "But, of course," he adds, "the absence of a person objected to will in some cases weigh with the revising barrister in deciding as to the facts of the case." If in this case the revising barrister could be shown to have made the allowance of the claimant's vote dependent upon his compliance with a requirement of personal attendance and had disallowed the claim because the claimant did not personally appear, we should be of opinion that his decision could not be supported. But, as we understand the facts, although the revising barrister seems by the statements of paragraphs 14 and 21 of the special case to have entertained a mistaken opinion on this point of the personal appearance in court, it appears to us to be the fair interpretation of the special case and of the exhibit "W. J. 3," which we have already cited that he did not disallow this vote or intimate either by his statement in court or by the written notice that he would disallow it on the ground of the failure of the claimant to appear personally on September 18. He gave notice that he should require certain evidence to support the claim; but neither orally nor by notice did he insist upon the personal attendance of the claimant; in fact, as the case tells us, in some cases where claimants were unable to attend he accepted as sufficient evidence letters written by them to him stating that they had paid rent sufficient to satisfy the statutory standard of qualification. We desire to express our view that the statute does not make personal attendance absolutely necessary; such a requirement might entail serious hardship in the case of these lodger claimants who, to a very large extent, form part of a very poor class which could ill afford to bear the loss of time involved in personal attendance at the proceedings of the revising barrister's court.

We now pass to the second point made by the appellant, that the provisions of section 28, subsection 10, have not been complied with. In our view this contention rests upon an erroneous conception of the meaning and intent of this enactment. It is not intended by the Legislature in our view absolutely to confine the right of the revising barrister to disallow a claim when the claimant has by his declaration given *prima facie* evidence of his qualification to the case of such *prima*

facie proof of the ground of objection as is there described. Section 28, subsection 10, deals only with one special method of establishing a *prima facie* case against the claim, and then in subsection 11 goes on to say that in case of such *prima facie* proof of objection being given, the revising barrister *shall* (not *may*) expunge the name of the person objected to unless the person objected to appears by himself or by some person on his behalf and proves his title to inclusion in the list of voters. The section does not prevent the revising barrister from considering and, if he thinks it just, giving effect, by a decision adverse to the claim, to any proper evidence against the claim. If, to take a single example, the objector, in order to meet the *prima facie* evidence afforded by the claimant's declaration, at once called the landlord, or produced the lodger's rent book and by this evidence proved that the rent paid was much below the statutory standard, the revising barrister would, in our view, clearly be entitled in point of law to say that if the matter stood there he had evidence which entitled him to reject the claim. As to the weight of such evidence and the proper effect to be given to it, he is the constituted judge, and no appeal lies from his decision. Section 28 (subsection 10 and subsection 11) merely enacts in substance that if the objector's *prima facie* proof of the ground of objection is made out in a particular way, then, unless it is rebutted in a particular way, the revising barrister *must* disallow the claim. If the objector's case does not satisfy section 28, subsection 10, it still may consist of evidence against the claim which the revising barrister is entitled to weigh, and *may* give (and ought to give) effect to if he thinks its weight is sufficient to outweigh the *prima facie* evidence of the claimant's declaration, and any other evidence confirmatory of the declaration which the claimant may think proper to adduce. In this case the revising barrister had on one side the declaration, and on the other side the rating of the house with information as to the character of the street in which it was situated. The rating was not necessarily conclusive evidence against the claim; it was evidence only, as the Court pointed out in regard to the valuation roll in *Kellie v. Little*, reported in "Lawson's Registration Cases," 1894-7, at page 132; and the revising barrister decided to give the claimant the chance, if he wished to take it, of "producing or causing to be produced" at a later sitting of the court evidence either by his rent book or otherwise in support of the declaration. Many other claimants in the like position availed themselves of the chance, and succeeded; this claimant did not do so; and the revising barrister, in this state of things, held adversely to the claim. He had to decide

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what effect he ought to give to the evidence *pro* and *con.* ; and even if this Court could upon the same evidence have decided otherwise it has no power to overrule his decision.

Appeal dismissed.

Solicitors for the claimant—Russell, Cooke, & Co.

Solicitor for the respondents—The Treasury Solicitor.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

BARNETT v. COVELL.

1903.

Dec. 17

Streets—Advertising hoarding—Local Act—Land “abutting on or adjoining” street—Hoarding separated from street by strip of land—Ilfracombe Improvement Act, 1900 (63 & 64 Vict. c. cexlil.), s. 87.

By a local Act a penalty was imposed upon anyone who erected a hoarding wholly or partly for advertising purposes, in or abutting on or adjoining any street without the consent of the Council.

Held, that a hoarding erected in the centre of a hedge bank, and thus divided from the street by a continuous narrow strip of private land throughout its length, did not abut on or adjoin the street within the meaning of the Act.

CASE stated by justices of the peace for the county of Devon, who had dismissed an information preferred by the appellant against the respondent for a contravention of the Ilfracombe Improvement Act, 1900, in erecting an advertisement hoarding:—

At a petty sessions holden at the Town Hall, Ilfracombe, in the County of Devon, on June 15, 1903, an information was preferred by the appellant, of Ilfracombe, clerk to the Urban District Council of Ilfracombe, against the respondent, also of Ilfracombe, manager to the Ilfracombe Bill Posting Company, Limited, charging him for that he did on April 29, 1903, at Ilfracombe aforesaid, unlawfully erect a hoarding to be used for advertising purposes abutting on a street known as Slade Road, near the gate leading to the London and South-Western Railway station there, without the consent of the said Council, contrary to section 87 of the Ilfracombe Improvement Act, 1900; and upon the hearing the justices dismissed the information.

By section 87 of the Ilfracombe Improvement Act, 1900, it is enacted:—

(1) Every hoarding or similar structure in or abutting on or adjoining any street shall be securely erected and maintained.

(2) It shall not be lawful after the passing of this Act to erect any hoarding or similar structure to be used either wholly or partly for advertising purposes in or abutting on or adjoining any street without the consent of the Council and such consent may be given subject to such conditions as to the submission of a plan and elevation and as to the maintenance of such hoarding as the Council may determine.

(3) The owner or other person using any hoarding wall or similar structure for advertising purposes whether erected before or after the passing of this Act shall at all times hereafter keep and maintain the same in proper and safe repair and condition and in the event of any papers affixed for advertising purposes to such hoarding wall

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or other structure falling off or becoming detached shall forthwith remove and clear away such papers.

(4) Any person who acts in contravention of any of the provisions of this section or who violates any conditions or the terms of any consent given in pursuance of any such provisions shall be liable to a penalty not exceeding £5 and to a daily penalty not exceeding twenty shillings.

(5) Any consent or condition made under this section may be under the hand of the clerk or surveyor.

Upon the hearing of the information it was proved that Slade Road was a street within the limits of the Ilfracombe Improvement Act, 1900, that the respondent had without the consent of the Ilfracombe Urban District Council erected a hoarding to be used for advertising purposes in a field adjoining Slade Road, that the hoarding was erected on the centre of the hedge bank so that, as the hedge was from 4 feet to 6 feet 8 inches thick, the distance from the hoarding to the foot of the hedge varied from 2 feet to 3 feet 4 inches, and that the boarded part was about 60 feet in length and about 18 feet above the top of the hedge. A photograph of the hoarding was put in by the respondent and annexed to the case. The hoarding and the site on which it stood were well known to the justices.

The appellant contended that "abutting" meant "bordering," and that the hoarding came within the section, and he cited the following cases in support thereof, namely, *Wakefield Local Board v. Lee* (1876) 1 Ex. D. 336; and *Newport Urban Sanitary Authority v. Graham* (1882) 9 Q. B. D. 183.

The respondent contended that for the hoarding to abut on the street there must be a contact with the street, and that, as the hoarding was at its nearest point 3 feet away from the street no such contact existed, and that consequently the hoarding did not abut on the street nor did it adjoin the street, and he quoted the cases of *Rex v. Hodges* (1829) 1 Moo. & M. 341; *Vale and Sons v. Moorgate, &c., Buildings, Limited* (1899) 80 L. T. 487; and *Ind Coope & Co. v. Hamblin* (1900) 84 L. T. 168.

The justices found upon the evidence that the respondent had erected a hoarding for advertising purposes inside a field fronting the street known as Slade Road and parallel therewith, that about half the thickness of the hedge of the field was between the hoarding and the street, and that no part of the hoarding was nearer to the street than two feet. They were therefore of opinion that the hoarding did not abut on the street.

The question for the opinion of the Court was whether under the circumstances the justices were right in dismissing the information.

Graham Campbell for the appellant. There ought to have been a

conviction in this case. The land on which the hoarding was erected abutted on Slade Street, notwithstanding the continuous strip of land between. In *Wakefield Local Board v. Lee* (1876) 1 Ex. D. 336 premises were held to front and abut on a street from which they were divided by a small stream. The words of section 87 are "abutting on or adjoining." "Abut" is not so strong a word as "adjoin"; it means "border upon," and "border upon" may mean "near to." "Adjoin means "touching": *Newport Urban Sanitary Authority v. Graham* (1882) 9 Q. B. D. 183. 1908.
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Kimber for the respondent. The justices were right. As to the distance of this hoarding from the road they find it varied from 2 feet to 3 feet 4 inches throughout its length, and that the hoarding nowhere touched the street. This is a penal section, and must be construed strictly. The land does not belong to the respondent: he is a mere licensee, but the hoarding is his. It is clear from the case that a continuous strip of land, the property of the landowner, who gives him leave to erect the hoarding, lies between it and the street. "Abutting," according to the "New English Dictionary," is "projecting towards; terminating upon or against; coming into contact; touching." Here there is no contact or touching as between the hoarding and the street.

Graham Campbell in reply. As these words "abutting on or adjoining" are used in section 87, "abut" means "to border upon," and "border upon" means "to be near"; "adjoining," of course, means "absolutely touching," and therefore it is inserted to cure any defect which may exist in abutting, which means bordering upon and not touching.

LORD ALVERSTONE C.J. I am of opinion that our judgment must be for the respondent, and that this appeal must be dismissed; at the same time I am most anxious not to lay down any general rule as to the meaning of "abut," for the meaning of the word and the sense in which it is used must be a question of fact in each case in which it occurs. If as a fact the hoarding did abut on the road we could not go outside such a finding. But the fact here is that a licensee has gone on to another man's land and has erected a hoarding some 60 feet long, at the same time leaving a continuous strip of land from 2 feet to 3 feet 4 inches in width between the hoarding and the street. Mr. Campbell contends that the words of the section should be construed liberally; but we must bear in mind that although the alleged object of the Act may be to prevent the erection of unsightly structures, yet, even if this particular hoarding had been 10 or 20 feet back in the field, and therefore so much further away from the street, it would

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have been equally unsightly, although there could have been no pretence for saying that it abutted on the street. Again, this is a penal statute, and must be strictly interpreted, and in my view the word "abut," used as it is in section 87 in reference to land, must be held to mean absolutely touching. When, however, we contrast the hoarding here and the land on which it is erected on the one hand, and the street on the other, and find that there is a continuous strip that separates them for the whole length, it cannot be fairly said that the land on which the hoarding stands does in reality abut upon the street, nor can it be correct to say that it abuts in the sense in which that word is used in a penal section of the Act. The justices here have found as a fact upon the evidence before them that this hoarding did not abut on the street or touch it, and we cannot interfere with their finding. The appeal must therefore be dismissed.

LAWRANCE J. I agree.

KENNEDY J. I agree.

*Appeal dismissed.**Solicitor for the appellant*—J. H. L. Brewer, Barnstaple.*Solicitors for the respondent*—Whitelock and Storr.*Reported by* Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

CAREY v. BERMONDSEY BOROUGH COUNCIL.

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**Limitation of time—Action against public body—Personal injuries—
“Continuance of injury or damage”—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**

Oct. 27.

The continuance of personal suffering from the effects of an accident is not “continuance of injury or damage” within section 1 (a) of the Public Authorities Protection Act, 1893. Consequently an action, coming within that section, in respect of personal injuries caused by an accident is barred after the lapse of six months from the accident though the personal suffering caused by the accident still continues.

APPLICATION by the plaintiff for judgment or a new trial in an action tried before Channell J. and a common jury.

The appeal was, with the consent of the parties, heard by a Court of two judges.

The action was brought by the plaintiff, a nurse, to recover damages for personal injuries alleged to have been caused by the negligence of the defendants or their servants in repairing a road.

The accident happened on June 17, 1901, and the writ in the action was not issued until October 8, 1902.

The jury found that the plaintiff was injured owing to the misfeasance of the defendants, and that she was not guilty of contributory negligence, and they awarded her £400 damages.

The defendants then submitted as a point of law that by reason of the provisions in section 1 (a) of the Public Authorities Protection Act, 1893, they were, in spite of the verdict, entitled to judgment. On behalf of the plaintiff it was submitted that the action was not barred, because the plaintiff had proved that at the time the writ was issued she was still suffering from the effects of the accident, and, there being a continuance of the injury or damage, the case fell within the second alternative in clause (a), and the action was, therefore, maintainable.

Channell J. decided that there had been no continuance of the injury or damage within the meaning of the section, and that, more than six months having elapsed since the accident, the plaintiff's action was barred. He, therefore, set aside the verdict, and entered judgment for the defendants.

Section 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), provides that :—

Where after the commencement of this Act any action, prosecution, or other pro-

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ceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Cyril Dodd, K.C., and Moyses (Cairns with them) for the plaintiff.
In *Markey v. Tolworth Joint Hospital District Board*, 1900, 2 Q. B. 454 ; 69 L. J. Q. B. 738, a widow sued a public authority under Lord Campbell's Act for the loss of her husband, who died in hospital from an overdose of opium. There it was held that the injury or damage referred to in section 1 of the Act of 1893 was that of the husband killed, and not that of the wife suing, and that therefore the plaintiff was out of time in that action on any construction of the section. But Darling J. clearly indicated the opinion that the time ran not from the giving of the overdose, but from the time when the consequences ensued. If that principle is applied here it follows that the plaintiff's case comes within the second limitation of section 1 (a). So long as the plaintiff continues to suffer there is a continuance of the injury or damage. Construed according to their usual or popular meaning, the words injury or damage mean the injury or damage arising out of the negligent act, and not the continuance of the act which caused the damage. Even if the *injuria* ceased immediately after the accident the *damnum* still continued at the time the writ was issued.

Avory, K.C., and Biron for the defendants were not called upon.

THE EARL OF HALSBURY L.C. It seems to me that this judgment is perfectly right. If one reads the language of the statute—which is, I think, perfectly plain—as applicable to the subject-matter with which it is dealing, it is manifest to my mind that the Legislature intended to reserve from the period of six months (as being still open to an action), if it was known that the thing causing the accident or damage was continuing; and that it would be unreasonable to say, if, although the original act was six months old, yet the continuing of the result of that act was still going on, and damage still accruing from time to time, that therefore the plaintiff should be limited to that six months. But such considerations, I think, are wholly inapplicable to the question of personal injury such as is here complained of. The truth is that the other construction would lead to this ridiculous absurdity—that if some injury was done, the effect of which would remain for the rest of a man's

life, the statute of limitations would be gone altogether. It is all very well to pass over lightly what has been suggested as to the point where injury does continue to the end of life. Such a consideration as that which the learned counsel strives for would render the whole Act negatory—if it were only necessary to show that the man is not as good a man after the accident as he was before the accident; that the injury still remains open, and that therefore the statute does not apply. Such a construction of the statute as that would, as I say, lead to a manifest absurdity, inasmuch as there is a whole region of contingencies within which these words would receive a reasonable interpretation, such as the slipping of an undermined portion of ground (as in *Darley Main Colliery v. Mitchell* (1886) 11 App. Cas. 127; 55 L. J. Q. B. 529); and many other suggestions might be made of contingencies of that sort, where an action is brought against a public body for the continuance of what has caused, and is still causing, the mischief. As relative to the question of the personal injury produced here, the words are wholly inapplicable, and my brothers Channell, Darling, and Bigham all agree in taking that view.

LORD ALVERSTONE C.J. I am entirely of the same opinion. I have nothing to add.

Appeal dismissed.

Solicitors for the appellant—Lovett and Liddle.

Solicitor for the respondents—F. Ryall (town clerk).

Reported by Erskine Reid, Esq., Barrister-at-Law.

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High Court of Justice.

KING'S BENCH DIVISION.

BUTT v. SNOW.

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/s/ 3.

Nuisance—Cesspool—Conduit for drainage of several houses terminating in cesspool on private land—"Sewer"—"Buildings works materials and things belonging" to sewer—Undertaking by owner that conduit and cesspool shall be treated as private property—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 12, 94-96.

The appellant, in accordance with plans submitted to the local authority, laid a line of pipes for the conveyance of sewage, 1,200 feet long, under a road, and leading to a large cesspool, which he constructed on land of which he was lessee for a term of years at a nominal rent; and he gave an undertaking to the local authority, expressed to be in consideration of their approval of his plans, whereby he agreed that the line of pipes should for all purposes of the Public Health Acts be a private drain, and that the line of pipes and cesspool should be maintained and cleansed by him or other the owner of the premises for the time being. A number of houses were drained, each by a single pipe, into the line of pipes in question. The appellant failed to cleanse the cesspool with the result that a nuisance was caused. The local authority thereupon took proceedings against him under the nuisance clauses of the Public Health Act, 1875.

Held, on the authority of Meader v. West Cowes Local Board, 1892, 3 Ch. 18; 61 L. J. Ch. 561, that, whether the line of pipes was a "sewer" within the Public Health Act, 1875, or not, the cesspool was not a work or thing belonging thereto within section 13 of that Act, and therefore did not vest in the local authority; and that, on this ground, an order for the abatement of the nuisance was properly made on the appellant.

Per Channell J. The appellant would have been liable even on the footing that the line of pipes was a "sewer" and the cesspool a thing belonging thereto; for in that case, though the line of pipes and cesspool would have been vested in the local authority, who would have been responsible for their condition as between themselves and third parties, yet as between the local authority and the appellant, the appellant would have been responsible by virtue of his undertaking.

CASE stated by justices of the peace for Essex, by whom the appellant had, upon an information laid by the respondent as Town Clerk of the Borough of Southend-on-Sea, on behalf of the Corporation (who were in the special case, and are hereinafter, called "the respondents"), under section 95 of the Public Health Act, 1875, been ordered to abate a nuisance within 14 days and fined.

The following facts were proved or admitted :—

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The appellant was a builder, and in 1897 had built certain houses on each side of a road called Beach Road, which were drained by means of separate drains leading into separate cesspools. Some of such houses as so built and drained were occupied prior to the year 1900. Butt v. Snow.

In May, 1899, the appellant submitted plans to the respondents for the carrying out of a scheme of drainage and sewerage involving the works hereinafter mentioned, and the proposals shown by these plans were accepted by the respondents subject to the appellant entering into the undertaking hereinafter mentioned, required by the respondents, and the works were carried out by the appellant in accordance with the plans and subject to the supervision of the respondents.

In April, 1900, the works were carried out by the appellant pursuant to the above proposals and undertaking as follows, namely, a sewer or drain with which each house was connected by a single pipe was built 1,200 feet in length, 9 inches in circumference, communicating with the surface by a series of manholes, which commenced at the north end of Beach Road and ran down the middle of Beach Road and along Beach Avenue, a continuation of Beach Road, and terminated at a point about 600 feet from the last of the houses in Beach Road, at which point it was connected with a cesspool or cesspit built on the adjoining land on the east side of the road, of which land the appellant was lessee in possession for the residue of an unexpired term of 50 years from June 24, 1899, at the rent of 1s. per annum, under an indenture of August 16, 1899, made between Charles Hales of the one part and the appellant of the other part. Such cesspit or cesspool was constructed of brick and cement, being 12 feet 6 inches deep, 29 feet long, and of an average width of 13 feet, having the capacity to hold 31,000 gallons. The drain or sewer discharged into the cesspit or cesspool.

The appellant was not the owner of the fee simple of the land upon which the cesspit or cesspool was built, but had the before-mentioned lease from the freeholder.

Thirteen of the houses were on July 10, 1902, connected with the sewer or drain and drained into the cesspool, as the ultimate outfall.

The appellant was not on July 10, 1902, the occupier of any of these houses, but he was the owner within the meaning of the Public Health Act, 1875, of six of such houses.

The occupiers of these houses, in common with the other burgesses of the borough, were charged through the general district rate with their proportion of the sewerage system of the borough.

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There were no houses built in Beach Avenue, but, if and when any were built, it would be possible to connect the same with the drain or sewer.

Before the cesspool or cesspit was constructed, the appellant signed the undertaking with reference to the construction and maintenance of the same, subject to which his proposal had been agreed to. The undertaking purported to cast upon the appellant the obligation of cleansing and repairing the cesspit or cesspool.

There was on July 10, 1902, a nuisance existing at the cesspool or cesspit from escape and overflowing therefrom of sewage and drainage from the houses, which were occupied by persons not before the court. The absence of a proper cover also contributed to the nuisance. No nuisance would have arisen if the cesspool or cesspit had been periodically emptied. The cover which had been provided by the appellant in the construction of the cesspool was broken in March, 1901, by workmen of the respondents in course of the work mentioned in the next paragraph. The cost of a new cover would have been a few shillings, and a provision of a new cover was one of the requirements of the respondents' notice of July 10, 1902.

In or about January, 1901, proceedings were taken by the Corporation against the appellant before the same court in respect of the undertaking, and in or about March, 1901, the contents of the cesspit or cesspool having overflowed, the respondents, under the power conferred by the Public Health Act, 1875, and in the interest of the health of the district, by their workmen commenced to empty the cesspool and remove the contents, so as to prevent the existence of any nuisance therefrom or from such overflow.

Notice under section 94 of the Public Health Act, 1875, to the appellant, dated July 10, 1902, requiring him within seven days from the service thereof to abate the nuisance therein mentioned, was served upon the appellant as the person by whose act, default, or sufferance the nuisance arose or continued, and such notice required the appellant to empty the cesspool and to provide a proper cover thereto. The appellant made default in complying with the requisitions of such notice.

The respondents had not yet carried out any system of drainage for this part of their borough, cesspools or earth-closets being generally used; but the respondents were then preparing to carry out a scheme of main drainage, whereby a sewer would be constructed by the respondents which might obviate the necessity of the existence of the cesspool or cesspit by receiving the drainage of the houses which were or could be drained into the cesspit or cesspool by means of the sewer or drain.

It was admitted by the appellant that there was a nuisance on the spot in question.

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It was contended on behalf of the appellant that the nuisance was caused by the occupiers of the various houses which drained into the cesspool, and that the appellant was not the person by whose act, default, or sufferance the nuisance arose or continued; that the undertaking of March 22, 1900, created no obligation binding upon the appellant, on the ground that it was not supported by any valuable consideration, or that, if there were, it could not be enforced in a proceeding under section 95 of the Public Health Act, 1875; that the respondents, once having cleansed the cesspool or cesspit, had themselves undertaken the duty of cleansing the same within the meaning of section 42 of the Act; that the sewer or drain and cesspit or cesspool constituted a sewer, and things belonging thereto, within the meaning of the Public Health Act, 1875, and vested in the respondents, and that the duty of keeping the same so as not to be a nuisance, and the duty of cleansing and emptying the same, were cast upon the respondents, and that the appellant could not be required to cleanse, alter, or amend the same.

On behalf of the respondents it was contended that the appellant was the person by whose act, default, or sufferance the nuisance referred to in the notice of July 10, 1902, arose and continued, and also that he was the owner within the meaning of the Public Health Act, 1875, of the premises on which the nuisance arose; that the undertaking of March 22, 1900, was for valuable consideration, and was binding upon him, and if necessary could be summarily enforced under section 23 of the Southend-on-Sea Corporation Act, 1895; that although the respondents under the powers given by section 47 of the Public Health Act, 1875, did in 1901, upon the appellant's default, themselves abate the similar nuisance then existing by the overflow from the cesspool, such action did not amount to taking upon themselves the duty of cleansing cesspools under section 42 of the Public Health Act, 1875; and that the cesspool did not constitute a sewer vested in the respondents.

On December 16, 1902, the justices gave their decision in the following terms: "We have very carefully considered the evidence given by both parties in this matter, and also the arguments and cases cited. We have come to the conclusion that the defendant must be regarded as the person by whose act, default, or sufferance the nuisance complained of arose. We do not propose to go fully into the features of the case in giving this decision, as it will probably be argued elsewhere. We consider the case is governed by the decision in *Meador v. West Cowes Local Board*, 1892, 3 Ch. 18;

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61 L. J. Ch. 561, and that we are precluded by that decision from regarding the cesspool as an adjunct to or part of the sewerage system of the district. We find as facts that the nuisance complained of existed on the premises in question on the day in question; that it arose by the act, default, or sufferance of the defendant through the defective condition of the cesspool, whereby the sewage escaped or overflowed therefrom. We find as matters of law that the defendant is owner of the premises within the meaning of the Public Health Act, 1875; and that we must deal with the cesspool by itself, and not as forming part of a system of drainage. We therefore order the defendant within fourteen days from service of this order to empty the cesspool, and to provide a proper cover for the same pursuant to the requirements of the notice. We impose a fine of £3, and the court fees of 4s. and £2 2s. costs, recoverable by distress; in default imprisonment without hard labour for twenty-eight days."

The justices stayed further proceedings upon their order pending the present appeal.

The question for the opinion of the Court was whether the decision of the justices is correct in law. If the decision were correct, then the order was to stand; if otherwise, the order was to be quashed, or such other order made as to the Court should seem meet.

The appellant's undertaking to the Corporation of March 22, 1900, was as follows:—

"To the Mayor, aldermen, and burgesses of the borough of Southend-on-Sea and their successors (hereinafter referred to as 'the Corporation'). I, William Butt, of &c., the owner, within the meaning of the Public Health Acts and of the Southend-on-Sea Corporation Act, 1895, of certain land situate in Beach Road, Southend-on-Sea, aforesaid, and upon which said land it is proposed to construct the cesspool hereinafter mentioned according to plans deposited by me or on my behalf with your surveyor on the 3rd day of May, 1899, and numbered 2,168, and also delineated on the plan annexed hereto, upon which I am now erecting or am about to erect twelve dwelling-houses, in consideration of your approving the said plans, do hereby, pursuant to section 23 of the said Southend-on-Sea Corporation Act, 1895, and so as to bind myself and the owner or owners of the property for the time being and my successors in title, undertake and agree as follows:—

(1) That the drains or sewers coloured blue and red in the said plan (hereinafter referred to as 'the said drains'), and which it is intended shall empty into the cesspool shown upon the said plan (hereinafter referred to as 'the said cesspool'), shall, for all the

purposes of the Public Health Acts and any Act of Parliament existing or future, amending or re-enacting the same, be private drains; and that the said drains and cesspool shall be at all times cleansed, maintained, amended, and repaired by me or other the owner or owners for the time being of the said premises, or of any part thereof; and I or other the owner or owners aforesaid will and shall indemnify the Corporation at all times hereafter from and against the costs and expenses of cleansing, maintaining, and repairing the said drains, and against all actions, proceedings, claims, and demands arising either from the same not being properly cleansed, maintained, and repaired, or from any other cause whatsoever. 1908.
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(2) That the surveyor of the Corporation or their inspector of nuisances shall at all reasonable times hereafter be permitted to enter the said premises, with or without assistants and workmen, and cause the ground to be opened, and examine the said drains or cesspool; and if the said drains or any part thereof, or the cesspool shall on examination appear to require cleansing, maintaining, amendments, or repair, the same shall, on notice in writing being given by the Corporation to the owner or owners, or the occupier or occupiers for the time being of the said premises, or any part thereof, be forthwith cleansed, amended, or repaired by or at the expense of such owner or owners to the satisfaction of the said surveyor or inspector of nuisances; and if the owner or owners shall fail to execute such works as aforesaid, it shall be lawful for the Corporation, if they think fit, to execute such works, and the owner or owners shall forthwith on demand repay to the Corporation the expenses incurred by them in so doing, together with interest thereon at £5 per cent. per annum from the date of such demand until payment; and such expenses and interest may be recovered by the Corporation from such owner or owners in a summary manner in the same way as expenses are summarily recoverable by a local authority by virtue of the Public Health Act, 1875.

(3) That the cesspool shall be used for sewerage purposes only, and shall not be used for the drainage or reception of surface water, and that no rain pipe shall either directly or indirectly be connected therewith.

(4) That as soon as any public sewer shall be constructed or laid down within 100 feet from any part of the said houses and premises which in the opinion of the Corporation or their surveyor shall be capable of effectually receiving and carrying away the sewage of the said premises, I, the said owner, or other the owner or owners for the time being of the said premises or any part thereof, will within one month of the receipt of notice for that purpose from the Corporation or

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their surveyor, at our own expense disconnect the said drains from the said cesspool, and cleanse and fill in the said cesspool, and to the satisfaction of the Corporation or their surveyor annex such drains to such new public sewer, and in default thereof such disconnection, cleansing, and new connection may be made by the Corporation, who shall be entitled to recover in a summary manner from me or other the owners or owner for the time being of the said premises all expenses incurred therein by the Corporation, and in such shares and proportions as may be determined by the surveyor for the time being of the Corporation.

* * * * *

(9) That this undertaking shall be binding and enforceable as provided by the said section 23 of the Southend-on-Sea Corporation Act, 1895, but any remedy thereunder shall be in addition to, and not in substitution for, any other powers or remedies vested in the Corporation by virtue of these presents or otherwise.

* * * * *

(11) [This was the last paragraph.] That this undertaking and all the before-mentioned terms and stipulations shall apply and remain in force, notwithstanding that the said drains or any part thereof may hereafter be connected with the public sewer as provided by clause 4 hereof, or that they may at any time hereafter be altered or disconnected from the sewer with which the same is now proposed to be connected, and be or not connected with any other drain or public sewer."

Section 23 of the Southend-on-Sea Corporation Act, 1895 (58 & 59 Vict. c. clviii.), referred to in the above case, contains provisions making any undertaking or agreement in writing given by or to the Corporation to or by an owner of property on the passing of plans, or otherwise in connection with the property of such owner, binding upon the owner of the property for the time being, and provides for the enforcement of the agreement summarily under penalties. Nothing ultimately turned on the section.

A. Glen, K.C., and Morle for the appellant. The justices were wrong in holding that the conduit was not a sewer. It receives the drainage of 13 houses, and is therefore clearly within the definition of "sewer," and not within that of "drain," in section 4 of the Public Health Act, 1875. *Meader v. West Cowes Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561, by which the justices conceived themselves bound, is distinguishable, on the ground that the conduit there in question was laid without the knowledge of the local authority,

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while here it was laid with their sanction, and also on the ground that the conduit there was a mere short length of pipes wholly in the private land of the person who laid it, while here it runs for something like a quarter of a mile under the public street. The case just cited was followed in *Button v. Tottenham Urban District Council* (1898) 78 L. T. 470, but with obvious reluctance, the Court evidently thinking that the decision had been brought about by the very peculiar state of facts. If the conduit is a "sewer," and vested accordingly in the local authority, the sewage itself becomes their property the moment it reaches their sewer, and the private individual loses all control over it and ceases to be responsible for it: per Lord Esher M.R. in *Ferrand v. Hallas Land and Building Company*, 1893, 2 Q. B. 135, at p. 140; 62 L. J. Q. B. 479. In the present case, therefore, the local authority are responsible for the sewage which has caused the nuisance. It became their sewage, and their responsibility cannot cease when it reaches the cesspool. In this case the local authority are seeking to evade the duty cast upon them of providing the necessary sewers for the district by taking proceedings against the appellant, and that the Court will not permit: *Fadom v. Parsons*, 1894, 2 Q. B. 780; 64 L. J. M. C. 22. Further, the cesspool itself is a "work or thing belonging to" the sewer within section 13 of the Public Health Act, 1875, and is accordingly vested by that section in the local authority. In *Meader v. West Cowes Local Board*, Lindley L.J. points out that a cesspool at the end of a sewer may well be a work or thing belonging to the sewer so as to vest in the local authority. The cesspool is in fact in the position of a settling tank on a sewage farm belonging to the local authority. *Reg. v. Parlby* (1889) 22 Q. B. D. 520; 58 L. J. M. C. 49, and that line of cases, show that the nuisance clauses of the Public Health Act, 1875, are inapplicable to a nuisance arising from drainage works belonging to the local authority. If the appellant is under any obligation to cleanse the cesspool at all, it is a mere contractual liability arising out of the undertaking given by him to the local authority, and the local authority cannot enforce a contractual liability by means of the penal provisions of the Public Health Act, 1875.

Macmorran, K.C., and *Herbert Smith*, for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. This is one of those cases of which in times gone by there were not a few before the Court, where an attempt is made to put upon the local authority responsibility for work which upon the terms of the actual bargain made between the parties was to stand in an entirely different position. All I say

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with regard to that part of the case is that I should require a very strong case to be made out before I gave a judgment, in effect, that a man who has made a contract with a local authority that sewers and cesspools shall be private sewers and private cesspools, and has got the burden, which might otherwise have fallen upon him in law, removed from his shoulders, can be allowed—not, so to speak, because third persons have been damnified or have acquired rights, but because he chooses to say, “I will turn over this work to this local authority, because I now see that I by agreement have created a state of things which, if it had not been created by agreement, might possibly not have given rise to a difficulty”—I should require; I say, a strong case indeed to justify the argument that a person who had entered into this kind of contract should be allowed to turn round and say, “I meant all these drains and cesspools to be private drains and cesspools, and I find now they are public drains and public cesspools, and therefore I wash my hands of them and put them back on the local authority.” I mention that because I want to be careful in dealing with this case, as it has sometimes arisen indirectly and been referred to. That question, however, does not really arise here.

I think that this case is absolutely covered by *Meader v. West Cowes Local Board*, 1892, 3 Ch. 18; 61 L. J. Ch. 561, and *Button v. Tottenham Urban District Council* (1898) 78 L. T. 470. It has been suggested, and may possibly be suggested, that it was not necessary for the decision in *Meader v. West Cowes Local Board* to hold that the line of pipes in that case was not a “sewer.” I do not think that is important, because at any rate the case did decide that when a man chose to deal with sewage which went through a line of pipes—I will not consider whether it was a sewer or not—and upon his private land he had got a cesspool, and did not clean out that cesspool, the obligation was upon him, and not upon the local authority, to clear it out.

In this case I think it is quite impossible to contend that the cesspool vests in the local authority under section 13 of the Public Health Act, 1875. Certainly Lindley L.J. never meant to say anything of the kind in *Meader v. West Cowes Local Board*. What he did say was that there might be works in connection with sewers which would undoubtedly vest in the local authority, as, for instance, manholes and inspection chambers, and a variety of other things. A cesspool is a perfectly well-known thing, and in his judgment Lindley L.J. decided that the cesspool in that case did not vest in the local authority under the Act of Parliament.

I think this is a very simple and plain case of a man who has for

his own purposes and upon his own land constructed a cesspool which gives rise to a nuisance, and I think the justices were justified in coming to the conclusion that proceedings could be taken against the appellant, who had allowed that nuisance to continue in the cesspool, which was under his control. 1908.
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I therefore think that the appeal fails, and should be dismissed.

WILLS J. I am of the same opinion. I think it is very difficult to distinguish this case in any satisfactory sense from the case before the Court of Appeal of *Meador v. West Cowes Local Board*. If the cesspool did belong to the sewer, and the sewer belonged to the Corporation, then the cesspool would belong to the Corporation. But I think the agreement makes it quite clear that it was at the time of making the agreement private property, and it was intended it should be so made. Therefore I agree with my Lord that the appeal should be dismissed.

CHANNELL J. I am also of opinion that this appeal should be dismissed.

My learned brothers have come to the conclusion, as I understand their judgments, that the cases show that this cesspool had never vested, upon the proper construction of the Public Health Act, in the local authority. If that is so, there is an end of the case altogether. But I desire to give my judgment upon the footing that even if it had come within the Act, or even if the nuisance had arisen from the non-repair of the conduit, to use a neutral phrase, which received the drainage of more than one house, and consequently for certain purposes would be a sewer within the Public Health Act, and not a drain, the appellant would be still the person by whose act or default the nuisance arose. The definition in section 4 of the Public Health Act, 1875, under which a pipe receiving the drainage of more than one house is a sewer, and vests in a local authority even against their will, has been applied in a great many cases—I am bound to assume rightly—so as to cause grievous injustice. But there never has been a case to the best of my belief where, as between the local authority on the one hand and the man who has done the work in question on the other, it has been held that the Court was bound to hold that the thing was repairable by the local authority contrary to the real truth of the terms upon which it was made.

In the present case there is a pipe made by the appellant which the local authority could have prevented his making, and they say to him, "You may make it if you like, but upon the terms as between us that it is to be deemed to be a private drain, and you are to repair it." He contracts to do it, and then as soon as he has done it he

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turns round and says that it receives the drainage of more than one house, and is therefore a sewer, and is vested in the local authority, notwithstanding any agreement, and that the law says the local authority are bound to repair it.

I am glad to think there is no law that compels us to hold that that is so. As between these parties there is no difficulty, if difficulty there might have been, if the question had arisen between the local authority and third parties. It may be in that case that the third party would have a right to say that as between the third party and the local authority the local authority were responsible for it. But when the question arises between the immediate parties themselves, to the best of my belief there is no authority which compels us to hold that the conduit is vested in the local authority in such a way as to make them responsible for it as between them and the person who has made it, either against their will, or wrongfully, or without their consent, or upon terms which he does not carry out.

Therefore, I am prepared to give my judgment upon the footing that according to the construction of the Act and the cases upon it, if the question had arisen between a third party and the local authority, this pipe or drain has vested in the local authority. Of course, that point does not arise if my learned brothers are right—which I daresay they are—in saying that this thing had not in any sense vested in the local authority.

Appeal dismissed.

Solicitor for the appellant—G. Boyd Wickes.

Solicitors for the respondent—J. E. and H. Scott, for William H. Snow, Southend.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It is to be observed that Channell J., in the very valuable judgment he gave in the above case, speaks of the local authority as being able to prevent the laying by a private person of a line of pipes such as to be a sewer within the Public Health Act, 1875. It may have been so in the particular case, for the line of pipes in question was laid under the road, and if the road was a street vested in the local authority, their consent would have been required to the opening up of the roadway. It is, however, an error to suppose that the consent of the local authority is always required to the laying of a sewer by a private person. In London it is so, but not elsewhere under the general law. Indeed, the absence of any provision giving the local authority adequate control over the laying of sewers by private persons is well known as one of the gravest defects in the Public Health Acts. Even, however, if Channell J. did fall into this error, as from the generality of his language would rather seem to have been the case, it does not really affect the reasoning of his judgment.

High Court of Justice.

KING'S BENCH DIVISION.

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METROPOLITAN INDUSTRIAL DWELLINGS CO. v. LONG.

Dec. 10, 11.

Bye-laws — Drains — Water-closets — "Construction of water-closet" — Ventilation of trap of water-closet — Extension of bye-laws to existing buildings — Metropolis Management Act, 1855 (18 & 19 Viet. c. 120), s. 202 — Public Health (London) Act, 1891 (54 & 55 Viet. c. 76), s. 39.

A series of bye-laws were made by the London County Council under the provisions of section 202 of the Metropolis Management Act, 1855, giving power to make bye-laws for regulating the dimensions, mode of construction, &c., of "the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith."

No. 17 of these bye-laws provided that every person who should "construct any water-closet," of which the soil pipe fulfilled certain conditions, should cause the trap of the water-closet to be ventilated in a particular manner.

No. 21 of the bye-laws was as follows: "These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected."

The appellants, who were owners of a building erected before the confirmation of the bye-laws, reconstructed and replaced the pans and traps of several water-closets in the building, which had been broken in the course of alterations they were carrying out in the drains connecting the soil pipes of the closets with the sewer, or in the course of ordinary wear and tear. The soil pipes of the water-closets were of the character contemplated by bye-law 17.

Held—1. That the bye-laws were neither ultra vires nor unreasonable.

2. That the work done by the appellants was not the construction of water-closets within bye-law 17; and that bye-law 21 did not impose on a person who constructed or reconstructed the pan or trap of a water-closet, but did not construct a water-closet, the obligation of complying with bye-law 17 as to the ventilation of the trap.

Semble, that a bye-law imposing that obligation in such a case would be intra vires, and not unreasonable.

CASE stated by a metropolitan police magistrate, before whom the appellants had been convicted of a breach of bye-laws of the London County Council.

1. The appellant company, as owners of No. 1, Ponsonby Buildings,

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in the borough of Southwark, was summoned before me to answer a complaint made by the respondent that at the premises above mentioned, on or about the 22nd of December, 1902, the appellant company did construct or reconstruct a water-closet, the soil pipe of which communicated with a sewer and was in connection with another water-closet, without causing the trap of such water-closet to be ventilated into the open air at a point as high as the top of the soil pipe, or into the soil pipe at a point above the highest water-closet connected with such soil pipe, in the manner required by the bye-laws made in that behalf by the London County Council, in exercise of the powers conferred by the Metropolis Management Act, 1855, which bye-laws were approved by the Local Government Board on the 14th day of June, 1901. At the hearing before me my decision on the said complaint was treated as a determination of 32 other similar summonses obtained by the respondent in similar terms relative to the same Ponsonby Buildings.

2. By section 202 of the Metropolis Management Act, 1855 (as amended by the Public Health (London) Act, 1891), it is provided that: “. . . and the said Metropolitan Board may also from time to time make, alter, and repeal bye-laws for regulating . . . the material of the pavement and roadway of new streets and roads . . . and for regulating the dimensions, form, and mode of construction, and the keeping, cleansing, and repairing, of the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith . . . and generally for carrying into effect the purposes of this Act . . . provided also that no penalty shall be imposed by any such bye-law unless the same be approved by one of Her Majesty's Principal Secretaries of State.”

By the Local Government Act, 1888, the powers conferred on the Metropolitan Board of Works were and are now vested in the London County Council. The Local Government Board has been substituted for one of Her Majesty's Principal Secretaries of State.

3. By the Public Health (London) Act, 1891, s. 39, it is provided as follows:—

“(1) The County Council shall make bye-laws with respect to water-closets, earth-closets, privies, ashpits, cesspools, and receptacles for dung, and the proper accessories thereof in connection with buildings, whether constructed before or after the passing of this Act.

“(2) Every sanitary authority shall make bye-laws with respect to the keeping of water-closets supplied with sufficient water for their effective action.

“(3) It shall be the duty of every sanitary authority to observe and enforce the bye-laws under this section; and any directions given by the

sanitary authority under this Act shall be in accordance with the said bye-laws, and so far as they are not so in accordance shall be void."

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4. The facts and matters hereinafter stated were either admitted or proved before me at the hearing of the said complaint.

5. On the 30th day of October, 1900, certain bye-laws purporting to be made under the powers conferred by the said section 202 of the Metropolitan Management Act, 1855, were made by the London County Council, and were submitted to and confirmed at a subsequent meeting of the Council, held on the 6th day of November, 1900, and the common seal of the Council was affixed to the said bye-laws on the 7th day of November, 1900. The said bye-laws were subsequently approved by the Local Government Board on the 14th day of June, 1901. A copy of the said bye-laws, headed "London County Council Drainage Bye-laws," is annexed to and forms part of this case.

6. Bye-law No 17 of the said bye-laws provides that :—

"Any person who shall construct any water-closet, the soil pipe of which shall communicate with any sewer and shall be in connection with any other water-closet, shall cause the trap of every such water-closet to be ventilated into the open air at a point as high as the top of the soil pipe, or into the soil pipe at a point above the highest water-closet connected with such soil pipe, and so that the ventilating pipe shall have in all parts an internal diameter of not less than two inches and shall be connected with the arm of the soil pipe or the trap at a point not less than three and not more than twelve inches from the highest part of the trap and on that side of the water seal which is nearest to the soil pipe. He shall cause the joint between the ventilating pipe and the arm of the soil pipe or the trap to be made in the direction of the flow.

"He shall construct such ventilating pipe in drawn lead or of heavy cast-iron. Provided that in any case where it shall be necessary to construct such ventilating pipe within a building he shall construct such ventilating pipe in drawn lead.

"He shall construct such ventilating pipe, whether inside or outside a building, so that if the pipe be of lead its weight shall not be less than 45 lbs. per 12 feet length, and if the pipe be of iron its thickness shall not be less than $\frac{3}{16}$ ths inch and its weight not less than 25 lbs. per 6 feet length.

"He shall in all cases cause the joints in and the connections to such ventilating pipe to be made in the same manner as if such ventilating pipe were a soil pipe."

7. Bye-law No. 21 of the said bye-laws provides that :—

"These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of

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communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected."

8. Bye-laws made by the London County Council under the Public Health (London) Act, 1891, s. 16 (2), on October 10, 1901, and June 2, 1893, and section 39 (1), on June 22, 1893, which were all approved by the Local Government Board, were also put in at the hearing, and they are annexed to and form part of this case.

9. The appellant company own certain buildings known as Ponsonby Buildings, situate and being in the metropolitan borough of Southwark, which are divided into tenements, sometimes of three rooms, in other cases of two rooms, and in other cases of one room. The said buildings contain upwards of 100 water-closets, the pans wherein communicate with soil pipes which ultimately, through intermediate drains, empty into a sewer.

10. The said buildings were erected in the year 1886 or 1887 (before the said bye-laws were made) by the appellants, who have a number of similar buildings in various parts of the Metropolis, all of which (including Ponsonby Buildings) are intended to supply dwellings for artisans. The Ponsonby Buildings are situated in the new borough of Southwark, and were provided when built with a system of drainage.

11. There is annexed hereto, and forms part of this case, a "block plan" of Ponsonby Buildings.

12. At the end of the year 1902 the appellants resolved to substitute for the ordinary tile drain pipes of which the drains of the said buildings communicating with the sewers were constructed iron pipes, so that the drains should continue in the same condition and be of the same number as before, but the materials of which they were formed would be iron pipes instead of earthenware. The said work was accordingly carried out, and it was in the course of carrying out such alterations that the matter complained of by the respondent arose.

13. The said buildings are constructed (as is also to be inferred from the block plan) in blocks, and consist of several floors. On each floor there are water-closets. Outside the building there is a soil pipe of 5-in. diameter which runs up outside the buildings and communicates at the lower end directly or by intermediate pipes with the drains, and runs up to over the height of the whole building, the top being open so as to form an open ventilating pipe. The pans inside the water-closets on each floor are connected by pipes sealed with a water seal with a soil pipe 5 inches in diameter outside these connecting pipes which are 4 inches in diameter. To each block there are two soil pipes. Evidence was given, and not cross-examined to, that the said respective

diameters of 4 in. and 5 in., and the open ventilating character of the outside soil pipe, were selected and so constructed with a purpose, and they were intended (amongst other things) to prevent any syphonage from the pans and connecting pipes. The water-closets, besides the pans and connecting pipes, contained the flushing apparatus and all the other necessary fittings of a water-closet.

14. Evidence was given on behalf of the appellants, and not cross-examined to, that long before the present cause of complaint arose and quite apart from it, as well as in connection with the present proceeding, very exhaustive experiments had been made not only at the said buildings but at other buildings similarly constructed and arranged belonging to the appellant company and another large industrial dwellings company, and that it had been found practically impossible to produce any syphonage from the pans or traps of the water-closets; and I was satisfied that under ordinary conditions such syphonage was impossible. Evidence was also given, and not cross-examined to, that with the system of soil pipes in use at the said buildings and the construction of the drainage it was not practically possible to have any regurgitation, that is, the forcing back of foul gases from the drains through the soil pipes and through the pans into the closets. Counsel for the respondent contended that all this evidence was not material to the issues raised by the summons, and did not cross-examine or call evidence to contradict the evidence called on that part of the case by the appellants. I saw no reason to doubt the evidence called for the appellants.

15. Evidence was given before me, and not cross-examined to, to show that the means prescribed by the said bye-laws and the means adopted at the said buildings are not the only means of preventing syphonage or regurgitation and that there are other means of preventing the evils intended to be guarded against by anti-syphonage pipes. Evidence was also given to show that the construction of pipes, &c., in accordance with bye-law No. 17 in old buildings might be a matter imposing a large expenditure, and, if it had to be undertaken by the appellants and other companies of the same sort in all their buildings, would put them to an expense of many thousands of pounds, and seriously draw upon the means of providing such dwellings as it is the object of such companies to provide.

16. Correspondence between Dr. Millson, the medical officer for the borough of Southwark and the chairman of the appellant company was read and a copy thereof is annexed hereto and forms part of this case. I came to the conclusion from this correspondence and from the evidence called before me that nothing had been done by the appellants to alter the closets and pipes further than the reconstruction

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or replacing of several pans and pipes connected therewith (and with the soil pipes) which had been broken in the course of changing the said soil pipe or in the ordinary wear and tear in the user of the buildings. [In the course of the argument of the case it was agreed that no soil pipe had in fact been changed, and that what was changed was the drain which led from the foot of the soil pipes to the sewer. See the judgment of Lord Alverstone C.J.]

17. The respondent contended that in the circumstances aforesaid it was necessary to affix anti-syphonage pipes such as required by bye-law 17 in every closet and on every floor, where such renovations had been made throughout the said buildings.

18. It was contended on behalf of the appellant company (1) that the work executed by the appellants as in this case described was not a "construction" or "reconstruction" of a water-closet within the meaning of the said bye-laws; (2) that bye-law 21 did not apply to or incorporate bye-law 17 in any case or at all; (3) if bye-law 21 does apply to bye-law 17 neither bye-law imposed on the appellant company the obligation of doing the works the omission to do which is complained of; (4) that there was no power under section 202 of the Metropolis Management Act to make bye-laws Nos. 17 and 21 of the said bye-laws, or either of them, that they are therefore both or either *ultra vires*; (5) that the said bye-laws Nos. 17 and 21 were unreasonable in regard to old buildings constructed before the bye-laws were made, inasmuch as such bye-laws provided only one of several means of attaining the same end as effectively, and that such bye-laws (if applicable at all) purported to extend alike to buildings already provided and those not provided with efficient means of preventing syphonage, and that the application of the bye-laws would or might entail unnecessary expense, and that any operation in a closet of one series involved alteration and expenditure of the whole series connected with the same soil pipes.

19. It was contended on behalf of the respondent (1) that the bye-laws were not unreasonable; (2) that there was power under section 202 of the Metropolis Management Act, 1855, to make the said bye-laws; (3) that the said bye-laws were applicable to the circumstances existing and works done at the said buildings; (4) that compliance with the said bye-laws was practicable, and the bye-laws therefore applied to the said works; (5) that the said works amounted to the construction of a water-closet within the meaning of the bye-laws; (6) that the said bye-laws had not been complied with; (7) that such non-compliance was deliberate in view of the correspondence referred to in paragraph 16

20. I took time to consider, and delivered my written decision as follows :—

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JUDGMENT.

The question in this case is one of considerable practical importance, and has been deliberately raised by the defendants as a matter of principle. They are the owners of certain industrial dwellings known as the Ponsonby Buildings, erected before the confirmation of the drainage bye-laws of 1901, made under section 202 of the Metropolitan Management Act, 1855 ; and in December, 1902, owing to the substitution of an iron pipe or drain for one of ordinary Doulton ware, they found it necessary to put new traps and pans connected with 33 water-closets in their buildings. They were then informed by the local authority that these new traps to the water-closets must be fitted with anti-syphonage pipes in accordance with bye-law 17 of the London County Council drainage bye-laws, because by bye-law 21 the said bye-laws were made applicable to new work in old buildings, so far as practicable. The defendants refused to comply, on the grounds that these bye-laws were inapplicable and unreasonable, and it is now further contended that they are *ultra vires*. The local authority thereupon took out 33 summonses for non-compliance in the case of each of the 33 closets, in order that these questions may be settled in a court of law. There does not appear to be any material dispute as to facts, but the defendants, in order to support their contention as to the unreasonableness of the bye-laws, have called evidence before me, which has not been cross-examined to, to show that the soil pipes in their buildings are of such a dimension, namely, five inches in diameter, that the evils of syphonage, to prevent which these bye-laws have been made, cannot possibly occur, and that the expense which must be entailed by compliance with the bye-laws is so great as to make the application impracticable. Mr. Dodd, for the local authority, contends that I have no right to consider any question except the application of the bye-law and its practicability. I have, with some reluctance, come to the conclusion that this contention is right. The bye-laws admit of no exception for the case of new buildings which contain a system of drainage where there is no probability of syphonage, and I do not think I am at liberty to create such an exception in the case of old buildings to which the bye-laws apply. If this were possible, a dispute might be raised in each case, and the bye-laws would be rendered practically valueless. I set aside, therefore, the question of whether the bye-law is necessary or even useful in the particular case before me. Then, as to its practicability, I do not think that there is any evidence before me that compliance with the bye-law is not practicable. The figures given for the probable expenses go far beyond the case before me, and do

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not touch the question of practicability, so that I do not think they ought to affect my judgment. The words "so far as practicable," in my opinion, are intended for cases where large structural alterations or demolition of buildings would be necessitated by the application of the bye-laws, which is not the case here. I think, therefore, that the application is practicable. Then I have to consider whether the work done involves the application of the bye-laws to these traps. In my opinion it does. Mr. Danckwerts contends that the words must involve a reconstruction of the rooms in which the water-closets are placed, or, at any rate, of the system of water-closets; but I think the words used in bye-law 21 are intentionally wider than that, and specifically apply to every trap or apparatus connected with a pipe or drain or other means of communicating with sewers starting from the water-closet, and not only such a trap as communicates from the drain direct into the sewer. Two other questions remain. Are these bye-laws under section 202 *ultra vires*? And are they unreasonable? As to the first, I am of opinion that the bye-laws are not *ultra vires*, because section 202 is intended to deal with "pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith." And bye-law 17 specifically deals with the traps of any water-closets, the soil pipe of which communicates with a sewer, and not with the character of the water-closet itself, which rightly comes under section 39 of the Act of 1891. As to the second question, if I felt justified in pronouncing an opinion as to the reasonableness of the bye-law as applied to this building, I should have great hesitation in deciding the case; but I have already said that I do not feel so justified, and as to the wider question of the reasonableness of the bye-laws generally, I cannot doubt that it has been made by the London County Council and approved by the Local Government Board for good cause, and there appears to have been unusual deliberation in the making of them, seeing that they were confirmed by the County Council on November 7, 1900, and approved by the Local Government Board on June 14, 1901. Under these circumstances, I cannot hold that they are unreasonable, though I regret that there is no proviso for the case where it is proved that there is practically no danger of syphonage. There are other dangers, no doubt, connected with pipes of too large a diameter, and it may well be that the authorities have felt that the only safe way of dealing with so difficult and dangerous a matter is by such hard and fast rule, and so long as it exists the local authority is bound to enforce it, unless they can obtain the sanction of the Local Government Board to some relaxation of the rule for a particular case, and I have no alternative but to convict the defendants. There will be a fine of 40s. and £10 10s. costs on one summons, and 2s. on the other summons.

22. The question for the opinion of this honourable Court is whether my determination was correct in point of law.

It appeared from the various sets of bye-laws annexed to the case that provisions of similar scope to those contained in No. 17 of the bye-laws made by the London County Council under section 202 of the Metropolis Management Act, 1855, and approved by the Local Government Board on June 14, 1901, had been inserted among the bye-laws made by the London County Council under section 39 of the Public Health (London) Act, 1891, and approved by the Local Government Board on June 28, 1893.

The provisions of the 1893 bye-laws in this respect were, however, rescinded by a bye-law approved by the Local Government Board on June 14, 1901.

In other words, when the bye-laws of 1901 under section 202 of the Metropolis Management Act, 1855, were made, the provisions as to the ventilation of the traps of water closets were transferred from the series of bye-laws under section 39 of the Act of 1891 to the series under section 202 of the Act of 1855.

Danckwerts, K.C., and Courthope Munroe for the appellants. If the magistrate was right in this case the result is that if an owner of a house, built before the bye-laws under which the appellants were convicted, reconstructs the drain which leads from the soil pipe to the sewer, and incidentally some of the water-closet apparatus is broken, he must remodel the whole of that apparatus. It is submitted that the learned magistrate was wrong, and that this is not so. In the first place it is submitted that bye-law No. 17 is *ultra vires*. It purports to be made under the provisions of section 202 of the Metropolis Management Act, 1855, authorising the making of bye-laws with reference to "pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith." This does not authorise the making of a bye-law as to the water-closet itself. Neither the water-closet itself nor the trap below the pan is apparatus connected with the drain which communicates with the sewer within the meaning of the section. In a sense no doubt the trap is connected with the drain, but so is the flushing cistern or even the apparatus by which the water for flushing is brought into the house. The line must be drawn somewhere. And the proper line to draw is to say that the provisions of section 202 are concerned with the drain external to the water-closet. If a bye-law is to be made as to such matters as are dealt with by bye-law 17 it must be made under section 39 of the Public Health (London) Act, 1891, which authorises the making of bye-laws with respect, among other things, to water-closets. It is

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important that the powers of section 202 of the Act of 1855 and section 39 of the Act of 1891 should not be confused, because, among other reasons, section 202 of the Act of 1855 extends to the City while section 39 of the Act of 1891 does not.

Secondly, the bye-laws do not bear the construction put on them by the learned magistrate. Bye-law 17 is dealing with the case of a person who constructs a water-closet; it has no application in any other case. And bye-law 21, if it can be regarded as incorporating bye-law 17 in any sense, cannot at all events render bye-law 17 applicable except where the person in question is constructing a water-closet. In this case the appellants did not construct any water-closet.

Lastly, if the bye-laws bear the construction put upon them, they are bad as being unreasonable. It may be reasonable to require a person who is erecting a new building, or putting in an entirely new water-closet, to provide against syphonage in one particular way. But it is utterly unreasonable that because a man touches some one part of existing apparatus, which is effectually constructed so as to guard against syphonage in one manner, he must reconstruct the whole apparatus so as to attain the same end in another manner.

Horace Ivory, K.C., and *Frank Dodd* for the respondent. The learned magistrate was right. In this case the appellants did in each of the 33 cases construct a new trap and pan. The important thing is that they constructed a new trap. That brings them within the express words of bye-law 21, for the trap is certainly connected with the drain. Therefore any previous bye-law that can be applied must be applied. Now turning to bye-law 17; it is a bye-law dealing precisely with that very matter, with the traps of water-closet drains, and providing how in particular circumstances the trap is to be ventilated. [Lord Alverstone C.J. The difficulty I feel is this:—If it is intended that, where the pan of a water-closet is broken and the landlord repairs it, he must reconstruct the whole of the ventilation, then the bye-law ought to tell him so in plain language.] The language really is quite plain, because bye-law 21 tells him that if he is reconstructing any apparatus connected with a drain he is to comply with the previous bye-laws. A water-closet is clearly apparatus connected with a drain.

The bye-law thus construed is reasonable. It would be reasonable to require a particular method of ventilation to be adopted as regards all closets new and old. If that would be reasonable it is reasonable, *a fortiori*, to say that the new method of ventilation must be adopted whenever any repair is done to the closet.

It is suggested that the case does not fall within the bye-laws because what the appellants did was not the construction of a water-closet. It is submitted that it was. They were constructing the pan and the trap,

which are the substantial and only essential parts of a water-closet. Bye-law 17 cannot have been intended to be confined to a case in which a person is building a new room for the purpose of containing a water-closet. The bye-law is not a bye-law dealing with the construction of water-closets in that sense. It is a bye-law dealing with the mode in which the trap of a water-closet is to be ventilated. That that was the intention appears from the marginal note to the bye-law which is "Ventilation of trap of water-closet." Bye-law 17 must be among the bye-laws referred to in bye-law 21, because that bye-law speaks of "any trap or apparatus" connected with a drain, and bye-law 17 is the only bye-law in the series dealing with any apparatus other than a trap.

The transfer of the provisions now contained in bye-law 17 from the series of bye-laws under section 39 of the Public Health (London) Act, 1891, to the series under section 202 of the Metropolis Management Act, 1855, was effected because it was thought that the provisions clearly were concerned with apparatus connected with a drain, while some doubt was felt as to whether they were concerned with an accessory to a water-closet.

Danckwerts, K.C., replied.

LORD ALVERSTONE C.J. This is an interesting and a very important case. In my opinion the magistrate has gone too far, but I cannot help thinking that in all probability the view, mistaken I venture to think, which he has taken of the proper construction of the bye-law, may be largely due to the fact that a number of points were urged before him which in my opinion are absolutely untenable. With the greater part of Mr. Avory's argument I agree; but I do not think, fairly construed, the bye-law has the meaning which must be put upon it in order to uphold the conviction. Now I wish to say, as I have ventured to point out in many cases of this kind, that bye-laws such as these ought to be supported except in a very clear case of either their being unreasonable—which is not a common case though it does occur sometimes—or in a clear case of their not covering what is complained of. This is so particularly in connection with sanitary bye-laws because it is extremely important to the local authority responsible for laying down sanitary bye-laws that their authority should be maintained. It is for that reason that I entirely reject the argument—which I will not say was actually made, but which was implied—that because there was existing means of ventilation in this drainage system, the magistrate should have taken that into his consideration in dealing with the summons for the breach of bye-law 21. In fact, I think that the greater part of that evidence going to show that there was little chance of regurgitation, and that the system as already existing was such that

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there might be effective ventilation, was really *nihil ad rem* for the purpose of the question before the court. The only question the magistrate had to consider was whether or not, on the facts, there was a breach of the bye-law properly construed; and that is one of the grounds why I think matters which were introduced into this case may have diverted his attention from the real question. Again, I consider that there was a power to make this bye-law under section 202 of the Metropolis Management Act, 1855, which gives power to make bye-laws "for regulating the dimensions, form, and mode of construction, and the keeping, cleansing, and repairing, of the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith." That provision is contained in an Act nearly 50 years old, and I have no doubt whatever that a bye-law such as here purports to be made under section 202 is in no sense *ultra vires*. That is another point with which we are pressed, and I think it raises an issue which tends to divert the mind from a calm and judicial consideration of what is the proper construction to be put upon the bye-law. Again, with regard to section 39 of the Public Health (London) Act, 1891, which gives powers to make bye-laws for water-closets: to my mind it is quite a matter of indifference whether those powers are separate or ancillary, or even duplicated. I see no reason why the authority should not make bye-laws of this class under one or other of the sections. It may be, as Mr. Avory very properly pointed out, that they thought it better to keep such bye-laws as appeared more directly appropriate to the 202nd section of the Act of 1855 separate from those that they made under section 39 of the Act of 1891. I further wish to say that I shall adopt in this case, what I have previously said, namely, that I feel absolutely bound by the judgment of Lord Russell of Killowen C.J. in *Kruse v. Johnson*, 1898, 2 Q. B. 91; 67 L. J. Q. B. 782, where he pointed out that it is only under strong circumstances that bye-laws can be held to be unreasonable. Therefore, upon the main part of Mr. Avory's argument I agree, because I do not think the bye-law is unreasonable and I do not think that it is *ultra vires*. All I have to do is to deal with the construction of it. On this, taking the facts as found by the magistrate, we are obliged to come to the conclusion that the bye-law is such that it ought not to be held that what the appellants did was a breach of the bye-law.

It must be remembered that the statute does not enact the bye-law. The local authority have the power to do it, and there is power to impose penalties. Therefore there should at least be as much clearness and certainty as there would be in the ordinary case of statutes, provisional orders, or bye laws and regulations made under them, by which a penalty is imposed. I think a person who has got to make up

his mind, with regard to the questions he has to determine, as to what his duties will be and as to what his liabilities will be, is entitled to be told in reasonably plain language what he is to do, and particularly so in the case of existing property. It is one thing to lay down bye-laws with regard to new buildings and new constructions and quite a different thing to apply those bye-laws to old constructions and old buildings; and I do not think it is putting too great a burden on the local authority to say that they must state in reasonably plain language what are the obligations put upon the owners of old property.

In this case, of course, I take the facts from the case and from nothing else. There are a large number of dwellings, the sanitary arrangements of which seem to have been carefully thought out at the beginning; there was a series of soil pipes, the ventilation being through the soil pipes; and there were sufficient drains communicating from the foot of those soil pipes to the sewers; the work which was being done was altering the drains from being pot pipes into iron pipes. The soil pipes were not touched. In the course of altering the drains some of the pans and traps of the closets were injured. It is stated in this way in paragraph 16 of the case: "I came to the conclusion from this correspondence and from the evidence called before me that nothing had been done by the appellants to alter the closets and pipes further than the reconstruction or replacing of several pans and pipes connected therewith (and with the soil pipe) which had been broken in the course of changing the said soil pipe or in the ordinary wear and tear in the user of the buildings." It is agreed that those words, "the said soil pipe," mean "said drains," and that there was no change of an upright soil pipe; which is not an unimportant matter when we come to construe the bye-law. Therefore the finding of fact is that there was nothing done for the reconstruction or the replacing of the pans or pipes except where they were broken. So that in effect, on these findings of fact, the respondent is saying that the provisions of the bye-law to which I will refer in a moment apply in a case where really there is nothing but repair of the closets and of their traps; because there was no reconstruction or intentional reconstruction of the pans or traps. There was putting them in where they had been broken by ordinary wear or broken in the course of another operation. Now—I am not saying they may not do it for a moment—if the local authority desire to say that when any part of an existing closet is repaired or the closet itself is repaired the ventilation of that closet must be remodeled, then I think they ought to say so in plain words. Have they said so here? The magistrate in dealing with this matter says: "Mr. Danckwerts contends that the words must involve a reconstruction of the rooms in which the water-closets are placed" (that, if I may be allowed

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to say so, is an absolutely untenable argument, and it is one which again, I think, tends to complicate or confuse the mind of the magistrate) "or at any rate of the system of water-closets" (again I think that goes much too far) "but I think the words used in bye-law 21 are intentionally wider than that and specifically apply to every trap or apparatus connected with a pipe or drain or other means of communicating with sewers starting from the water-closet, and not only such a trap as communicates from the drain direct into the sewer." I have my doubts whether or not the magistrate has not gone a little too far in the construction he has put upon bye-law 21, but for the purpose of my judgment it is not material to criticise or deal with that particular view.

Now I come to these particular bye-laws. There are a series of bye-laws (I have gone through them very carefully) dealing with the size of the drains, the joints, the size of the pipes and the traps to drains. I refer to bye-law 4; to bye-law 8 dealing with the ventilation of drains and the use of soil pipes in a particular way; and to bye-law 11 dealing with the method of connection of soil pipes and the joints of soil pipes. Then comes bye-law 17: "Any person who shall construct any water-closet, the soil pipe of which shall communicate with any sewer and shall be in connection with any other water-closet, shall cause the trap of every such water-closet to be ventilated" in a particular way which is well known and most desirable. Then follows—I need not go through it—how that ventilation is to be carried out, and what it is to be. That is a provision with regard to a particular method of ventilating a water-closet when it is constructed, or I ought to say the soil pipe of the water-closet and the trap of the water-closet. I quite agree that if in terms with regard to an old house the local authorities have said in fairly reasonable and plain language that when you come to touch your water-closet, and when you come to repair a pan, or when you come to repair a trap which is broken, you have to put in the ventilation—if that is the bye-law—that is a perfectly good bye-law, and I see no reason why it should not be. But what really does bye-law 21 say? It is a general bye-law without specific directions meant to apply to old buildings: "These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected." I think you have, therefore, to read that, reading it most strongly against the person who is doing the work, as meaning that with regard to the work which he is effecting in any building he is to obey the bye-laws. The words to be noted are "construct or reconstruct" with regard to an old

building. Therefore the bye-laws refer to a person who constructs or reconstructs a pipe or drain, who constructs or reconstructs a trap, or who constructs or reconstructs the apparatus connected therewith. I need not go through the bye-laws again. There are many bye-laws but they do give specific instructions as to what is to be done as to the drains, as to the traps, and as to the apparatus connected therewith.

Now is it right to say that work such as is contemplated by that bye-law must be constructing a water-closet within bye-law 17? It seems to me that that is going a great deal too far. It seems to me that if the local authority meant to say that putting in a new trap or a new pan is constructing a water-closet—or, to put it more fairly, if they meant that doing repairs, rendered necessary because in doing some other work a part of the water-closet is broken, should bring bye-law 17 into operation, they ought to have said so in plain words. I think that is not imposing on the local authority a greater obligation than is necessary, having regard to the very important rights they have of interfering with private rights in the interest of the public health.

There is one argument which I do not think must be overlooked, and which strikes me as a very strong confirmation of this. There was a previous bye-law under section 39 of the Public Health (London) Act, 1891, dealing with exactly the same thing, and in that bye-law these words were used: "If he shall construct any water-closet or shall fix or fit any trap to any existing water-closet or in connection with a soil pipe, which is itself in connection with any other water-closet, he shall cause the trap of every such water-closet to be ventilated into the open air at a point as high as the top of the soil pipe, or into the soil pipe at a point above the highest water-closet connected with such soil pipe" A man must be presumed to know of this code, especially if he is a builder or if he is the manager of a great property. There is no hardship on him. He has a code under section 39 of the Act of 1891 and section 202 of the Act of 1855. He knows that under the code under section 39 as it originally was there was the bye-law I have just referred to. I think it is not unimportant to observe that that bye-law is repealed, and the new one comes into force as from the same date. I must say that I think if it were intended to make any fixing of a trap, or still more the repairing of a trap, or the fixing of a pan or the repairing of a pan, equivalent to constructing a water-closet, when one form of expression is abandoned and another is adopted, at least it ought to have been made plain.

Notwithstanding the difficulties arising in this case, I have come to the conclusion that this bye-law is not sufficient to make that which was being done on the admitted facts of this case the constructing of a water-closet within bye-law 17, and, that being so, I think these penalties

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ought not to be enforced. I need not say that I wish it to be distinctly understood that in giving this judgment I have not adopted any of the arguments as to *ultra vires* or as to the limiting of any of the powers or rights of the local authority under a bye-law properly framed, but I think, having regard to the old and repealed bye-law, and to the new and existing bye-law, the local authority have not brought what was admittedly done in this case within the purview of bye-law 21 of the new series. For these reasons I think the appeal must succeed.

LAWRANCE J. I am entirely of the same opinion. It is impossible to read bye-law 3 of the series of 1893 under section 39 of the Act of 1891 and bye-laws 17 and 21 of the series of 1901 under section 202 of the Act of 1855 without seeing that there is a great distinction. Bye-law 3 distinctly stated that which the County Council wished to carry out, and if it had been in existence it would have been an answer to the whole of this case. There is no doubt whatever about that. It provided that if a person constructed a water-closet or fitted a trap to an existing water-closet he should, in certain cases, cause the trap to be ventilated. The ventilation of traps of water-closets is now dealt with by bye-laws 17 and 21. I quite agree with what my Lord has said as regards bye-law 17. It can apply only to the construction of a water-closet. It is confined to the construction of a water-closet—not the room of a water-closet, but what is generally known as a water-closet and its apparatus. It applies only to construction. If a person constructs a water-closet, then in certain cases the trap has to be ventilated in a certain way. When you come to bye-law 21 (the whole question is whether the facts of this case can be brought under bye-law 17), it seems to me it is entirely different, and that it has nothing in the world to do with bye-law 17 at all. All it says is this:—“These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith.” The matter was treated fully, distinctly, and clearly in bye-law 3 which was repealed, and these two bye-laws were supposed to be substituted for the bye-law which was so repealed. The bye-law which was repealed was perfectly clear, but instead of that bye-law the County Council have adopted two other bye-laws, one of which, in my judgment, does not apply at all, and with regard to the other of which it is difficult to see how the facts of this case can be brought under it. I therefore agree with the judgment of my Lord.

KENNEDY J. I have come to the same conclusion. I entirely concur in and adopt what my Lord has said with regard to the untenableness of all the other arguments addressed to us as against the contention of the local authority on this matter. My difficulty has been, speaking

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for myself with complete satisfaction as to the question of the applicability of bye-laws 17 and 21, on the combined effect of which the case of the local authority rests, that the application of those is not a question of fact, and that the question of fact has not been decided by the magistrate in such a way that, whether we agreed with him or not, if there was any evidence, we should not, sitting here, have a right to review his decision. If it was open to me to take a more liberal view than I think in justice I can of the effect to be given to bye-laws 17 and 21 together, I should have felt a good deal of difficulty in assenting to a reversal of the magistrate's decision. I think that there may be cases in which it is a question of fact whether or not what has been done has amounted to a construction or reconstruction; but upon the whole I think that my Lord has correctly expressed what ought to be our conclusion here, considering that the effect of these bye-laws is in the case of a breach to subject the person breaking them to penalties such as are prescribed, and we ought to construe the matter, therefore, with strictness. So construing it, I am unable to see on the whole that a case has been made out by the local authority for saying that there has been in what has been done that which could fairly be taken under bye-laws 17 and 21 together to be a construction or reconstruction of a water-closet, using that term in the most liberal way. It would have been easy, as my Lord has pointed out, for example, in bye-law 21 to have said: "These bye-laws shall, so far as practicable, apply to a person who shall construct or reconstruct," and so on, and then to have said: "And a person so constructing or reconstructing shall be taken to be constructing or reconstructing a water-closet under bye-law 17." Unfortunately, as I think, in one sense, merely looking at it in the public interest, they have spoken of constructing or reconstructing a pipe or drain or other means of communicating with sewers or any trap or apparatus. It is sought under those words to say if you are so doing you are constructing a water-closet under bye-law 17. They have not in terms said so, and I think in the nature of things one is not justified in saying that one ought to put that construction on the words which would subject to a penalty, without those words being much more clearly expressed so as to make the application of bye-laws 17 and 21 to a case like the present quite plain to a reasonable man.

Appeal allowed.

Solicitors for the appellants—Burgess, Taylor, and Tryon.

Solicitor for the respondent—G. C. Topham.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Note.

In the above case Lord Alverstone C.J. uses language which seems to imply that in proceedings for a breach of a bye-law such as was there in question it is not for the magistrate to consider evidence tending to show that in the particular case the object of the bye-law has been attained, though by means other than those prescribed by the bye-law. And no doubt, on the bare question whether there has been a breach of the bye-law, this is so. At the same time it would seem necessarily to follow from the decisions in *Salt v. Scott-Hall*, 1903, 2 K. B. 245; 1 L. G. R. 753; 72 L. J. K. B. 627; 88 L. T. 868; 52 W. R. 95; 67 J. P. 306; and *Pomeroy v. Makhern Urban District Council* (1903) 1 L. G. R. 825; 89 L. T. 555; 67 J. P. 375, that in such a case the fact that the object of the bye-law had been attained would justify the magistrate in treating the breach of the bye-law as a trifling offence within the meaning of section 16 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 43), and in dismissing the information accordingly. Indeed, in the former of the above cases the very fact that a court of summary jurisdiction have this power was said by Channell J. to be the reason why it is possible to hold a bye-law reasonable and good which in terms applies to many particular cases with regard to which it would be highly oppressive to enforce it.

Whether, however, the doctrine of the two cases in question will ultimately prevail, without at least very material qualification, may be doubted.

High Court of Justice.

KING'S BENCH DIVISION.

GARBUTT v. DURHAM JOINT COMMITTEE.

1908.

Dec. 9, 10.

Police—Pension—Reckoning of service for pension—Discontinuous service—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 4, 5, 21.

The twenty-five years' approved service, which will, under the Police Act, 1890, entitle a police-constable to a pension for life on retirement from the force, must be continuous service, except in the cases where the Act expressly provides for the reckoning together of separate periods of service.

CASE stated by the court of quarter sessions for the county of Durham upon an application by way of appeal by the above-named appellant under section 11 of the Police Act, 1890, against the refusal of the respondents to order payment of a pension to him under that Act:—

On the hearing of the application the appellant relied upon a certificate of approved service for upwards of 25 years, which was produced to us, and which (save for the objection hereinafter mentioned) was admitted to be a certificate duly given under the said Act, and to refer to the appellant.

The respondents contended that the certificate, though "sufficient evidence," was not conclusive; and tendered evidence to the effect that the services of the appellant during the said period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service, and was not conclusive evidence, and that the acting chief constable could not certify as to character, which appeared from the police records, and that the Joint Committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The appellant contended that it was not open to the respondents to contradict the certificate, and that such evidence was therefore inadmissible. On this point we agreed with the contention of the appellant, and refused to receive evidence as to the character of the appellant.

The respondents further contended that upon the true construction of the Act it was necessary that the whole period of service of 25 years should be continuous in order to entitle the appellant to a pension in respect thereof. The appellant contended that the period need not be continuous, and further contended that, even so, the certificate of approved service, once given, precluded the respondents from raising this point.

We considered that the Act required that the whole period should

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Pickersgill and *Simey* for the appellant. Section 11 of the Police Act, 1890, gives an appeal to quarter sessions in case of forfeiture or refusal of pension or allowance, and confers jurisdiction upon that court. The main question is whether that court were right in holding as they did that the appellant's service as a police constable must be necessarily continuous. It is submitted that there is nothing in the Act itself, taken as a whole, which supports this view. Its tendency is, on the contrary, in favour of the view that the 25 years' approved service need not be continuous. The court of quarter sessions had in the present case no right or power to take into consideration the two breaks in the service of the appellant which had admittedly occurred, and so deprive him of his pension after an approved service of 25 years and 99 days, as appears by the certificate of the acting chief constable. Section 1 provides that, "Subject to the provisions of this Act, every constable—(a) if he has completed not less than 25 years' approved service," may retire and receive a pension for life. There is no suggestion in the section that this 25 years may not be made up of different periods of service; and had such a state of things been contemplated, the Legislature would have added the word "continuous," and made it continuous approved service which was to be so rewarded. Section 30 (8) supports the same view.

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Shearman, K.C., and *Meynell* for the respondents. As to the appellant's service not being continuous service, subsections (4) and (5) of section 4 are in point, for these contain express provisions that a police constable is not to lose the benefit of his earlier or subsequent service if he be transferred to another force, or, being a member of the reserved forces, is called out on duty. Unless the 25 years' service required by the Act was intended to be continuous, there would be no necessity for providing for such breaks in it upon the constable being called away to other duty or foreign service. That this was the intention of the Legislature is conclusively shown by section 21, which provides for a return of rateable deductions to a constable on leaving the force: *Walker v. Simpson*, 1903, A. C. 208; 72 L. J. P. C. 58.

Cur. adv. vult.

LORD ALVERSTONE C.J. This case is not free from difficulty, and I certainly think it is very desirable that the matter should be put beyond all question by some amending Act, or by some regulation, if such can be made, which would produce that result. I am, however, of opinion that upon the construction of the Act the service referred to must be continuous service. In this case there seem

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to be peculiar difficulties that do not always arise. There is no order of the police authority under subsection (1) of section 4. I do not say there was none in this case—but none has been produced before us. The document before us is the certificate signed by the chief officer of the police force under subsection (2) of section 4, and I have no doubt that that is intended to be sufficient evidence as to the period of the constable's approved service in any particular force. But that does not touch the question we are dealing with, and whether or not that certificate can be gone behind is a matter unnecessary for us to consider. I should have thought it would require a very strong case to go behind it, but be that as it may, I only desire to point out that we are not dealing here with the order of the local authority—the standing committee of the quarter sessions and the county council—made under subsection (1) of section 4. Therefore, the case before us is this: There is the certificate under subsection (2), which shows 25 years and 99 days' service made up of three periods—there was a break of four months in 1881, when the constable resigned. He then became a second-class constable, and was afterwards reinstated as a first-class constable. Mr. Pickersgill has said that he resigned of his own free will, and was not dismissed. I will take it that it was so. But if so, it rather makes clear, upon what I think is the real construction of this certificate, that he re-engaged himself. Then he was called upon to resign in February, 1889, and he was reinstated as a second-class constable in April, 1889. In other words, there are two breaks in his service up till then, and I think it must be taken that either he was called upon to resign or that he did resign. Therefore, what we have to consider is, whether "approved service" in this Act means continuous service, or service that may be interrupted by breaks. It seems to me that the words, taken by themselves, do not in any way indicate that the service might not be made up of several periods; and *Walker v. Simpson*, 1903, A. C. 208; 72 L. J. P. C. 58, shows that under certain circumstances service of a certain time may be made up of broken periods. But what we have to consider is what was meant in this Act, and, although I do not come to the conclusion without doubt, I think there are certain clauses which show that the service must have been intended to be continuous service, as otherwise the clauses would be absolutely unnecessary. The first section speaks in clause (a) of a constable's completing not less than 25 years' approved service, and in clause (b) of his completing 15 years' approved service. This of itself does not to my mind decide the case, but it rather points, I think, in the direction of the period being completed as a continuous period, though of course that might be

very easily rebutted. Therefore, we have to see what light is thrown upon it by the other provisions.

The first important provision is in subsection (1) of section 4: "The service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression 'approved service' shall for the purposes of this Act mean such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service." Again, I think, to a certain extent, that provision rather supports the view that continuous service is contemplated, because it speaks of deductions in respect of sickness, misconduct, or neglect of duty, which would refer to the period when a man was, so to speak, serving; but it is not conclusive, because it is quite possible to apply those words to the several periods of service and to make a deduction for each period, and then take the sum total of the various periods. So that again we have an enactment which is not conclusive, but which, I think, favours the view that the service must be continuous. Subsection (4) of section 4, which relates to the constable shifting from one force to another, and which was relied on by Mr. Shearman, does not, I think, touch the question at all. It was necessary to entitle a constable to count service in one force as being service in another. But subsection (5) is entirely different. If all periods are to be added together, why should it be necessary to provide by subsection (5) that where a constable belonging, with the knowledge of the police authority, to the army reserve, is called out for training or for permanent service, he shall be entitled, on returning to the police force after the end of such training or service, to reckon any approved service he was entitled to reckon at the commencement thereof. If ever there were a case in which a break ought not to make any difference, and where the constable ought to be entitled to add together the pieces of service which he has performed, we should have thought that that would be the case; and yet it has to be provided for by express enactment.

Coming to section 5, which deals with incapacity for duty during the service, we find a provision, which again I think is absolutely unnecessary if all periods of service may be added together. The 5th subsection of that section is as follows: "Where a constable so serves again, the provisions of this Act as to retirement and pensions, allowances, and gratuities shall apply as if he had not previously retired, save that, except in the case of pensions for non-accidental injuries received in the execution of duty, he shall not reckon as

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approved service the time which elapsed between his former retirement and the commencement of his service again." That, again, is a case in which the break is specially provided for by allowing the provisions to apply as though the constable had not previously retired.

I think it is a strong thing to say, in the face of these two provisions, that if a man chooses to absent himself from the force for however long a period or for whatever purpose he likes, he can claim that the 25 years' service can be made up of broken periods. There was one more section to which our attention was drawn which shows what the scheme of the Act was. Section 21 refers to a constable being retired without getting a pension, and enacts that "if a constable not having been dismissed leaves a police force without a pension or gratuity, the police authority may, if it seems to them just, pay him the whole or part of the rateable deductions which have been made from his pay. . . ." Again, that is not conclusive, because it may be said that if the constable does not claim any repayment of the deductions, he ought to be allowed when he goes into service at the later period to add the periods together. I agree that that is not conclusive, but it seems to me to support the view that the Legislature was dealing with continuous service, and was therefore providing for a constable going out of the service before the time he was in a position to claim a pension.

For these reasons I think the decision of the quarter sessions was right, and that the appeal should be dismissed.

LAWRANCE J. I am of the same opinion. It is, I think, impossible to say, reading these sections, that they are consistent with the argument that any number of periods of service may be added together for the purpose of ensuring the pension. It is an instance, among very numerous instances in Acts of Parliament, where by the insertion of one word the framers of the Act might have made their meaning perfectly clear, and have not done so; so that, in order to see what the meaning of the Act is, it is necessary to look through the whole of the sections to see whether service is to be a continuous service or not. If the framers of the Act had used the words "continuous service," there would have been no difficulty whatever.

KENNEDY J. I think it is certainly strange and very unfortunate that the Legislature in passing this important Act has left to the administrators of the Act or to those who have to deal with it judicially to infer indirectly from scattered sections that which is obviously a most important part of the scheme, namely, whether the right to pensions depends upon continuous and uninterrupted service, or whether the service may be made up of various terms of service with interruptions or breaks between. I am afraid that I feel a good deal

more doubt than my Lord and my brother Lawrance do as to the right inference to be drawn from these sections. I hope that it is not unreasonable in construing an Act of this kind, where we are admittedly driven to an interpretation on an important point by inference from various sections up and down the Act, to say that it is not absent from my mind that the decision, from which I am not going to dissent, certainly cannot tend to enhance the popularity of this service, which is of the highest importance to the community. I approach the Act with a feeling that certainly if a man has served creditably and with merit for 25 years to earn a pension, he ought to get it. There may be cases in which—as to the merits of the present case I can say nothing one way or the other—an officer who for a short time may have left his force and has been invited by his superior officer to return to it would be, I think, hardly treated in the opinion of many, if the 10 years or so that he had first faithfully served should not form part of the consideration in the pension which the Act allows. I feel rather pressed also by this: that I think that the view which should be taken is the view which I understand Lord Macnaghten to have given his high authority to in the case of *Walker v. Simpson*, 1903, A. C. 208; 72 L. J. P. C. 58, namely, that *prima facie*, if a constable serve 25 years, he should be entitled to a pension. It was for those who say that such service must be continuous to have inserted a word which should convey that, and it would have been simple to have said, as my brother Lawrance has pointed out, "continuous service." But it is conceded that in order to construe an Act of Parliament of this kind rightly the whole Act must be looked at. If I find distinct provisions which certainly I am not capable of explaining except upon the basis that those who framed the Act had in view continuous service, I am not prepared to dissent from the view that the inference from those sections is so strong that the judgment of the court below must be upheld. And I entirely agree with my Lord that it is very difficult, after reading subsection (5) of section 5 or subsections (4) and (5) of section 4, to see why, if the basis of the Act were that the service need not be continuous, provisions should be inserted providing for the treatment as continuous service of service with certain specified breaks. I am not prepared to dissent from the judgment which has been pronounced by my Lord and my brother Lawrance.

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Appeal dismissed.

Solicitors for the appellant—Bell, Brodrick, and Gray, for Geipel, West Hartlepool.

Solicitors for the respondents—Simey, Son, and Iliffe, Sunderland.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

BRINCKMAN v. MATLEY.

Foreshore—Private owner—Right of public to bathe.

1904.

Jan. 14, 15,
16, 18, 23.

By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purpose of navigation, and have, primâ facie, a common of fishery there. They have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. When the sea recedes and the foreshore becomes dry there is no general common law right in the public to pass over the foreshore. There are certain limited rights of passage over the foreshore when dry, e.g., to cross the same in case of peril or necessity, but the fact that such limited rights exist goes far to show that there cannot be a general right.

The plaintiff C. was the lord of the manor of Minster, and at the trial of the action established that the foreshore in Joss Bay was part and parcel of the manor. The defendant claimed a common law right to go upon the foreshore at Joss Bay, to pass and re-pass thereon at will, and, further, being there, to bathe in the sea.

Held, that there was no such common law right.

Blundell v. Catterall (1821) 5 B. & Ald. 268 followed.

ACTION with witnesses.

The plaintiff, the Marquis Conyngham, and the plaintiffs, Sir Theodore Henry Brinckman and the Hon. Arthur William de Moleyns, as trustees for him, were the owners of the manor of Minster, in the Isle of Thanet, and of the foreshore lying between the ordinary high-water mark and the ordinary low-water mark of the sea at a bay called Joss Bay, the place at which rights were claimed by the defendant in the present action. These plaintiffs were until recently the owners of a much larger extent of the foreshore, but had sold that which lay between Hackemdown Point (near the North Foreland) and Margate on the one side, and that which lay between Broadstairs and Ramsgate on the other, remaining owners of all that which lay between Hackemdown Point and Broadstairs. In this last-mentioned length of foreshore lay the small bay or curvature of the coast called Joss Bay, the scene of the disputes in the action.

The title of the plaintiffs above named to the foreshore was derived under a grant by the King in the ninth year of James I., whereby he granted the Manor of Minster and all lands theretofore overflown with the water of the sea which had been gained from the sea and reduced to dry ground, and lands there overflown with

the water of the sea which should thereafter be gained and be reduced to dry ground, abutting on the Manor, and lands subject to the inundation of the sea between the flowing and ebbing of the sea. In the court rolls of the manor were to be found, for at least 150 years last past, entries of payments made upon the footing that the ownership of the foreshore was in the plaintiffs' predecessors in title. There were entries from 1756 onwards in respect of fines for the groundage of vessels on the foreshore, and of sums paid for permission to gather seaweed and sand in the manor between high and low water, and of payments made for trespass to gather flints, and for trespass in working part of the cargo of a vessel and going with carts for that purpose, and for trespass to get seaweed. There were also accounts of payments made to the Lord of the Manor for wreckage taken up on the foreshore. In later times, after the Board of Trade became entitled to collect wreckage, there were accounts rendered by the Board of Trade, and payments made by them to the lord for proceeds of sale of wreck taken up on the foreshore. In 1889 there were two cases in which Stirling J. granted injunctions at the suit of the plaintiffs to restrain persons from digging and getting sand, shingle, stone, or beach from the foreshore. In brief, the foreshore was, as the Court found, plainly proved to be the property of the plaintiffs above named as private owners.

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The other plaintiff, Frederick William Turner, under a deed dated February 9, 1903, executed by the steward of the Manor, had obtained liberty to enter on a portion of the foreshore, including Joss Bay, for the purpose of placing bathing machines, tents, and pay-boxes on the shore, and in July, 1903, he was exercising his rights under that deed.

The defendant was the headmaster of St. Saviour's Elementary School, Poplar, in the county of Middlesex. In July, 1903, he brought some 200 boys belonging to his school down to a camp situate on the cliffs immediately adjoining Joss Bay, and on land belonging to Alfred Harmsworth, the land being customary freehold held by Harmsworth of the Manor at a quit rent, he being admitted tenant on the court rolls and paying the quit rent. The defendant pitched his camp with the permission of Harmsworth, who, "for the best motives, no doubt," as his Lordship said, allowed the master and the boys to come down for a summer holiday and occupy his land for the time being.

In July, 1903, the attention of the steward of the Manor was called to the fact that these boys were bathing in Joss Bay. On July 25 the steward wrote a letter to the defendant to the effect that, as a matter of right, they were not entitled so to do, adding that in the

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event of the defendant considering the bathing beneficial to the boys under his charge he would be prepared to make arrangements with him. The defendant, by his reply, did not accept that offer, but said that the boys did no harm, and added that, if the steward wished to raise the question of the right of the boys to bathe in Joss Bay, he must refer him to Harmsworth's solicitors, Messrs. Lewis and Lewis. The defendant thus setting up a claim of right, the writ in the action was issued on July 28, 1903.

The following further facts were referred to in his lordship's judgment:—

(a) Joss Bay was approached from the land down a cutting (made through the cliffs, which were here about 20 feet high) which was called Joss Gap. In Joss Gap, between the sides of the cutting and at a short distance above the upper limit of the foreshore, which was here practically at the foot of the cliff, there had stood for many years—as long as the recollection of any of the witnesses—either a bar between two posts or a single post in the middle of the roadway which could be let down at will so as to allow a cart to pass. This post, and the bar which succeeded it, was locked, and the holder of the key and no one else could go down Joss Gap with carts. The key of that bar was held, and the bar was repaired, by the successive owners of Joss Farm, Harmsworth and his predecessors in title. Only he and the persons to whom he might allow the use of the key could get down Joss Gap with carts. There was, however, no physical obstacle to prevent anyone on foot passing down, either by stooping under the bar or by passing between the posts and the cliff, if, as was sometimes the case, there was sufficient room there. The result was that it was physically possible for persons on foot, without substantial obstruction, to pass down Joss Gap and thus reach the foreshore. This had been the case for a great many years.

(b) For many years, down to about 15 years ago, there were some fishing boats at Joss Bay—some four or five of them. A few fishermen, who lived in Reading Street, an adjoining hamlet, owned these boats, and used to go down and launch and draw up their boats there.

(c) The Lord of the Manor from time to time granted leases of the right to get seaweed, and many, at any rate, of the carts to which the defendant's evidence referred, were carts of the lessees or of persons who went for them or by their authority. If there were any carts not included in that category (which was not plain upon the evidence), they did not in any case go adversely to the lord and under claim of right so to do. The accumulation of the seaweed on the foreshore was at times a nuisance, and it was an advantage to get rid of it. At most (as his lordship found) the evidence came to this—

that sometimes unauthorised persons went, perhaps, to collect seaweed, and nobody interfered with them.

The plaintiffs, by their statement of claim, claimed (1) a declaration as to their right to the foreshore, and (2) "an injunction to restrain the defendant, his servants, agents, and workmen from bathing from the said foreshore or from any part thereof, and from wrongfully entering upon the said foreshore or any part thereof for that purpose."

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Astbury, K.C., and *L. Mossop* for the plaintiffs. The evidence of the steward and the deeds and documents relating to the Manor prove that the foreshore in question forms part of the Manor. The onus is therefore on the defendant to show that the public have acquired any rights over it.

Buckmaster, K.C., and *W. R. Sheldon* for the defendant. The question is whether the plaintiffs have a right to prevent bathing from the foreshore. The defendant bases his claim to bathe from the foreshore on three grounds. First, that there is a common law right in all the subjects of the Crown to use the foreshore for the purpose of bathing. In *Blundell v. Catterall* (1821) 5 B. & Ald. 268, no doubt the contrary was decided. But that case is distinguishable upon the ground that there the Lord of the Manor had an exclusive right of fishery. Here the plaintiffs have not shown that they have any such exclusive right.

Secondly, *Harmsworth*, the owner of *Joss Gap*, is entitled either at common law or by statute to a prescriptive right to enter upon the foreshore from *Joss Farm* and in connection therewith to use the foreshore for the purpose of bathing from. A right to enter upon a foreshore carries with it a right to bathe from it. There is no common law right to bathe in a river, but it is otherwise in the case of the sea.

[BUCKLEY J. You cannot prescribe for a right to wander at will. The right, if it exists, must be one to go from a point to a point or to use the foreshore for a purpose.]

The defendant here claims a prescriptive right to enter upon the foreshore.

[BUCKLEY J. I do not appreciate a prescriptive right to enter upon a foreshore.]

If the defendant can show that he has a prescriptive right to get to the sea then he can bathe in it. In *Mace v. Philcox* (1864) 15 C. B. (N. S.) 600, 611; 33 L. J. C. P. 124, there is a *dictum* of

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Erle C.J. that "if you can lawfully get to the seashore, I apprehend you may lawfully bathe there."

[BUCKLEY J. I think that the Chief Justice was there referring to the foreshore where the water begins.]

[The point as to prescription was subsequently given up by the defendant, as it was proved that Harmsworth had been entered upon the court rolls of the Manor as a tenant, and had paid quit rent.]

It is sufficient for the defendant to prove a dedication of the foreshore to the public. If he succeeds in this, then, having a right to enter upon the foreshore for a lawful purpose, he is entitled when there to bathe from it.

[BUCKLEY J. Dedication is always a question of intention.]

In *Llandudno Urban District Council v. Woods*, 1899, 2 Ch. 705; 68 L. J. Ch. 623, Cozens Hardy J. followed *Blundell v. Catterall* (1821) 5 B. & Ald. 268, with regret.

Thirdly, the defendant bases his claim on a right by custom for the inhabitants of St. Peter's to resort to the foreshore and to bathe from it. Such a right may extend to include temporary inhabitants. Whether it does so or not is a question to be determined upon the evidence.

Astbury, K.C., and *L. Mossop* for the plaintiffs. The defendant is not entitled to the right he claims. Assuming that the foreshore is a highway, it is so only for certain purposes.

[BUCKLEY J. What do you say *Blundell v. Catterall* (1821) 5 B. & Ald. 268, decides?]

That case decides that even where there is a highway along the foreshore, so that persons may be lawfully upon the foreshore, there is no right in the public to bathe from it. One of the difficulties in that case is that the judges there were only dealing with the question of the right to cross the foreshore belonging to a private owner for the purpose of bathing. They did not discuss the right of passage over it for other purposes.

[BUCKLEY J. It is a right of passage that they are discussing throughout.]

The Court is reluctant to hold that a right has been acquired merely because an owner has indulgently permitted persons to enjoy his property: *Chamber Colliery Co. v. Hopwood* (1886) 32 Ch. D. 549, 559; 55 L. J. Ch. 859.

Access to a foreshore cannot be claimed by prescription. A number of persons not claiming in respect of a dominant tenement cannot

prescribe. There must be a dedication to the public or nothing, and there is here no sufficient evidence of any such dedication. The mere use by persons of tracks in a wood where they are free to wander about as they please is not necessarily enough to show a dedication of such tracks to the public: *Schwinge v. Dowell* (1862) 2 F. & F. 845; *Chapman v. Cripps* (1862) 2 F. & F. 864.

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[BUCKLEY J. referred to the observations of Bowen L.J. in *Blount v. Layard* (1888) 1891, 2 Ch. at p. 691, n.]

Mere user by the public of an open space is not sufficient evidence of the intention of the owner to dedicate the surface to the public: *Maddock v. Wallasey Local Board* (1886) 55 L. J. Q. B. 267; and see "Pratt on Highways" (14th ed.), p. 32.

As regards Joss Gap, there has always been a bar across it. This bar has been kept locked and the key held by the tenant of Joss Farm. The owner of Joss Farm is tenant of the Manor. A tenant cannot prescribe against his lord.

Further, there cannot be a dedication to the public of a right of way unless there are definite *termini*. The bar across Joss Gap is not at the junction of Joss Farm and the foreshore, but wholly on the former.

A right of access to private property cannot be acquired unless it be shown that the person claiming it is entitled to exercise some right on the property when he has obtained access to it.

There cannot be an easement in gross. There must be a dominant and a servient tenement: *Dovaston v. Payne* (1795) 2 H. Bl. 527; 2 Sm. L. C. (11th ed.), p. 160; and "Gale on Easements" (7th ed.), p. 12.

Cur. adv. vult.

Jan. 23. BUCKLEY J. The question in this action is whether the public are entitled to bathe in the sea from the foreshore near Broadstairs, in Kent. [His Lordship then stated the facts down to the issue of the writ, observing that the plaintiffs' title to the foreshore as private owners was clearly proved. He continued:—] The question I have to try is simply whether the defendant and his boys are as of right entitled to go on the foreshore at Joss Bay, which is the private property of the plaintiffs, and bathe in the sea.

The defendant contends that that which he is doing is justified by a common law right, which he says exists, to do the acts complained of. The proposition is put in two ways:—First, that there is a common law right to go upon the foreshore, to pass and repass there at will, and, further, being there, to bathe in the sea; and, secondly, supposing there is not this common law right to go upon

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the foreshore and pass and repossess thereon at will, that if the defendant shows, as he says he does, that he has in some way a right of access, then, being there in exercise of such right of access, he and his boys are entitled to bathe. I deal with these two in order.

As to the first, no facts are wanted beyond that which I have stated—that this foreshore is the private property of the plaintiffs. The defendant contends that he has a common law right to go upon this land, being private property of the plaintiffs, and to bathe therefrom, because it is the foreshore. I propose to state what I understand to be the law as to the right of a member of the public to go on the foreshore of a private owner. By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation, and have, *prima facie*, a common of fishery there, and they have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes, and the foreshore becomes dry, there is not, as I understand the law, any general common law right in the public to pass over the foreshore. There are certain limited rights, and the fact that such limited rights exist goes to show that there cannot be a general right. For purposes of navigation there exists a common law right to cross the foreshore in case of peril or necessity. For the purpose of exercising the right of fishing it may be that there is—I do not say that there is—a right to cross the foreshore in order to launch a boat. In Brooke's Abridgment, Tit. Customs, pl. 46, all the judges agreed "that fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the Commonwealth, affording sustenance to many persons, and is the common law."* The right of navigation, it has been said, is for the general benefit of all the kingdom, and the right of fishing tends to the sustenance and beneficial enjoyment of individuals, and for these purposes it would seem that there are special rights to cross the foreshore. But it does not follow, and I think is not the law, that the public have the right to go upon or to cross the foreshore for all purposes. If there be such a general right by common law it must exist on every part of the foreshore; and the result would be that the erection of buildings, wharves, and quays so as to reach the water, the reclamation of additional land from the sea and its conversion to pasturage and tillage, the erection of stakes for nets upon the foreshore, and the digging of sand or stones which might leave dangerous openings in the foreshore, would all be indict-

* The quotation, which is a free translation of the passage in Brooke's Abridgment referred to, seems to be taken from the judgment of Best J. in *Blundell v. Catterall* (1821) 5 B. & Ald. 268, at p. 284.

able as being interferences with a right of highway over the foreshore.

I have endeavoured thus to summarise the reasoning upon which, as it seems to me, in *Blundell v. Catterall* (1821) 5 B. & Ald. 268, it was, after citation of numerous passages from Lord Hale, *De Jure Maris*, decided that there is no common law right of going upon the foreshore with a view to bathing therefrom and exercising any supposed common law right of bathing. Holroyd J., at p. 301 of the report, puts the greater part of the matter in a small compass thus:—"The public common law rights, too, with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the seashore when covered with water, and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unloading, landing, or embarking where they please upon the seashore, or the land adjoining thereto, except in case of peril or necessity." In *Blundell v. Catterall* there was found to be a public right of way along the shore, but, looking at Holroyd J.'s judgment at p. 289 of the report, the existence of such highway in no way affected the decision. The point was that the acts committed were committed for other purposes than as a general public highway, and out of the highway, by the latter of which I understand that the public left so much of the foreshore as was a highway and crossed over the part which was not a highway down to the sea and there bathed. *Blundell v. Catterall* has been followed in *Mace v. Philcox* (1864) 15 C. B. (N. S.) 600; 33 L. J. C. P. 124, and *Llandudno Urban District Council v. Woods*, 1899, 2 Ch. 705; 68 L. J. Ch. 623. It is binding upon me. The defendant before me sought to distinguish *Blundell v. Catterall* from the present case by pointing out that the owner of the foreshore there had an exclusive right of fishing; but I cannot see that that fact formed any essential basis of the judgment. The judgment seems to me to have been rested upon the general principles which I have endeavoured to state.

I pass to the second point, and here I must state some facts. [His Lordship then stated the facts about Joss Gap—see *supra* (a)—and continued:—] The defendant says that I ought to infer from it that the Lord of the Manor has dedicated to the public, who could thus reach the foot of Joss Gap, the right to go upon and pass over the foreshore. [His Lordship then stated the facts about the fishing boats—see *supra* (b)—and continued:—] Thirdly, the defendant says—I will presently state the facts as I find them—that the tenant of Joss Farm, by unlocking the bar, and other farmers in the district,

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by going round from Broadstairs and otherwise approaching the foreshore, have gone with carts and collected seaweed. From these circumstances he seeks to evolve a right in the public to have access to the foreshore, and then argues that, having access to it, they have a common law right to bathe. As to the collection of seaweed, I find the facts to be as follows:—[His Lordship then stated the facts as to seaweed—see *supra* (c)—and proceeded:—] From no one of the three sets of circumstances above mentioned can I find any right in the public to a way over the foreshore. As regards Joss Gap, there is no suggestion of a *terminus a quo* and a *terminus ad quem*. What is suggested is a dedication of a right to wander at will anywhere over the foreshore or a right to wander at will in any direction down to the brink of the sea. Such a dedication cannot, I think, be maintained: *Chapman v. Cripps* (1862) 2 F. & F. 864. As a separate and independent consideration altogether, it is, I think, impossible to infer a dedication from the mere fact that the owner of the foreshore has not objected to the public wandering at will over the sand from time to time uncovered by the sea, they doing no harm in so doing. I refer, without reading them at length, to two passages upon this—the one in the judgment of Abbott C.J. in *Blundell v. Catterall* (1821) 5 B. & Ald. 268, at p. 315, as to wandering at will in all directions over wastes and commons, as to which he says, “No one ever thought that any right existed in favour of this enjoyment,” and the other in Bowen L.J.’s judgment in *Blount v. Layard* (1888), 1891, 2 Ch. 681 n., at p. 691 (the Mapledurham fishing case), where he uses these words: “Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of Isaac Walton from dropping their lines for trout for fear that their doing so should crystallise into a right. It would be a most unfortunate thing for the public if that should ever happen, and I think that, however continuous, however lengthy the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence.” I refer also to *Chamber Colliery Co. v. Hopwood* (1886) 32 Ch. D. 549; 55 L. J. Ch. 859. I think, therefore, that there was no such right of access at Joss Gap as the defendant sets up, and I only add that, if there were, this would only bring the case to

Blundell v. Catterall again, where there was a public right of way along some part of the foreshore. The facts as to the boats are still weaker, and what I have said as to a possible right of access for the purpose of fishing is to be borne in mind. If such a right exists—I do not say it does—it will not help the defendant. The alleged right or claim of access to get seaweed seems to me even further from having any bearing on the question for decision.

The defendant sought at the outset to defend the case upon two other grounds upon which I will say a word. The first was that he endeavoured to set up against the lord a prescriptive right in Harmsworth of passing from Joss Gap over the foreshore, and a user by the defendant and his boys of that prescriptive right by the leave and licence of Harmsworth. This was ultimately abandoned at the Bar, for, as soon as it was shown that Harmsworth was a tenant of the Manor and had been admitted tenant under services, it was, of course, impossible to contend that he could prescribe against the lord. Moreover, even if that had not been so, the considerations which I have suggested above as sufficient to defeat any claim of dedication to the public would, I think, defeat also any claim to prescription for an indefinite right to wander at will.

The second was that it was attempted to set up a customary right in the inhabitants of the parish of St. Peter's to bathe at Joss Gap. Upon this I find the facts to be as follows: In this immediate neighbourhood there are several bays which are convenient for and have for many years been used for bathing. Coming from the south they are Dumpton Bay, Louisa Bay, Broadstairs, Stone Bay, Joss Bay, Botany Bay, and there may be others. Resort has been made to these several bays for many years past, not by the inhabitants of St. Peter's or any other particular parish, but by anyone who was minded to bathe. As matter of date this has gone on from at least 1842. There are many boys' schools in St. Peter's, some of them existing at that date and some of subsequent date. Boys from these schools to the number of 30 or 40 or more at a time have gone down to bathe, sometimes at one and sometimes at another of these bays on the coast. Nobody has ever interfered with them until quite recently. The bathers have included people coming from Margate, which is not in St. Peter's Parish, from Ramsgate, which is not in that parish, trippers from London and other distant places, and others. Nobody has ever heard of any claim set up by the inhabitants of St. Peter's as distinguished from the general public to bathe at all or to bathe at any particular place. The custom alleged is unknown to anyone who has given evidence before me. There are plenty of witnesses who say that bathing has taken place, but nobody has

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alleged any claim of right to do it. All they say is that they thought that every member of the public had a right to bathe wherever he liked. Joss Bay was the better bay in the sense that the shore was more free from flints and rocks, and it was perhaps used more than the others. I will give one or two references to the evidence adduced by the defendant. Mr. Snowden, who established a school at St. Peter's some years ago—about 1890—chose St. Peter's for the erection of his school because on inquiry he found that the coast afforded a safe bathing place. He made inquiries on the subject, and came to the neighbourhood because there was a good shore. He built in St. Peter's Parish, but not because anyone told him the inhabitants of that parish had any rights which others did not enjoy. As the result of his inquiries he thought all the shore was equally open to him, and if he had found Stone Bay preferable to Joss Bay he would have gone there. He thought the whole sea was open to him, and that he could choose the particular place at his own discretion. Nobody told him he had a right to bathe at Joss Gap and not elsewhere, or that he could bathe at Joss Gap if he was an inhabitant of St. Peter's Parish. Mr. Byron, who has been chairman of the District Council, who has lived at St. Peter's 44 years, and whose half-brother kept a school there, has never heard of any custom, has never heard of any question raised whether people had a right to bathe or not, thought people generally were free to bathe at Joss Gap or Broadstairs or elsewhere as they liked. Mr. Skinner, who is clerk to the Urban District Council, and who went with a deputation to the steward of the Manor when the Corporation of Broadstairs was minded to buy this particular foreshore, says that the steward told that deputation that there were no rights against the lord so far as the steward knew, and that he, Skinner, did not say (because he did not think) there was any right of bathing. He never heard of any right or custom in the inhabitants of St. Peter's, never supposed there was any right, but thought the public had a right to bathe where they pleased, and that was all. In other words, he thought there was a common law right to bathe. The result is that I find that there is no such custom as alleged. There is no evidence of a customary right in the inhabitants of St. Peter's or of any other defined place, no identification of any spot to which the custom relates, and no evidence that anybody ever heard of any custom of any kind.

The result of all this is that the defendant fails in establishing the right which he sets up. I have no reason to suppose that this judgment will produce any practical difficulty, or that these East End boys, if they are taken again to this coast, will be prevented during their summer holidays from enjoying the healthful recreation of

bathing in the sea. Mr. Saltwell, by his letter of July 25, offered to make an arrangement for that purpose. The tone of his letter is not that the lord has any desire churlishly to exclude anyone from a reasonable use of the foreshore; but, on the contrary, that his desire is to ensure, by proper regulations as to bathing, that other members of the public shall not, by reason of bathing on this large scale, be unable to resort to it. His object seems to be to control an extravagant user by some which tends to prevent a reasonable enjoyment by all. He desires to have control over his own property. All this, however, rests in the good sense and good feeling of the owner. What I have to decide is the question of right. The claim of right having been made and having failed, I must give judgment against the defendant. I declare that the plaintiffs, other than Turner, are entitled to the foreshore lying between ordinary high-water mark and ordinary low-water mark in Joss Bay, and I grant an injunction in the terms of paragraph 2 of the claim. The defendant must pay the costs of the action.

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Judgment for the plaintiffs accordingly.

Solicitors for the plaintiffs—Saltwell, Tryon, and Saltwell.

Solicitors for the defendant—Lewis and Lewis.

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HOUSE OF LORDS.

WAKEFIELD CORPORATION *v.* COOKE AND OTHERS.

Streets—Private street works—Decision of justices that street is a highway repairable by inhabitants at large—*Res judicata*—*Estoppel*—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150—Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), ss. 29, 30, 31—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 6, 7, 8.

A decision of justices upon an objection taken by frontagers to a proposal for the execution of private street works under the Private Street Works Act, 1892 (or a local Act containing similar provisions), that the street is a highway repairable by the inhabitants at large is in the nature of a decision in rem, and is therefore conclusive on the point if the local authority subsequently makes a fresh proposal for the execution of private street works in the street under the Act, and the objection is again taken.

Judgment of the Court of Appeal, 1903, 1 K. B. 417; 1 L. G. R. 337; 72 L. J. K. B. 345, *affirmed*.

Reg. v. Hutchings (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35, *distinguished*.

Semble (per the Earl of Halsbury L.C.), *that justices before whom proceedings are taken for the recovery of expenses of private street works under section 150 of the Public Health Act, 1875, cannot entertain the question whether the street is or is not repairable by the inhabitants at large.*

APPEAL from a decision of the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) reversing a decision of the Divisional Court (Lord Alverstone C.J. and Lawrance J.) upon a case stated by justices.

The case was stated by the justices upon the hearing of objections taken by the respondents to certain private street works which the appellant Corporation proposed to execute.

The proposals of the Corporation were made and the objections were taken under sections 29 to 31 of the Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), which are practically, *mutatis mutandis*, identical with sections 6 to 8 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57).

The facts stated in the special case are set out very fully in the report of the case in the Court of Appeal, 1 L. G. R. 337. The following brief statement of them will be sufficient for the purposes of the present report.

In the early part of 1897 the appellant Corporation resolved to

execute private street works pursuant to the Wakefield Corporation Act 1887, in part of a road known as "Sludge Lane," and they took the necessary preliminary steps and caused the necessary documents to be served on the frontagers.

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Most of the frontagers, but not all, duly objected to the proposals of the Corporation, on the ground, *inter alia*, that Sludge Lane was a highway repairable by the inhabitants at large of the City of Wakefield.

The objections were duly heard on January 6, 1898, when the justices found that Sludge Lane was a highway repairable by the inhabitants at large, and held accordingly that the objection was a good one.

The order of the justices as drawn up contained a determination that the objection was a good and valid objection, but did not purport to quash the proceedings of the Corporation.

No steps were taken by the Corporation to proceed with this proposal.

In the year 1901 the Corporation again resolved to execute private street works in part of Sludge Lane under the Wakefield Corporation Act, 1887, and took the necessary preliminary steps and caused the necessary documents to be served on the frontagers.

The part of Sludge Lane to which this proposal of the Corporation related comprised the whole of the part of the Lane to which the proposals of 1897 related, together with an additional length of about 80 yards. It was, however, admitted, on the hearing of the case before the Divisional Court, that the inclusion of this additional length might be disregarded for the purposes of the case.

On this occasion most of the frontagers duly objected on, *inter alia*, the same ground as on the previous occasion, namely, that Sludge Lane was a highway repairable by the inhabitants at large, one of the frontagers adding the objection that this was so found by the justices on the previous occasion.

Most of the persons who objected on this occasion were persons who had objected on the previous occasions, but one at least of the frontagers who might have objected, but did not object in 1897, objected on this occasion; and in some instances the objectors were different persons owing to changes in the ownership of the property.

The objections were heard by four justices for the City on July 25, 1901, who determined that the objection that Sludge Lane was a highway repairable by the inhabitants at large was the same objection as was decided on January 6, 1898, and that the matter was *res judicata*, and they declined to hear any evidence or go into the merits of the objection.

The justices however stated a case setting out the facts for the opinion of the High Court.

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The Divisional Court (Lord Alverstone C.J. and Lawrance J.) held that the matter was not *res judicata*, and that the justices were bound to determine the objection on the merits. The decision of the Divisional Court is reported, 1902, 1 K. B. 188; 71 L. J. K. B. 257.

The Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.), on appeal by the objectors, reversed the decision of the Divisional Court, holding that the matter was *res judicata*. The decision of the Court of Appeal is reported, 1903, 1 K. B. 417; 1 L. G. R. 337; 72 L. J. K. B. 345.

The Corporation appealed to this House.

C. A. Russell, K.C., and *Senior* for the appellants. The decision of the Divisional Court was right. That Court held that the present case was not distinguishable from *Reg. v. Hutchings* (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35, where it was held that the decision of justices, on proceedings for the recovery of expenses of private street works under section 150 of the Public Health Act, 1875, that the street was a highway repairable by the inhabitants at large created no estoppel if proceedings were again taken with reference to the same street under the same section. The change in the procedure with regard to the recovery of the expenses introduced, where that Act is adopted, by the Private Street Works Act, 1892, or in this case by the precisely similar provisions in the local Act, does not affect the applicability of the decision in *Reg. v. Hutchings*. The basis of the decision was that the question whether the street was repairable by the inhabitants at large came only incidentally in question in proceedings under section 150 of the Public Health Act, 1875. That is also the case under the legislation now in question. The jurisdiction of the justices under this legislation is to quash or amend the resolution of the local authority and the other documents. In determining whether they will quash the resolution they may have to decide whether the street is a highway repairable by the inhabitants at large; but only incidentally. In substance the jurisdiction of the justices under the Act of 1892, or the local Act, on an objection that the street is a highway repairable by the inhabitants at large, is the same as their jurisdiction to determine a similar objection taken in the case of proceedings under section 150 of the Public Health Act, 1875. The only real difference is, that while under the Act of 1875 the objection cannot be entertained until the works have been done and it is sought to recover the expenses, under the local Act or the Act of 1892 provision is made for determining the objection beforehand. This view is borne out by the express provision in section 31 of the local Act and section 9 of the Act of 1892, that the objections are to be determined as if the local authority were

proceeding summarily against the objectors to enforce payment of a sum of money. This provision also shows that the onus of proving, at the hearing of the objections, that the street is not a highway repairable by the inhabitants at large is on the local authority: *Rishton v. Haslingden Corporation*, 1898, 1 Q. B. 294; 67 L. J. Q. B. 387. All that the justices decide, therefore, when they give effect to an objection that the street is a highway so repairable, is that the local authority have failed to discharge this onus. The decision is not at all in the nature of a decision *in rem* with regard to the status of the highway; nor can it even create an estoppel *inter partes*. There is this further reason why there cannot here be an estoppel *inter partes*:—One of the objectors on the present occasion was not a party to the previous proceedings. As between this objector and the local authority there can be no question of estoppel *inter partes*, and his objection the justices must determine on the merits. And obviously if they are under an obligation to determine the one objection on the merits they must have power to deal with all the objections in the same way.

[They also referred to *North-Eastern Railway v. Dalton Overseers*, 1898, 2 Q. B. 66; 67 L. J. Q. B. 715 (taken to the House of Lords *sub nom Dalton Overseers v. North-Eastern Railway*, 1900, A. C. 345; 69 L. J. Q. B. 650, where the decision of the Court of Appeal reversing that of the Divisional Court was affirmed); *Attorney-General for Trinidad v. Eriché*, 1893, A. C. 518; 63 L. J. P. C. 6; and *Twickenham Urban District Council v. Munton*, 1899, 2 Ch. 603; 68 L. J. Ch. 601.]

Danckwerts, K.C. (*Compston* with him), for the respondents. Whether *Reg. v. Hutchings* (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35, was rightly decided or not, the decision does not apply to this case, for it was a decision under section 150 of the Public Health Act, 1875, and that statute contains no such provisions for raising and determining objections to any proposed private street works as the statute in the present case contains; and especially it does not empower justices to determine, as the substantive matter in issue, the question whether any particular street is or is not a highway repairable by the inhabitants at large, whereas the statute under consideration does. The jurisdiction that the justices have under the Act of 1875 is merely administrative, but there is no such restriction in Act of 1887 or in the General Act of 1892. Therefore, the decision of the justices in the first proceedings of 1898 that Sludge Lane was a highway repairable by the inhabitants at large, was a decision by a court of competent jurisdiction upon a question of fact, which was the question directly in issue in those proceedings, and not upon a question which was incidental or collateral only. It follows, therefore, that the decision in 1898 by the justices

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was a decision *in rem*, a final and decisive decision as to the status of this particular street, and as to which of the parties to this litigation were liable for the expenses of its repair.

Many of the objections that can be raised under the present legislation, like that now in question, go to the root of the matter; and it is submitted that the determination of the justices upon an objection of this nature is final, and in the nature of a judgment *in rem*, like an adjudication on the settlement of a pauper or a conviction for non-repair of a highway; *Reg. v. Hartington Middle Quarter Inhabitants* (1855) 4 E. & B. 780; 24 L. J. M. C. 98; *Reg. v. Haughton Inhabitants* (1853) 1 E. & B. 501; 22 L. J. M. C. 89; *Reg. v. Blakemore* (1852) 2 Den. C. C. 410; 21 L. J. M. C. 60.

Further, in the circumstances of the present case, the parties claiming the benefit of the estoppel are practically all persons who either were themselves parties to the previous proceedings, or are privies in estate to such parties.

If the order made by the justices in 1898 was *ultra vires* and ought to have been an order quashing the proceedings of the Corporation, and not expressed as a determination of the objection that Sludge Lane was a highway repairable by the inhabitants at large, it might have been quashed on *certiorari*. But as that was not done, the order stands, and cannot be questioned in collateral proceedings of this kind.

Senior replied.

THE EARL OF HALSBURY L.C. My Lords, although I do not deny the local importance of this case, and indeed the importance of it generally, it seems to me that it lies within a comparatively short compass. I think that the matter becomes clear if we look at the corresponding section of the Public Health Act, 1875 (section 150), and observe what has been the question in doubt in some of the cases under that Act, and then compare it with the local Act with which your Lordships are dealing here.

In the Public Health Act the mode in which the matter is dealt with is this:—"All streets being or which at any time become highways repairable by the inhabitants at large," are by section 149 given to the jurisdiction of the urban authority. Then section 150 gives the urban authority jurisdiction in certain cases over "any street within any urban district (not being a highway repairable by the inhabitants at large)." The urban authority is empowered to give notice to the owners of property in a private street which requires them to flag, channel, and so forth, to deal with the particular place which is under their authority by reason of section 150; and if the

owner does not do what he is ordered to do by the urban authority they can do it themselves. Thereupon the magistrates are empowered to enforce by a proper order the payment of those expenses. In *Reg. v. Hutchings* (1881) 6 Q. B. D. 300 ; 50 L. J. M. C. 35, what happened was this. The magistrates before whom the question came as to whether or not a certain sum of money (£400 odd) had been incurred, thought proper to enter into the question of whether or not it was properly proved that this was not a public street, but a private road within section 150. I have looked to find some jurisdiction given to the magistrates to enter into that question, and I can find none. The only thing which I can suppose is that it was argued that, inasmuch as this power given under section 150 depends upon the question of the street with which they are dealing not being a highway repairable by the inhabitants at large, that was one of the necessary facts to be proved to give the magistrates jurisdiction in order to issue their process and enforce the payment of those expenses. I must say, so far as that case is concerned, I entirely concur with the judgment. The magistrates had no such jurisdiction at all ; they were not invested with any such power at all. The only thing which the Legislature confided to them was that they should issue process to compel payment of something which the urban authority had themselves paid by reason of the disobedience of persons upon whom the notice has been served. As to that case, I think it was quite rightly decided.

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But let us turn for a moment to the statute which is before your Lordships, and the distinction will be at once apparent. Instead of its being left to the determination of the local authority to give notice, and when that notice is disobeyed to do the work themselves, and thereupon when they have done the work themselves to sue for the amount against the person who disobeyed their order—instead of that—a whole machinery is created by which the question of whether or not the street is repairable by the parish shall be determined by a particular tribunal, a tribunal erected for this express purpose ; and when we look to see what that particular forum erected for that purpose is to determine, it is sufficient to see the number of objections which can be made and what has to be determined :—“(a) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act” (that is a question which relates to a different class of things that the urban authority have to do) ; “(b) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.” So that, instead of being, as it is, under the Public Health Act, 1875, something removed from the jurisdiction of the justices who have only power to issue process and enforce the payment of a sum of money payable under the circumstances stated in section 150, in this Act the

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very question whether or not a particular road is or is not a highway repairable by the parish is expressly remitted to that tribunal for the purpose of determination.

For my own part, I am wholly unable to see anything more in the nature of a judgment *in rem* than that; and although I desire not to be bound by it, because I think it unnecessary after what I have said to enter into that question, yet I must say that where you have a corporation on the one side and objectors capable of coming in, and receiving notice to come in, in respect of a particular matter on the other side, it comes very near to showing that it is a proceeding between the same parties—an adjudication between the same parties.

For my own part I am quite prepared to base my opinion upon the subject upon the hypothesis that it is a judgment *in rem*. It is a judgment as to the *status* of that street; and that judgment as to the *status* of that street is, it is said, subject to appeal. Counsel for the appellants, I think, told us that it was subject to appeal to quarter sessions. He has not pointed out to us where the appeal comes, and I have not found it; but whether it is subject to appeal or not seems to me to be immaterial. If there is no appeal, it is a final adjudication and determination. If there is an appeal, I presume, from what has happened, the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined; and I must say that I rather concur with what has been suggested by Lord Justice Vaughan Williams, that the probability is that a section of this character or a statute of this character was introduced by reason of the difficulty that had arisen under the Public Health Act. If you look carefully into the matter you find that there is no one who has any power of litigating the question when once the local authority has thought proper to give the notices. There is no forum that I can see created by the statute before whom that question can come, and all that is to be done is that they are to recover the expenses against any person who has disobeyed the order. Probably there must be some method of removing the order if made without jurisdiction—perhaps it might be removed by a *certiorari* to the King's Bench; but certainly no such proceeding is contemplated by the Public Health Act as is created by the Wakefield Act.

Under these circumstances it appears to me that it is an order made by the justices who are called on by the provisions of the statute to exercise that jurisdiction. They have exercised that jurisdiction. They have acted within their powers, and it seems to me that the adjudication which they have made is conclusive, and properly conclusive, getting rid of a great many awkward questions which might

otherwise be raised. This appeal, therefore, ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I agree. I entirely concur in what has been said by the Lord Chancellor. I desire only specially to add that I think that Lord Justice Vaughan Williams and Lord Justice Mathew have stated clearly the distinction which exists between this case and the case of *Reg. v. Hutchings*, which deprives that case of any authority in the present case.

LORD DAVEY. My Lords, I am of the same opinion. The point on which I differ from the judgment of the Lord Chief Justice may be put very shortly, and it is this. He seems to have thought that the primary jurisdiction of the justices under section 31 of the Act of 1887 was either to quash or to amend the proceedings, and that the power to determine the matter of the objection was merely incidental and leading up to that jurisdiction. I take a wholly different view of the construction of that section. I think that the primary jurisdiction of the justices is to proceed to hear and determine the matter of all objections—that is their first and their main duty; and then, as consequential upon that, they may, but they are not bound to do so on the application either of the objectors or the Corporation, proceed either to quash in whole or in part or to amend the resolutions, &c., which form the subject of the proceeding.

This view shows the distinction between this case and *Reg. v. Hutchings*, which the Lord Chief Justice thought covered this case. I cannot put the distinction between this case and that more clearly than it has been put by Lord Justice Vaughan Williams. Shortly stated it is, in my opinion, this: that in *Reg. v. Hutchings* Lord Selborne L.C., and the learned judges who sat with him, thought that the matter on which the decision of the magistrates was said to be *res judicata* was one which they had no jurisdiction to entertain *per se*—that they had no jurisdiction whatever to decide whether a road was or was not a highway; they had jurisdiction to decide whether a sum of money was due from a particular individual to the Corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind *res judicata* in a subsequent proceeding on which that question came into prominence.

I agree with Lord Justice Vaughan Williams also that this decision of the magistrates, if not in form a judgment *in rem*, was, at all events, in all its essentials, a judgment *in rem*. And I also agree that if it be

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not strictly a judgment *in rem*, so as to make it conclusive upon all the world, all persons who were called by being served with notice of the proceedings, and had an opportunity of attending and supporting or opposing the objection, must be bound by the decision of the magistrates, and none the less because they did not think fit to attend, but left the objection to be fought by other people.

LORD ROBERTSON. My Lords, I confess I was, in the first instance, inclined to share the doubts of Lord Justice Stirling, but the argument of counsel for the respondents has satisfied me that the judgment of the Court of Appeal is right. The question is whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a submissive issue *in rem* or merely as a *medium concludendi* of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue raised by one of the class interested is good against all the rest. There is nothing contrary to principle, and much convenience, in a local tribunal being so authorised to adjudicate on a local matter with full notice to all concerned, and the question is merely whether in this instance that has been done by the Legislature. On the whole, I have come to think that it has, and that the appeal, therefore, fails.

LORD LINDLEY. My Lords, I am entirely of the same opinion. It appears to me that the question turns entirely upon the fact which occurs in this case, and did not occur in *Reg. v. Hutchings*, that the objection raised for the purpose of being decided in accordance with the Act, and the question which was decided in accordance with the Act, was whether Sludge Lane was a street repairable by the inhabitants at large or not. If there had been no such matter raised, *Reg. v. Hutchings* would have had an important bearing on the present case; but as it is I have not the slightest doubt that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants—Sharpe, Parker, Pritchard, Barham, and Lawford, for C. J. Hudson, Town Clerk, Wakefield.

Solicitor for the respondents—S. F. Taylor, for J. B. Cooke, Wakefield.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Note.

Though the decision in the present case is of some importance, what will attract far more general interest than the actual decision is the opinion expressed by Lord Halsbury L.C. that the objection that the street is a highway repairable by the inhabitants at large is no defence to proceedings for the recovery of expenses of private street works under section 150 of the Public Health Act, 1875, which is quite contrary to what has for some time been supposed to be settled law.

There is one actual decision that it is a good defence to proceedings for the recovery of expenses under section 150 of the Public Health Act, 1875, to show that the street is repairable by the inhabitants at large: *Eccles v. Wirral Rural Sanitary Authority* (1886) 17 Q. B. D. 107; 55 L. J. M. C. 106; 34 W. R. 412; 50 J. P. 596. And there was a previous decision to the same effect on the earlier enactments corresponding to that section: *Hesketh v. Atherton Local Board* (1873) L. R. 9 Q. B. 4; 43 L. J. M. C. 37; 29 L. T. 530; 38 J. P. 149.

Further, apart from actual decision on the point, there are numerous cases in which it has been assumed as beyond question, that whether proceedings to recover expenses under section 150 are taken before justices, or whether those proceedings take the form of proceedings in Chancery for the enforcement of the charge on the premises, it is a good defence to show that the alleged street does not fulfil the conditions necessary to give the local authority power to deal with it under the section, *e.g.*, to show that it is not a street, or that it is repairable by the inhabitants at large, or that it was already sewered, &c., to the satisfaction of the local authority: see, *e.g.*, *Lewis v. Cardiff Urban Sanitary Authority* (1878) 47 L. J. M. C. 101; *Midland Railway v. Watton* (1886) 17 Q. B. D. 30; 55 L. J. M. C. 99; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405; *Bonella v. Twickenham Local Board* (1887) 20 Q. B. D. 63; 57 L. J. M. C. 1; 58 L. T. 299; *Walthamstow Local Board v. Staines*, 1891, 2 Ch. 606; 60 L. J. Ch. 738; 65 L. T. 430; *Handsworth Urban District Council v. Derrington*, 1897, 2 Ch. 438; 66 L. J. Ch. 691; 77 L. T. 73; 61 J. P. 518.

Lord Halsbury's opinion that it is not a good defence under section 150 to show that the street is repairable by the inhabitants at large appears to be merely *obiter*; and probably, particularly as his attention was not directed to any of the numerous cases above referred to, a court of first instance, at any rate, would still feel bound to follow *Eccles v. Wirral Rural Sanitary Authority*. But it is difficult to say what view might be taken if the question were taken higher.

If Lord Halsbury's opinion prevails, it would seem that the remedy of the frontagers, where the street is a highway repairable by the inhabitants at large, must be by appeal to the Local Government Board under section 268 of the Public Health Act, 1875, a section which would appear to have escaped Lord Halsbury's attention.

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KING'S BENCH DIVISION.

April 3.

SWINBOURN v. HAMMERSMITH BOROUGH COUNCIL.

Drains—Metropolis—Drain requiring alteration or amendment—Notice of sanitary authority—Specification of works—Notice going beyond resolution of sanitary authority—Appeal to London County Council—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 82, 85, 211—Metropolis Management Amendment Act, 1864 (25 & 26 Vict. c. 102), s. 64.

A metropolitan borough council purporting to act under section 85 of the Metropolis Management Act, 1855, passed a resolution that notice under the Act be served upon an owner of premises requiring him to execute such works as might be necessary for the amendment of a certain drain in bad order and condition, and that in the event of non-compliance proceedings be taken against him for penalties. The resolution did not specify the works to be done. Notice was subsequently, without any further authority from the council than the resolution above mentioned, served upon the owner requiring him to execute a number of specified works to the drainage system of his premises.

Held, that the notice was invalid, and that the owner had not incurred penalties for failure to comply with it.

Quære, whether a metropolitan sanitary authority have power in a notice under section 85 of the Metropolis Management Act, 1855, to specify the works to be executed.

[N.B.—The report of this case has been accidentally delayed.]

CASE stated by justices for the division of Kensington who had adjudged that the appellant had made default in complying with a notice served on him requiring him to alter and amend the drain of certain premises known as 51, Melrose Gardens, Shepherd's Bush, Hammersmith. The facts, &c., were stated in paragraphs 3, *et seq.*, as follows:—

3. At the hearing of the complaint it was proved or admitted—

(1) That the appellant was at the time of the happening of the events hereinafter mentioned and at all times material the owner of certain premises known as 51, Melrose Gardens, situate within the borough of Hammersmith.

(2) That the said premises were built in or about the year 1870, and were then constructed in accordance with the provisions of the Metropolis Management Act, 1855, the drainage thereof being constructed and provided to the satisfaction of the then Vestry as required by section 75 of the said Act.

(3) That the respondent council is the council for the said borough

under the London Government Act, 1899, and by virtue of such Act succeeded to the powers prior to the coming into operation of such Act vested in the Vestry of the parish of Hammersmith.

(4) That on or about February 5, 1902, a notice under the Public Health (London) Act, 1891, was served by the respondent council upon the appellant requiring him to abate a certain nuisance being a defective house drain at the premises aforesaid.

(5) That on or about February 19, 1902, a further notice under the last-mentioned Act in respect of the said drain was served by the respondent council upon the appellant requiring him to abate the said nuisance and to relay the drain in accordance with the regulations of the respondent council and with the bye-laws of the London County Council.

(6) That in consequence of a report made to the public health committee of the said borough that the works specified in sub-paragraph 9 of this paragraph were necessary for the amendment of the drain, the public health committee of the said borough caused a notice under the Metropolis Management Act, 1855, ss. 82, 85, and under the Metropolis Management Amendment Act, 1862, s. 64, to be served upon the appellant that the drain was defective and requiring him to alter and amend the same within seven days, and for that purpose to execute the works set out in sub-paragraph (9) hereof. A copy of the said notice which was served on the appellant on March 20, 1902, is annexed to and forms part of this case.

(7) That in or about the month of April, 1902, the appellant executed certain repairs to the said drain, but did not execute the work specified in the notice of March 20, 1902.

(8) That on June 18, 1902, at a meeting of the council, the public health committee reported to the council that they had had before them the reports of the sanitary inspectors of the said borough, and had given directions for the necessary statutory notices to be served, and recommended to the respondent council "that a notice be served under the Metropolis Management Act, 1855, upon the owner of No. 51, Melrose Gardens, requiring him to execute such works as may be necessary for the amendment of the drain of the said premises which is in bad order and condition, and that in the event of such notice not being complied with proceedings be taken against him for the recovery of the penalties provided in that behalf."

(9) That at the said meeting of the respondent council on June 18, 1902, the council duly resolved that the aforesaid recommendation of the public health committee be adopted. That notice in writing, dated July 14, 1902, was served on the appellant on July 16, 1902, in the following terms, namely:—"Borough of Hammersmith, Town Hall,

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Hammersmith, W., July 14, 1902. Metropolis Local Management Acts, 18 & 19 Vict. c. 120, ss. 82, 85, and 25 & 26 Vict. c. 102, s. 64. To Mr. A. Swinbourn, of Mayville, Stafford Road, Twickenham, the owner of certain premises situate and known as 51, Melrose Gardens, Shepherd's Bush, Hammersmith. Take notice, that whereas upon an inspection made by an inspector of the Hammersmith Borough Council the drain thereof was found to be in bad order and condition, the Hammersmith Borough Council hereby require you to alter and amend the said drain within seven days from the date hereof, and for that purpose to execute the following works:—

“That the ground be opened the required depth and the existing house drain be taken up and an approved intercepting trap be fixed to the sewer side of the drain in forecourt, that an inspection chamber be constructed on a foundation of good cement concrete and provided with a fresh air inlet ventilator, and that an air-tight iron cover be fixed over the same chamber at the ground level. That a six-inch stoneware pipe main drain be laid on six inches of Portland cement concrete under the house, the joints to be made with Portland cement. That an inspection chamber be constructed in the yard outside the water-closet door, and an air-tight cover be fixed over the same at the present level, and that a four-inch iron (or lead) ventilator be fixed to the same chamber and carried up three feet above the highest eaves of the house. That a four-inch branch stoneware pipe drain from the gully trap under the sink waste pipe and from the servants' water-closet be laid upon Portland cement concrete. That the joints of all the drain pipes be made with Portland cement, and the same branch drains be properly connected to the aforesaid inspection chamber.

“That a four-inch brass thimble be wiped on to the lead soil pipe in the scullery, and that it be connected with a four-inch pipe to a Y junction fixed in the main drain or to the chamber in the yard.

“That the whole of the drain be covered with six inches of Portland cement concrete.”

(10) That the appellant made default in complying with the requisitions of the said notice of July 14, 1902.

4. It was contended on behalf of the appellant—

(i.) That no notice of any order of the respondent council to execute the said works had been served upon the owner or occupier of the said premises, whereas it was a condition precedent to the right of the respondent council to recover penalties under section 64 of the Metropolis Management (Amendment) Act, 1862, that notice of such an order should have been served upon such owner or occupier. Further, that the notice dated July 14, 1902, was not a notice of an order of the respondent council within the meaning of the said

64th section or of section 211 of the principal Act of 1855, and that by reason of the failure of the respondent council to comply with the provisions of the said Acts in respect of such notice we were bound to dismiss the summons. 1902.
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(ii.) That the respondent council by the notice of July 14, 1902, in declaring that the drain was in bad order and condition or requiring the appellant to amend the same by the execution of structural works, being the taking up of the existing drain and the substitution thereof of a new system of drainage, and by specifying the details of the work required by them to be done, were acting in excess of the powers conferred upon them by section 85 of the said Act, and the said notice was therefore *ultra vires*.

(iii.) That the said notice was not a notice in the terms of the resolution set out in paragraph 3 (8) hereof, but was a notice to the appellant to execute certain works not referred to by the terms of the said resolution. Further, that no notice could be given to the appellant except in the said terms, and that the said notice was bad.

(iv.) That the drainage bye-laws made by the London County Council under section 202 of the said Act of 1855 were recognised by and were binding upon the respondent council, and where the requirements of the said notice were not in accordance with those of the said bye-laws they were *ultra vires*, and the notice was bad.

(v.) That the appellant, in pursuance of the said notice dated March 20, 1902, having repaired the said drain and the respondent council having taken no proceedings to enforce the execution of the further works required by the said notice or by the two previous notices, they were now estopped from requiring the execution of such works. Further, it was not open to the respondent council to serve the said notice of July 14, 1902, and to take proceedings thereunder while prior notices upon which proceedings could still have been taken had been served upon the appellant.

5. On behalf of the respondent council it was contended that the notice of July 14, 1902, was a notice of the resolution of the respondent council of June 18, 1902, and that the appellant having failed to comply with the requisitions thereof had neglected or made default to comply with an order of the respondent council within the meaning of section 64 of the Metropolis Management (Amendment) Act, 1862. That the resolution of June 18, 1902, was within the powers of the council and one which not having been appealed from we were bound to enforce. And that the respondent council was not estopped from instituting the proceedings before us.

6. Upon the said hearing we found as a fact that the appellant had been duly served with the notice of the respondent council dated July

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14, 1902, to execute the said works, and had made default in complying with such notice, and we held :—

(1) That such notice was a notice of an order of the respondent council within the meaning of the said Acts, and that the respondent council had power under the said Acts to require the execution of the works set out in the said notice. And that the council was not estopped from enforcing it as contended by the appellant.

(2) That the said notice was a notice of the resolution of June 18, 1902, and that the requirements of such notice were authorised by the terms of that resolution.

(3) That so far as the said bye-laws were applicable, the requirements of the notice of July 14, 1902, were in accordance therewith.

(4) That the respondent council had power to serve the said notice of July 14, 1902, and were not estopped from so doing as contended.

We therefore gave judgment against the appellant as aforesaid, but the appellant questioned the proceedings upon the grounds above set out.

The question for the opinion of the Court was whether the justices were correct in point of law in their determination.

The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), contains the following provisions :—

Section 82. It shall be lawful for any such vestry or for their surveyor or inspector, or such other person as they appoint, to inspect any drain or sinks, traps, syphons, pipes, or other works or apparatus connected therewith and for that purpose to enter, by themselves or their surveyor or inspector and workmen, upon any premises, and cause the ground to be opened

Section 85. If, upon such inspection as aforesaid, any drain appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the vestry shall cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given the vestry may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises.

Section 211. Any person who deems himself aggrieved by any order of any vestry in relation to the level of any building, or any order or act of any vestry in relation to the construction, repair, alteration, stopping or filling up, or demolition of any building, sewer, drain may, within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the Metropolitan Board of Works [now the London County Council] against the same

Section 64 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), provides as follows :—

Whereas by the seventy-third eighty-fifth, and *eighty-sixth* sections of the firstly recited Act [the Act of 1855], certain works, matters and things are required to be constructed, made, or executed on the requisition of vestries by the

owners or occupiers of the premises therein referred to ; and in case any such owner or occupier refuse or neglect to commence, proceed with, or complete the same, as the case may be, the vestry . . . are authorised to perform and execute such works, matters, and things, and recover the costs incurred thereby in manner therein provided : be it enacted, that in case of any such neglect or default by any person or persons to comply with the order of any vestry . . . to execute any works, matters, or things under any of the said provisions, the person or persons so offending shall forfeit and pay to the vestry . . . a sum not exceeding five pounds, and also a further sum not exceeding forty shillings for every day during which such offence shall continue, to be recovered by action at law or before a justice of the peace in a summary manner, at the option of the vestry . . . and the vestry . . . may at their discretion either execute or perform any such works, matters, or things, and recover the costs and expenses thereof from the owner of the property as aforesaid, or proceed for and recover the said penalty or penalties ; but nothing herein contained shall render any person or persons liable to be proceeded against for the penalty as well as for the costs and expenses of the works.

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Macmorran, K.C., and *Bevan* for the appellant. The justices were wrong. In the first place the notice of July 14, assuming it to be unobjectionable in other respects, was not in accordance with the resolution which purports to support it. It is, therefore, not a notice which the sanitary authority can be said to have caused to be given. Section 211 of the Metropolis Management Act, 1855, which gives an appeal against the requirements of the sanitary authority, shows how important it is that the notice should be the act of the sanitary authority. Secondly, the notice was bad because it specified the works to be done. Section 85 gives the sanitary authority no power to specify works. The scheme of the legislation is to put the responsibility of doing what is necessary on the owner or occupier. If the sanitary authority are not satisfied with what he has done, then they can proceed against him, and it is for the justices to determine whether what the owner or occupier has done is enough : *Wood v. Widnes Corporation*, 1898, 1 Q. B. 463 ; 67 L. J. Q. B. 254 ; *Clerkenwell Vestry v. Feary* (1890) 24 Q. B. D. 703 ; 59 L. J. M. C. 82. The provisions for an appeal to the London County Council do not preclude the appellant from taking the point before the justices that the notice is bad : *Fulham Vestry v. Solomon*, 1896, 1 Q. B. 198 ; 65 L. J. M. C. 33.

R. Cunningham Glen for the respondents. The notice was a mere carrying out of the resolution of the Council, and the appellant might perfectly well have appealed against it under section 211. It was not appealed against, and the justices cannot go into the question of the propriety of what it required to be done : *St. John's, Hackney, Vestry v. Hutton*, 1897, 1 Q. B. 210 ; 66 L. J. Q. B. 74.

LORD ALVERSTONE C.J. In this case on the facts stated, I do not think this conviction can be enforced. I am desirous of not expressing

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any final opinion as to what can be specified under section 85 of the Metropolis Management Act, 1855. All I say is that I am not prepared to hold that under no circumstances can the authority specify what they think to be the necessary works under the section. But I am clear of this, in order that the sanitary authority can sue for penalties there must be an order of theirs which would be subject to appeal, because I think if a valid order is made, and not appealed against, under ordinary circumstances the magistrate has only to see if the order, which is a valid one, has been obeyed.

In this case the sanitary authority gave notice to do certain works. The appellant carried out certain other works, and they then passed a resolution that the drain was not in proper order, and asked him to do the necessary repairs. After that a notice was served upon him specifying what was to be done. The resolution does not in terms refer to that notice, or to the facts which had been previously reported to the authority; but it says that he is to do such works as may be necessary.

Mr. Macmorran says, and for the purposes of this case it is possible, that the appellant regarded that as being an invalid order, and therefore did nothing more because he did not consider that he was bound to do anything, and he could not appeal against it. He wished to raise the point hereafter that nothing was necessary to be done. That matter has not been dealt with by the justices. They have simply decided against him and convicted him because he did not obey the notice which was subsequently brought to his knowledge, or served upon him, to carry out certain works. I think, at any rate, it is necessary that there should be an order of the sanitary authority requiring him to do certain things which can be appealed against. In this case I am not satisfied that there was, and, therefore, I think the conviction cannot be supported.

WILLS J. I am of the same opinion

CHANNELL J. I agree.

Appeal allowed.

Solicitor for the appellant—T. G. Bullen.

Solicitor for the respondents—H. Thompson.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It is not very easy to appreciate exactly what the Court intended to decide in the above case. The power in the sanitary authority under section 85 of the Metropolis Management Act, 1855, is to "cause notice in writing" to be given to the owner or occupier requiring him to "do the necessary works."

This, it would seem, must mean either that the sanitary authority are to cause notice to be given requiring the owner or occupier to do the necessary works without specifying what those works are to be, or that they are to cause notice to be given requiring him to do specified works, or, as a third alternative, that they may adopt at their option either of these courses.

It seems clear, further, that unless the authority are restricted to giving a

notice requiring the necessary works to be done without specifying them, in which case the notice given in the above case was obviously bad, the authority themselves must decide what the notice is to require.

On the facts as stated in the above case this was not done. There was no question even of an act of a committee subsequently ratified or anything of that sort; but apparently the determination of what the notice was to contain was simply left to an officer.

Thus, if the view above expressed is right, the notice was not, within the words of the section, a notice which the sanitary authority had "caused to be given."

Perhaps this is really what the decision of the Court amounts to; but, in view of what was said by Lord Alverstone C.J. with reference to the provisions for appeal in section 211, it is not very clear whether this was exactly the ground taken.

It would rather seem to have been assumed, it may be observed, that the resolution of the sanitary authority under section 85, to cause notice to be given, or perhaps the notice itself, constitutes an "order" of that authority within section 211. But this is not altogether clear. The section gives an appeal against any "order" of the sanitary authority in relation to certain matters and also against an "act" of the sanitary authority in relation to certain matters. And it may well be that the section in speaking of an "order" intends to deal with those cases only where an earlier section (*e.g.*, section 76) gives the authority power to make an "order" under that name; so that the appeal with reference to a notice under section 85 would be an appeal not against an "order" but against an "act" of the sanitary authority. This distinction may be important with reference to the very peculiar provisions of section 211 as to the time within which the appeal must be brought.

It may be observed that the existence of the provisions in section 211 for appeal seems strong to show that a notice under section 85 ought to specify the works to be done: see *Tracey v. Pretty*, 1901, 1 K. B. 444; 70 L. J. K. B. 234; 83 L. T. 767; 49 W. R. 282; 65 J. P. 196; 19 Cox C. C. 593.

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Divisional
Court.
Dec. 8, 9.
Court of
Appeal,
Feb. 13.

Poor rate—Appeal—Appearance of assessment committee as respondents—Consent of guardians—Notice of proposal to give consent—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 2—Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 12.

Section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which provides that where under the Poor Law Amendment Act, 1834, and the amending Acts, the consent in writing of the majority of the guardians of a union is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians after not less than fourteen days' notice to each guardian, deals with cases where the consent in writing of a majority of the guardians was expressly required, and not with cases where all that was required was the consent of the board of guardians, and where consequently the consent could be effectively given by a resolution of the guardians carried in the ordinary way. The section, therefore, does not apply to the consent of the guardians to the appearance of the assessment committee on rating appeals required by section 2 of the Union Assessment Committee Amendment Act, 1864.

CASE stated by the court of quarter sessions for the County Palatine of Lancaster upon an appeal heard and determined at the quarter sessions of the peace holden by adjournment at the County Sessions House, Liverpool, in and for the County Palatine of Lancaster, on the 27th April, 1903, against a certain poor rate made on the 19th day of June, 1902, which said appeal was allowed (the rate being amended in manner hereinafter appearing) subject to the following case:—

1. When the appeal of the above-named appellant, Joseph Smith, was called on for hearing, counsel claimed to appear and be heard on behalf of the Assessment Committee of the Leigh Union, appearing in the name of the Guardians of the union. The overseers of the township of Leigh (which is situated in the Leigh Union) did not appear either in person or by counsel.

2. Counsel appeared on behalf of the said appellant, and called upon the counsel who appeared on behalf of the Assessment Committee to prove that the said Committee had duly obtained the consent of the Guardians to their appearance as respondents to the said appeal.

3. It was then proved or admitted that the notice of appeal had

been served upon the Assessment Committee on the 11th day of March, 1903, that the next meeting of the Guardians was held on the 25th day of March, and that the Clerk of the Committee on the 20th day of March sent to each of the Guardians a notice dated Friday, 20th March, 1903, that at the next meeting the consent of the Board to the appearance of the Assessment Committee as respondents in appeals to quarter sessions would be proposed. Copies of the said notice of appeal and of the notice sent to the Guardians are hereunto annexed, and are to be deemed to form part of this case. On the 25th March the next meeting of the Guardians was held, and it was resolved: "That the Board hereby consents to the Assessment Committee appearing as respondents in appeals to quarter sessions against the assessment of the property" of the above-named appellant.

4. It was contended by counsel for the Assessment Committee that the consent of the Guardians thus given was a sufficient compliance with section 2 of the Union Assessment Committee Amendment Act, 1864, which enacts that the Assessment Committee may with the consent of the guardians, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union; and that such consent need not be in writing.

5. It was contended by counsel on behalf of the appellant that the Assessment Committee and the Guardians had not complied with the provisions of section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which enacts as follows: "Where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required it shall be deemed a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting, and of the business to be transacted thereat, not less than fourteen days notice shall be given to each guardian or manager." It was contended by counsel for the appellant that not less than 14 days' notice should have been given to each guardian of the meeting at which the consent to the appearance of the Assessment Committee as respondents was given and that as only four clear days' notice was given of such meeting, including Saturday and Sunday, such notice was insufficient and such consent was invalid, and that the Assessment Committee had no right to appear and be heard on the appeal.

6. It was contended by counsel for the Assessment Committee that section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, did not apply:—(1) Because it referred only to consents

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in writing, and section 2 of the Union Assessment Committee Amendment Act, 1864, did not require a consent in writing; (2) because the Union Assessment Committee Amendment Act, 1864, was not one of the Acts amending the Poor Law Amendment Act, 1834; and (3) because the said section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, provided merely that a resolution passed at a meeting of which not less than 14 days' notice had been given should be a sufficient compliance with the requirements of earlier Acts, but did not enact that a resolution passed without such notice should in no case be valid, and that the words "14 days shall be sufficient" (*sic*) do not impose a minimum.

7. We held that the objection raised on behalf of the appellant must be sustained, and refused to hear counsel for the Assessment Committee on the merits of the appeal, but agreed to state this case for the opinion of the High Court on the question whether the Assessment Committee were entitled to be heard.

8. Evidence was given on behalf of the appellant to show that he had duly served notice of appeal on the overseers of the parish and on the Assessment Committee, and had given notice of objection to the valuation list, and had failed to obtain relief before the Assessment Committee.

9. We allowed the appeal, with costs against the overseers, but declined to go into the question of the value of the said hereditament, and reduced the value of the said hereditament to the amount appearing in the valuation list in force before the making of the new valuation list on which the rate against which the said appeal was brought was based—that is to say, we reduced the said appellant's assessment from £140 gross and £110 rateable value to £60 gross and £51 rateable value.

The question for the opinion of the Court is whether we were right in refusing to hear counsel for the Assessment Committee.

If the said decision was right, it is to stand; if not, it is to be quashed, and the Court is to make such order herein as the Court shall think fit.

W. C. Ryde for the Assessment Committee of the Leigh Union (respondents at quarter sessions). Section 2 of the Union Assessment Committee Amendment Act, 1864, does not require the consent of the guardians of a union to the appearance of their Assessment Committee in their name on appeals to be in writing. It does not require the consent of a majority of the whole board. The consent required is wholly different from that contemplated, for instance, by section 23 of the Poor Law Amendment Act, 1834, when

guardians propose to purchase or hire land for the erection of work-houses and so on. The class of cases as to which the 14 days' notice to guardians to attend the meeting at which their consent is to be given, is required by section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, does not embrace the mere appearance of an Assessment Committee as respondents to an appeal at quarter sessions, and in such a case no 14 days' notice is required, and the ordinary notice contemplated by section 2 of the Act of 1864 is sufficient.

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W. Mackenzie (Boyle, K.C., with him), for appellant at quarter sessions. Any consent of the Guardians must be given in writing, for they can only act by resolution in writing. Section 12 of the Act of 1882 therefore applies, because the Act of 1864 is in effect an amendment of the Poor Law Amendment Act, 1834. The Act of 1882 was intended to import a uniformity into all these matters of business in connection with guardians and Assessment Committees, and the whole trend of modern legislation is to create uniformity in procedure. It must have been intended by section 2 of the Union Assessment Committee Amendment Act, 1864, that the consent of the guardians should be in writing. The power given to an Assessment Committee to appear as respondents in an appeal is an extremely important one, and may involve a large expenditure of the ratepayers' money. The express consent of the Guardians is therefore of importance.

Ryde was not called upon to reply.

LORD ALVERSTONE C.J. It by no means follows that because a point is taken very late in the history of Poor Law rating appeals it may not be a perfectly good point; therefore it must not be thought that I am deciding this case except upon the arguments that we have heard. But there are two lines of statutes in connection with these matters which I think are perfectly clear and definite. Prior to the Union Assessment Committee Act, 1862, and the Union Assessment Committee Amendment Act, 1864, the parties to the poor rate appeals were the direct parties, the appellant and the overseers, and it was only after the Union Assessment Committee Act, 1862, was passed that, in order to give the Union Assessment Committee who were responsible for the rating, and who approved the valuation lists, a right to appear, that this legislation enacted that they should be entitled to defend appeals. Section 2 of the Act of 1864 says: "The Assessment Committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of

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the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given"; and Mr. Mackenzie is perfectly right in saying that that power to appear as respondents to an appeal is an important matter. It involves the Guardians, or rather it involves the Assessment Committee in the name of the Guardians, in the possible liability to costs, and therefore it is not a step that ought to be taken without a formal consent of the Guardians. I quite agree, although there is no statement about it, that the consent of the Guardians must be given by resolution at a meeting; and if the point taken in this appeal had been that no notice had been given to the Guardians at all, and possibly that there was no consent of the Guardians to the Assessment Committee appearing in their name as respondents, the objection would have been a very fatal one, and an objection which has to my knowledge prevailed in a great many cases; but that was not the point taken in this appeal; but, notice having been given to all the Guardians, and—as for this purpose it must be assumed—the Guardians having assented to the Assessment Committee appearing as respondents in pursuance of section 2 of the Act of 1864, counsel for the appellant at the sessions objected, not that the conditions of that section had not been complied with, but that the notices given were not good notices, because they did not comply with section 12 of the Divided Parishes and Poor Law Amendment Act, 1882. Whatever may have been argued at the sessions as to notice being given in writing or not, which is one of the points taken, it is obviously suggested that this section required a 14 days' notice, and Mr. Mackenzie has very properly contended that in order to say whether that is so we must look and see whether this Act of 1882 was intended to amend the practice which had existed and was known to exist under the Acts of 1862 and 1864. The words of section 12 are: "Where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required." That is an entirely different thing from the written resolution of an ordinary majority at a meeting either of the Assessment Committee or of the Board of Guardians. There were certain provisions in statutes earlier than the Poor Law Amendment Act, 1834, some of which still remain, but it is enough for the present purpose to refer to one provision in section 23 of that Act, that before guardians could consent to spend capital money, either in erecting a workhouse, or in hiring a workhouse, the consent in writing was to be obtained—not of the board of guardians—

but of the majority of the guardians of the union, that is to say, a majority of the whole body. I need scarcely point out that that is an entirely different thing from the majority of those present at the meeting properly summoned. That would be the ordinary proceeding of both guardians and Assessment Committees. I am, therefore, clearly of opinion that the objection taken that notice under section 2 of the Union Assessment Committee Amendment Act, 1864, must be notice under section 12 of the Act of 1882, and therefore 14 days' notice, is a bad point, and one to which effect ought not to have been given. It is important that this should be pointed out, because, inasmuch as at these sessions, as at many other sessions in various other parts of the country—I do not know whether the practice has become universal since I was familiar with it—the practice is for the respondent to begin, the result is that the appellant only has been heard in this appeal, so the court of quarter sessions had to proceed with regard to the value without hearing the Assessment Committee, who are responsible for having put the appellant up to whatever figure his assessment was raised to. We are of opinion, therefore, that the preliminary objection at quarter sessions was a bad one, and the case must go back to the sessions to hear the appeal.

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LAWRANCE J. I quite agree.

KENNEDY J. I entirely agree.

Appeal allowed.

The appellant Smith appealed to the Court of Appeal.

A. T. Lawrence, K.C. (Boyle, K.C., and W. Mackenzie with him), for the appellant. It is submitted that section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, applies to the consent of the guardians required under section 2 of the Union Assessment Committee Amendment Act, 1864, which is an Act amending the Poor Law Amendment Act, 1834, within the meaning of the Act of 1882. It is true that the Act of 1864 does not in terms require the consent of the guardians to be in writing, but the General Order of the Poor Law Board of 1847, made under the Act of 1834, contains provisions requiring minutes of the proceedings of a board of guardians to be kept and signed: see Arts. 41, 202 (1), so that in effect the consent of the guardians spoken of in the Act of 1864 was necessarily a consent in writing. If section 12 of the Act of 1882 is to be read as confined to cases where the consent of the guardians was expressly required to be in writing, there are extremely few provisions with regard to which it could have any operation

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at all. Sections 23, 33, and 34 of the Poor Law Amendment Act, 1834, are the only sections I have found expressly requiring consent in writing. Lord Alverstone C.J. thought that section 12 of the Act of 1882 was confined to cases where the consent of a majority of the whole of the guardians of a union was required; but the section is not expressed as confined to such cases, and it is even far from clear that it applies to such cases at all. It is a section concerned with the length of notice that must be given of meetings of guardians, and contains no sufficient indication of an intention to repeal the provisions in the earlier Acts requiring the consent of a majority of the whole of the guardians, and to substitute the consent of a majority of those present at a meeting.

If the Court are against me on this point, it ought at any rate to be left open to the quarter sessions to determine whether the notice given in this particular case was in fact a reasonable notice.

Ryde for the respondents. It is submitted that section 12 of the Act of 1882 is clearly intended to apply just in those exceptional cases where under the Act of 1834, or any amending Act, the consent of a majority of the whole of the guardians of a union in writing was expressly required, and that it does not apply where the consent necessary is the ordinary consent given by a resolution passed at a meeting by a majority of the guardians present and voting. The provision in the Order of the Poor Law Board requiring minutes to be kept of the proceedings of a board of guardians has not the effect of requiring that any consent of the guardians should be a "consent in writing." The provisions in the Order as to the minutes are merely directory: *Rex v. Leicestershire JJ.* (1827) 7 B. & C. 6. At one time there were numerous enactments expressly requiring the consent of the guardians for various purposes to be in writing. Most of them had been specifically repealed before 1882; but that section was expressed in general terms, instead of in terms referring to the one or two sections that were left, *ex majore cautela*, in case any provisions of the kind might have been overlooked. The object of the section was to remove difficulties that had been found to arise in practice in obtaining a consent in writing from a majority of the whole of the guardians of a union. That this was understood to be the object appears from the remarks of the Local Government Board on the section in their report for 1882-83, at pp. l., li.

There can be no possible doubt that the notice was in fact reasonable. It was a five days' notice, and under the General Order of 1847 an extraordinary meeting of guardians could be held on a two days' notice (Art. 35).

Lawrence, K.C., replied.

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COLLINS M.R. This is no doubt a rather puzzling question upon the sections of the Poor Law Acts, but I have come to the conclusion that this appeal fails, and that the judgment of the Court below was perfectly right.

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The point is this: The Assessment Committee of a certain union appeared as respondents on an appeal by a ratepayer against a rate; and the question is whether they were empowered so to appear by section 2 of the Union Assessment Committee Amendment Act, 1864, which is in these terms:—"The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal." It is contended by the appellant that the Assessment Committee have not fulfilled the conditions of that section, inasmuch as they have not, he says, obtained the consent of the Guardians.

In order to make that point good, the appellant refers to section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which he says, governs the right of the Assessment Committee to say that they have got the requisite consent. That section is in these terms: "Where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required it shall be deemed a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian or manager." That section in its terms points to cases where the consent in writing of a majority of the guardians of a union is necessary, and it substitutes another provision for that consent. Counsel for the appellant is obliged to contend that section 2 of the Act of 1864, which gives the permission to the Assessment Committee to appear as respondents on the appeal, when it uses the words, "with the consent of the guardians of such union," must be taken to mean with the consent in writing of the guardians of such union, because it is with consent in writing only that section 12 of the Act of 1882 is concerned, and that, to begin with, creates an initial difficulty for the learned counsel. He is setting up that the Assessment Committee had failed to perform a condition precedent under the section under which they take their powers, and it seems to me it is for him to point out that that condition precedent is really enacted in the enabling section; but when he has to refer to the enabling section he cannot find his condition precedent in it. The condition precedent he seeks to establish is that they must have got the consent

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in writing, but he does not find those words in the section. What the section says is merely "with the consent of the guardians of such union"; and in this case the consent of the Guardians undoubtedly has been given. It was given at a meeting summoned by a notice of, I think, five days, and the consent was given by a majority. I do not even know whether it was not given unanimously at that meeting. So that there has undoubtedly been a consent within the meaning of the section enabling the Assessment Committee, with that consent, to take the course they have taken, unless counsel is entitled to read into the section that the consent must be in writing. He is obliged to do that in order to introduce section 12 of the Act of 1882 into the discussion at all. How does he do it? Section 12, as I have said, deals only with those cases where under the Poor Law Amendment Act, 1834, or the Acts amending the same, the consent in writing is a condition precedent, and it does substitute another machinery for that consent in writing.

The argument of Mr. Lawrence upon that is this:—He says that, by reason of section 38 of the Act of 1834, the guardians, in administering that Act and the amending Acts, could not act as guardians in any manner—except in two or three limited cases specially referred to—otherwise than at a meeting, and that by rules framed under the authority of the Act of 1834, those meetings were subject to regulations which involved the committing of the guardians' resolutions to writing. The resolutions were to be recorded. Therefore, he says, whenever the consent of the guardians was given, it was, not by special enactment, but by reason of the machinery applicable to meetings of guardians, necessarily in writing; and therefore section 2 of the Act of 1864, which deals with the consent of the guardians, must be taken to deal with and include, and make a condition precedent, consent in writing. That is shortly his argument.

Now it seems to me that that would be *prima facie* a very extraordinary way to introduce into an enabling Act a limitation upon the permission given in that Act. It would be introducing a limitation derived, not from express enactment at all, but from certain machinery which was introduced to facilitate the working of the earlier Acts. And when we look, as we have been enabled to do by the assistance of Mr. Ryde's argument, at the history of the legislation, it seems to me that that very strained and ingenious contention cannot stand. There is a specific section in the Poor Law Amendment Act, 1834, which is the first of the Acts referred to in section 12 of the Act of 1882, which specially requires the consent in writing of a majority of the guardians for a particular subject matter, namely, ordering a workhouse to be built. That, on the face of the Act

itself, is imposed as a special condition, and is not the sort of implied condition that is introduced into the operations of guardians by virtue of the application of the rules obliging minutes to be kept and recorded by their officer. So that there is in the same Act an express provision that a particular class of resolution can only be come to by and with the consent in writing of the guardians co-existing with other provisions, which Mr. Lawrence says have the same effect and force, namely, that everything done by the guardians at all has to be done by something that involves writing, and therefore assumes and entails a consent in writing by the guardians. It seems to me that that legislation shows that there is a certain special class of legislation involving by the force of the Act itself the special consent of the majority or of the whole of the guardians; and that that is quite different from the legislation which is introduced by a round-about process of machinery, and which does result, in fact, where they have consented, in there being a record, in most cases if not necessarily in all, of the fact that they have so consented. But it does not stand there, because we are told that there are other sections in the Acts, which have been subsequently one by one repealed, which did in the same way specially provide for the written consent of the guardians. From time to time those were repealed one by one, but there came a time, namely, in 1882, when the Legislature, as appears by the report of the Local Government Board, thought it more convenient that, instead of repeating this process of finding out these special sections and dealing with them one by one, they should *ex majore cautela*, in case any such sections still existed unrepealed, deal with them by one compendious section all at once, and make an end of them once and for all. That appears to me to be what they have done or attempted to do by the 12th section of the Act of 1882, which I have just referred to. The section seems to me to point to some specific enactments which had existed, and were still supposed to exist, which specifically imposed the condition of the consent in writing of the guardians or of a majority of them, and certainly not to apply to that consent which had to be in writing merely by reason of the machinery which was introduced to make the Acts operative. Furthermore, this machinery which Mr. Lawrence relies upon is a machinery whereby the guardians act at meetings and by "a majority of the guardians present at the meeting." That is the result of the machinery. Now what is provided by section 2 of the Act of 1864 is that "the assessment committee of such union may, with the consent of the guardians of such union, after notice . . . appear as respondents to such appeal." Then Mr. Lawrence introduces his machinery, and he says that in effect the words the

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"consent of the guardians" mean consent of a majority of the guardians present at a given meeting. Is that the same thing as the consent of a majority of the guardians of a union spoken of in section 12 of the Act of 1882? It seems to me that the two sections are enactments as to two different subject matters. One is an enactment as to the guardians of the union, and the other as to that portion of the guardians who happen to be present, and by a majority decide the matter at a meeting. That is an objection, I think, to Mr. Lawrence's contention, but I rest my judgment on broader grounds. It seems to me that when you look at the legislation, and follow out the course of it, this enactment which Mr. Lawrence relies upon, namely, the 12th section of the Act of 1882, is one specially directed at particular sections which require the consent in writing of the guardians or a majority of them, and not at the class of legislation contained in section 2 of the Act of 1864. It seems to me, therefore, that Mr. Lawrence has failed to show that section 2 of the Act of 1864 did impose the condition precedent for which he contends, or that the consent obtained by the Assessment Committee in this case was defective. It seems to me that the condition precedent did not exist, and that therefore their failure to comply with it is no bar to their assuming that they have got the consent which in point of fact they did get at a properly convened meeting.

For these reasons I think the appeal fails.

ROMER L.J. The suggestion made on behalf of the appellant is that for the purpose of section 12 of the Act of 1882 the words there used, "the consent in writing of a majority of the guardians," are equivalent to or include the words "the consent of the guardians," as used in section 2 of the Act of 1864. I cannot agree to that suggestion. I think that the Legislature intended to limit the operation of section 12 to the cases therein expressly mentioned—that is to say, to the cases where by some Poor Law statutory provision the consent of the guardians had to be obtained exactly as mentioned, that is to say, a consent in writing, and of the majority of the guardians. One can indeed see clearly a reason why the Legislature, in section 12, should have considered that special provision ought to be made for the cases the section expressly refers to, for there might be, and probably would be, great difficulty in obtaining the consent in writing of the majority of the guardians, and there might be even further difficulty in proof of such consent having been obtained after it was obtained; and I think it was to meet those difficulties that section 12 was passed, and that it was not intended at all by that section to deal with the ordinary case where a consent had only to be the simple consent of the guardians.

Now "the consent of the guardians," as mentioned in the Act of 1864, would ordinarily only have to be a consent given by a resolution of the majority of the guardians present and voting at a meeting, and it might not even be essential to obtain an absolute majority of the persons present and voting, for, if the votes were equal, then the chairman might have an extra vote, and so turn what was not an absolute majority into a majority by votes. I cannot think that a resolution such as I have mentioned, which would be all that was required in the case where the consent of the guardians was to be obtained in the ordinary form, even though such a resolution would have to be put into the minutes by the clerk, and subsequently signed by the chairman, could be fairly described as a consent in writing of the majority of the guardians.

In that view I would compare the words used in the first part of section 12 with those used in the latter part. The first part speaks of "the consent in writing of a majority of the guardians." The latter speaks of "a resolution giving consent passed at a meeting of the guardians." Those two expressions appear to me to be contrasted on the face of the section itself, and clearly not to be used as being at all equivalent. The latter provision points to something different being provided from that which is referred to in the early part of the section, and that view is corroborated when attention is paid to the significant words used in the section that the resolution "shall be deemed a sufficient compliance with such requirement," of obtaining the consent in writing of the majority of the guardians.

Lastly, I may add that if section 12 was intended to include all consents of the guardians, I cannot understand why the Legislature should not have said so simply, or why it should have worded section 12 in the special and significant way it has done.

I agree in thinking that the appeal fails, and should be dismissed.

MATHEW L.J. I am of the same opinion. When you look at section 2 of the Act of 1864 you are struck with the fact that the consent of the guardians of the union is what is required to be given; not a word is said about writing: "The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents," and so on. Nothing is said about writing. It would be highly inconvenient that any such provision should have been imposed, but we know from the history of the legislation that there was a time when the consent of the guardians was insisted upon, and a consent in writing, and it is with reference to that earlier history that the 12th section of the Act of 1882 would appear to have been passed. We can gather from the report that was made at the time that there

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were several instances in which the consent in writing of the guardians was insisted upon. The inconvenience of that was pointed out, and to get rid of that inconvenience this section appears to have taken that form. It referred to a particular class of cases where the inconvenient condition was imposed that there should be the consent in writing of the guardians. Mr. Lawrence sought to get away from that interpretation of section 12 by saying that a resolution of the majority of the guardians giving consent would be a consent of the guardians "in writing," because guardians under the rules passed for their guidance are compelled to have meetings, to appoint a clerk, and to set out in the minutes all conclusions that have been come to. But supposing you adopt that interpretation of section 12, see what an extraordinary result would follow. The section would run, "Where under the Poor Law Amendment Act, 1834, and the Acts amending the same, a resolution of a majority of the guardians of a union giving consent is required, it shall be deemed to be sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which meeting notice shall be given." Can one conceive any such legislation as that? It is repealing in the latter part of the section, according to Mr. Lawrence's argument, the earlier part. Mr. Lawrence says: "I get away from that because really the great object of this section is to provide for 14 days' notice." It seems to me that that is an untenable position, and that the object of the section is to get rid of the provisions of the Act of 1834 and the subsequent Acts, which require the consent in writing.

I agree, therefore, that the appeal must be dismissed.

Ryde asked whether the point that the notice was not in fact reasonable was still to be open, and *Lawrence, K.C.*, intimated that he desired that it should be open.

Per Curium. We decide only the point of law. We express no opinion on the sufficiency of the notice.

Appeal dismissed.

Solicitor for the appellant to Quarter Sessions—Frederick Kinch, for A. H. Hayward, Leigh.

Solicitors for the Leigh Union—Robbins, Billings, & Co., for Marsh, Son, and Calvert, Leigh.

Reported in the Divisional Court by Gilbert Metcalfe, Esq., Barrister-at-Law, and in the Court of Appeal by Erskine Reid, Esq., Barrister-at-Law.

HOUSE OF LORDS.

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Dec. 17.

WEST HAM UNION *v.* LONDON COUNTY COUNCIL.

Poor Law—Settlement and removal—Boundaries—Part of one parish added to another—Effect of alteration on settlement acquired in latter parish—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 1, 3, 6.

The amalgamation of part of one parish with another parish by Order of the Local Government Board under the Divided Parishes and Poor Law Amendment Act, 1876, and the amending Acts, does not destroy the identity of the latter parish and therefore does not destroy settlements previously acquired in that parish.

Decision of the Court of Appeal, 1902, 1 K. B. 562; 71 L. J. K. B. 299, *affirmed*.

Reg. *v.* Tipton Inhabitants (1842) 3 Q. B. 215; 11 L. J. M. C. 89, and Dorking Union *v.* St. Saviour's Union, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408, *commented on*.

APPEAL from a decision of the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) affirming a decision of a Divisional Court (Darling and Channell JJ.) on a special case stated by the London Quarter Sessions on an appeal to them from an order of two justices of the county of London, adjudging the settlement of Elizabeth Heritage, a pauper lunatic, to be in the West Ham Union.

The special case was as follows:—

1. Elizabeth Heritage (hereinafter sometimes referred to as the pauper lunatic) was born in Stevenson Street, Canning Town, in the parish of West Ham, in the West Ham Union, on or about the 11th February, 1852, and resided at Nos. 3 and 5, Widdicombe Terrace (afterwards and now known as Nos. 40 and 42, Barking Road), in the said parish, about 17 years, until the month of August, 1888.

2. The pauper lunatic resided at the address aforesaid in such manner and under such circumstances during the whole of the said period of 17 years, and in each of such years, as to render her irremovable from the parish in which such residence took place.

3. By an Order of the Local Government Board, dated the 24th August, 1886, and made under the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), as amended and extended by the Poor Law Act, 1879 (42 & 43 Vict. c. 54), it was ordered that a certain part of the parish of Wanstead should cease to be part of that parish, and should be amalgamated with the said parish

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of West Ham. A copy of the said Order, which took effect on the 24th March, 1887, is annexed to and is to be taken as part of this case.

4. The said address at which the pauper lunatic so resided as aforesaid was situate in the parish of West Ham as constituted previously to the date of the said Order, and not in any part of the parish of Wanstead.

5. The pauper lunatic left the parish of West Ham in the month of August, 1888, and did not thereafter acquire a settlement in any parish.

6. The pauper lunatic was afterwards found in the hamlet of Ratcliff, in the Stepney Union, in the county of London, and was sent therefrom to the said Claybury Lunatic Asylum of the respondents.

7. By an order of two of Her Majesty's justices of the peace acting in and for the county of London, dated the 14th February, 1900, the pauper lunatic was, under section 290 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), adjudged to be chargeable to the county of London.

8. On the 15th May, 1900, the respondents procured from two of Her Majesty's justices of the peace, acting in and for the county of London, the said order of that date, whereby amongst other things the pauper lunatic was adjudged to be settled in the appellants' union. A copy of the said order is also annexed to and is to be taken as part of this case.

On the above facts we gave judgment as follows :—

“ We are obliged to both counsel in this case for having been so precise in their arguments, because really it is a small point, although a point of immense importance, not only to this part of the Metropolis, but to many others.

We are of opinion that we must follow the reasoning in the decision of both the cases. As far as we can see the reasoning of the *Dorking* case is plain; that it applies not only to a district where a parish is divided, but also to where a district is destroyed by reason of amalgamation. Therefore under those circumstances we must allow the appeal with costs. Of course, if a case is required we shall have to state a case.”

If the Court shall be of opinion that our said judgment was correct, our said order is to stand confirmed. But if the Court shall be of opinion that our said judgment was wrong, our order is to be quashed, and the said order of the justices of the 15th May, 1900, to stand confirmed in all respects.

(Signed) RD. LOVELAND LOVELAND.

The material provisions of the Order of the Local Government

Board of August 24th, 1886, annexed to the special case were as follows:—

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"Whereas by the provisions of the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, We, the Local Government Board, are empowered to deal by Order with parts of divided parishes; and whereas the said parishes of Wanstead and West Ham are included in the West Ham Union.

And whereas the said parish of Wanstead is a divided parish within the meaning of the said Acts, a certain part thereof being isolated and detached or nearly detached from the residue thereof, namely, all that part which is included in the Borough of West Ham; and whereas a proposal having been made that the said part of the said parish of Wanstead should be separated from that parish and be amalgamated with some adjoining parish or be otherwise dealt with under the said Acts, we caused local inquiry to be held after notice duly given as required by the Act first above mentioned and report has been made to us thereon; and whereas it is expedient that the aforesaid part of the said parish of Wanstead should be separated from that parish and be amalgamated with the said parish of West Ham which it adjoins, and the Education Department have given their sanction thereto in accordance with section 4 of the Act first above mentioned so far as such arrangement may affect the constitution of any school district.

Now, therefore, in pursuance of the powers given to Us by the statutes in that behalf, We hereby order as follows:—

Article 1. All that part of the said parish of Wanstead which is included in the borough of West Ham, shall cease to be part of that parish and shall be amalgamated with the parish of West Ham.

Article 2. This Order shall take effect on the 24th of March, 1887, unless the same should, in the meantime, become provisional in pursuance of section 2 of the said Divided Parishes and Poor Law Amendment Act, 1876."

The Divisional Court, on March 21, 1901, quashed the order of quarter sessions, holding that the pauper was, under the circumstances, settled in the parish of West Ham.

The decision of the Divisional Court is reported 1901, 1 K. B. 720; 70 L. J. K. B. 503.

The Guardians of the West Ham Union appealed to the Court of Appeal, where the decision of the Divisional Court was affirmed.

The case in the Court of Appeal is reported, 1902, 1 K. B. 562; 71 L. J. K. B. 299.

The Guardians of the West Ham Union appealed to this House.

Avory, K.C., and *C. C. Hutchinson* for the appellant union. It

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is submitted that the decisions of the Divisional Court and the Court of Appeal are inconsistent with a series of cases which establish the proposition that if by alteration of boundaries the identity of a parish is destroyed, settlements in the parish are destroyed, unless they are expressly saved by some provision in the legislation or order effecting the alteration of boundaries: *Reg. v. Tipton Inhabitants* (1842) 3 Q. B. 215; 11 L. J. M. C. 89; *Dorking Union v. St. Saviour's Union*, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408. The principle is that the burden of maintaining the poor of a parish is not to be shifted from the parishioners of that parish without express legislation in that behalf. Thus here the burden of maintaining the paupers of West Ham cannot be cast upon the parishioners of the part of Wanstead which was added to West Ham in the absence of any express provision to that effect. It is not necessary for the appellants to contend that any addition of land to a parish necessarily destroys the identity of that parish; but it is submitted that it has that effect where it involves the shifting of the burden of the rates. There is no particular virtue in the word "amalgamated" which prevents the ordinary rule that an alteration in parish boundaries destroys the identity of the parishes from prevailing.

Reg. v. St. Martin, New Sarum, Inhabitants (1846) 9 Q. B. 241; 15 L. J. M. C. 123 on which the respondents relied in the Court below, is distinguishable because that was not a case of a part of one parish being added to another, but of two entire parishes being united and formed into a new parish, under a special Act authorising the union. Therefore it was clear in that case that the united parish should bear the burdens formerly borne by each of the two parishes. The Local Government Board, in the present case, might have adjusted the liabilities under section 8 of the Act of 1876. But they have not done so. [They referred also to *Reg. v. Hunnington Inhabitants* (1843) 5 Q. B. 273; 13 L. J. M. C. 24, and *Stourbridge Union v. Droitwich Union* (1871) L. R. 6 Q. B. 769; 40 L. J. M. C. 186.]

Macmorran, K.C., and *F. F. Daldy* for the respondents were not called upon.

THE EARL OF HALSBURY L.C. My Lords, in this case it appears to me that it is a novelty which has been presented to your Lordships for adjudication, and that it may be decided without reference to any of the cases which have been previously decided. Whether those cases were right or wrong, whether if they came in actual review before your Lordships you would affirm the principle which seems to have guided them, or whether you would take the view which Cockburn C.J. and Blackburn J. both took, that the case upon which they all really

depended had been decided upon a very narrow, and obviously in their view a too narrow, construction of the Act of Parliament, is a matter which one need not consider now, because, as I have said, it is unnecessary; and therefore, I think, it would not be proper to enter into an examination of those cases with reference to a case which really does not raise the same question. I have no doubt that what Cockburn C.J. and Blackburn J. felt was this—that in a question of this sort which was constantly arising between parishes, more constantly then than in modern days, it was a very inconvenient thing to have different rules laid down by the Courts from time to time, thereby putting the overseers in great difficulties, and for that reason there was a great reluctance to interfere with rules which were supposed to be once established. I am not certain that that consideration is so important now, because controversies between parishes are now very seldom litigated in these matters; but, be that as it may, I only mention it in order to point out that your Lordships are perfectly free, if the question ever does come in a distinct form before you, to consider those cases which after all only began in the year 1842, and may or may not be considered to have established a rule which it would be wrong to depart from now.

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At all events, this is the first case of this class which has ever come before a Court of Appeal, and it appears to me that the answer to the ingenious argument which has been presented to us is that none of the circumstances upon which the other cases have been decided exist here. One can see that where a parish has disappeared, in this sense, that it has been broken up into four or five different parishes, it would be difficult to say that the settlement in the parish still continued, because the parish which once existed, and in which the pauper had obtained a settlement, no longer exists, and you could not say that he belonged to A., B., C., D., or E., because no such parish existed as that in which he got his settlement, and the mere appropriation of his settlement to some one of the new parishes would be, or ought to be, legislation, and not decision. But be that as it may, in this case the pauper was settled in West Ham, and now claims a settlement in West Ham, and what is to prevent her having it? Is there no identity in the parish by reason of the same course of administration continuing, the same liabilities upon its inhabitants, the same duties to be performed by the officers of the parish? There is no doubt that everything that would constitute identity in an administrative body exists here, and it is upon the liability of that same administrative body that the pauper makes her claim. What is the answer to it? Not that there is any real change in the administration, not that there is any change in the very place where the pauper's settlement was obtained, but that something had been

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added to the parish afterwards, and that, it is said, is to make the whole difference in the rights and liabilities of the parish to which the addition has been made, so as to deprive the pauper of her rights under the Act of Charles the Second, and those Acts which succeeded it, amongst others the right not to be removed and sent to some other place. My Lords, I am wholly unable to accept the reasoning which suggests that this parish has changed its identity. It is the same parish in all the things which constitute identity of an administrative body, and the fact that a small part has been added to it so as to bring it within the area of that which is the unit for administrative purposes seems to me not in the smallest degree to interfere with the identity of that which is really the same parish which existed before. It would, indeed, be only an attempt at logic run mad to suggest that by reason of an addition to a parish it ceased to be the same parish, and became a new creature created by the mere fact of that addition. I am quite sure that nothing in the Act of Parliament which gave authority to make the addition to or change the boundary of the parish could ever have contemplated that the effect would be to change the whole legal liabilities; or, as Mr. Avory very frankly and boldly admitted, if it arose on the question of a debt contracted by the parish of West Ham it would be a good plea, apart from legislative remedy, to say that the parish has ceased to exist, and therefore the creditor cannot recover, and must lose his debt. That would, indeed, be reducing the matter to an absurdity.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND. My Lords, I am of the same opinion, and as I entirely concur in the reasons for the judgment which have been expressed by my noble and learned friend on the woolsack, and indeed with the reasoning of all the judges before whom the case has come,—the judges in the Divisional Court and the judges in the Court of Appeal,—I have really nothing to say except that I think there is identity of parish here, although an addition has been made to it to some extent.

LORD DAVEY. My Lords, I wish to speak with every respect which is due to a judgment of the Court of Queen's Bench delivered so long ago as the year 1842, of the decision in the case of the *Reg. v. Tipton Inhabitants* (1842) 3 Q. B. 215; 11 L. J. M. C. 89. I do not find it necessary for the decision of this case to say whether the reasoning upon which the decision in that case was founded is altogether satisfactory to my mind or not, because I think it is no authority for the decision of this case. This case is quite different in its circumstances and facts, and what was said in the case of the *Reg. v. Tipton* is no authority for the decision of this case. Nor do I think that the *Dorking*

case is an authority for this case. If we were considering the case of Wanstead the *Dorking* case might be an authority, because a piece has been taken out of the old parish of Wanstead and added to the parish of West Ham, and in that respect it would bear some resemblance to the *Dorking* case. But in the present case we have to deal with a case, not where a place has been cut out of West Ham, but where a place has been added from the parish of Wanstead to West Ham; and in that respect I think that the case is not governed by the *Dorking* case.

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My Lords, I think that the true test is that which has been suggested by the Master of the Rolls, namely, has the parish in which the pauper had a settlement lost its identity? In the case of the *Reg. v. Tipton* I can quite understand that the parish of Halesowen had ceased to exist, it had been divided into some half dozen or more parishes—I think fifteen—at all events, several smaller parishes, no one of which could claim to be the original parish of Halesowen. But in the present case I see no ground whatever for saying that the parish of West Ham has lost its identity. A parish does not lose its identity by the mere alteration of its boundary; it does not lose its identity because a piece has been added to it. It must be a question in each case whether what has been done has destroyed the identity of the parish; and it appears to me to be extravagant to say that if the boundary between two parishes is rectified by drawing a give-and-take line, so that each parish has a bit added to it, and loses a bit which is added to the next, those two parishes, therefore, have lost their identity, or that a pauper with a settlement in either of those parishes loses his settlement.

My Lords, in accordance with what I have said, it may be that a case similar to the *Dorking* case may some day come before us, and if it does I will examine it with an open mind; but I am bound to say that the principle upon which I decide this case, and which appears to me to be applicable to this case, is one which would lead to the conclusion that the *Dorking* case was not founded on pure reasoning, and, indeed, I do not think that the *Dorking* case would have been so decided had not the judges erroneously, as I think, thought it followed from the decision in *Reg. v. Tipton*.

LORD ROBERTSON. My Lords, I entirely agree on the grounds which have been stated by my noble and learned friend on the woolsack.

Appeal dismissed.

Solicitor for the appellants—F. E. Hilleary.

Solicitor for the respondents—W. A. Blaxland.

Reported by Erskine Reid, Esq., Barrister-at Law.

Note.

The principle upon which *Reg. v. Tipton Inhabitants* (1842) 3 Q. B. 215; 11 L. J. M. C. 89; 2 G. & D. 92; 6 Jur. 760 was decided, was that if by

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alteration of boundary the identity of a parish is destroyed all existing settlements in that parish are destroyed also.

There can, it would seem, be no possible doubt that what occurred in that case did destroy the identity of the parish of Halesowen, which was the parish there held to have ceased to exist.

It might, however, perhaps be held, though, of course, the existing authorities would preclude such a decision on the part of any Court short of the House of Lords, that once it is proved that a person has done the acts in any place requisite to give him a settlement in the parish comprising that place, then he is necessarily settled in any parish for the time being comprising that place, whether that parish existed when the acts were done, or whether it has come into existence since those acts were done. And if *Reg. v. Tipton Inhabitants* is to be hereafter overruled, it must be, it would seem, on some such principle as this. There are obvious difficulties, apart from authority, in putting such an interpretation on the statutes on which the law of settlement depends.

It is not easy to perceive on what grounds Lord Davey can have thought that the decision in *Dorking Union v. St. Saviour's Union*, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408; 78 L. T. 29; 46 W. R. 309; 62 J. P. 308, was not a necessary consequence of the decision in *Reg. v. Tipton Inhabitants*.

In both cases an existing parish was split up into new parishes, and there was nothing to identify any one of the new parishes with the original parish, and the only difference seems to be that in the one case the division was into numerous parishes, in the other into two only. And it is very difficult to see how this can be material.

Possibly Lord Davey had in his mind some one of the numerous saving clauses in the Local Government Act, 1894, by section 1 (3) of which the parish in question in the *Dorking* case was divided.

It was suggested in the *Dorking* case that the settlement was preserved by either section 67 or 68 of the Act. Neither of these sections, however, seems at all apt for the purpose. On the other hand, section 69 of the Act, which was not referred to in the case, certainly does seem to afford a means whereby, through the machinery of an order of the county council, settlements in a parish divided by that Act might have been preserved.

Even now it may be that an order under that section might revive the settlements that, according to the *Dorking* case, were destroyed where parishes were divided by the direct operation of the Act. It has, however, been suggested, though, perhaps, without very good foundation, that while an order might have been made under that section before the appointed day preserving settlements against destruction, an order could not be made after the appointed day reviving settlements that had once been destroyed.

It is submitted that the question whether the identity of a parish is destroyed by an alteration of boundary does not depend by any means entirely upon the physical nature of the alteration, but to a great extent on the way in which the legislation (whether contained in an order or a statute) is expressed. For example, an order expressed as dividing an existing parish A into two new parishes B and C, might, and in the absence of anything express or implied to the contrary probably would, destroy the identity of parish A; while an order effecting exactly the same physical alteration, but expressed as an order for forming one new parish C out of a certain part of A might not, and probably would not, destroy the identity of parish A.

In an order framed on the former lines one would expect to find the two new parishes treated alike, provisions being made as to the officers of each, and provisions being made as to the whole of the property, &c., of the original parish. In an order framed on the latter lines one would expect to find provisions as to the officers of C, and possibly transferring certain property, &c., to C, but no corresponding provisions as to the residue of the original parish, which would be treated as continuing under the officers of the original parish and continuing to enjoy the property, &c., of the original parish, so far as there was no express provision to the contrary.

If this view is right, it would seem fairly clear that the order in question in the above case no more destroyed the identity of Wanstead than it did that of West Ham.

Supreme Court of Judicature.

COURT OF APPEAL

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MOON v. CAMBERWELL BOROUGH COUNCIL.

Nov. 13.

Contract—Construction—Supply of horses and carts, &c.—Obligation to supply on requirement—Supply not required.

The plaintiff contracted with the defendants to supply horses, carts, &c., for scavenging at fixed prices for a year. The horses, carts, &c., were to be supplied in accordance with the requirements of the defendants' engineer; and there was a clause reserving to the defendants the right to obtain horses and carts for scavenging from other persons.

Held, on the construction of the contract, that there was no implied obligation on the defendants' part to continue to obtain the supply of horses, carts, &c., necessary for scavenging from the plaintiff throughout the year.

Churchward v. Reg. (1865) L. R. 1 Q. B. 173, explained.

APPLICATION by the plaintiff for judgment or a new trial in an action tried before Ridley J. and a common jury.

The action was brought by the plaintiff, a cartage contractor, claiming damages for an alleged breach of a contract for the supply of horses, carts, &c., to the defendants for scavenging purposes, dated March 25, 1901.

The contract (which was in common form), and was appended to a form of tender, was made between the plaintiff, therein called "the contractor," of the first part, two sureties of the second part, and the defendant Council, therein called "the Council," of the third part.

Its provisions, so far as is material to the present case, were as follows:—

"Whereas the said contractor has tendered to supply horses harness and drivers and also horses harness drivers and carts or vans as may be required at the prices named in the specification hereto annexed for the period therein named, being from 26th March, 1901, to 25th March, 1902, or for such further period (not exceeding six weeks) as the Council may determine.

* * * * *

"Now these presents witness that the said contractor hereby for himself his heirs executors and administrators agree (*sic*) to and with the said Council that W. Moon the said contractor his heirs executors or administrators shall and will whenever thereto required by the Borough Engineer of the said Council supply and deliver horses

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harness and drivers and also carts or vans as he may require of the best material of approved quality, and with due expedition in a workmanlike manner and under the direction and to the entire satisfaction of the Borough Engineer for the time being of the said Council (or his assistants), and in accordance with the specification set out in the second schedule hereto, and which is made part and parcel of this agreement. And also shall and will provide all manual labour, carriage, implements and other matters and things of every description that may be requisite for executing the orders of the said Council or its Engineer, at the prices named in the specification contained in the said second schedule hereto, and numbered thereon 2 and 3 at bottom of page 18.

"And also shall and will pay all fees and make good at his own expense all damage of every kind which may occur in the executing of any of the said orders, and shall indemnify the said Council from any loss or damage in respect thereof. . . . And also that said contractor shall and will supply to the said Engineer weekly vouchers, or daily vouchers, if so directed by the Engineer, of all materials and articles supplied as aforesaid; . . . And further, that in case the said contractor shall not deliver and supply with due diligence and with such expedition and quality as the Borough Engineer may require, all materials required by him to be supplied, it shall and may be lawful for the said Council to order any qualified person or persons to supply the said materials and articles ordered as aforesaid. . . . And it is hereby distinctly understood and agreed by the said contractor, that the stipulations and conditions contained in the specifications and in the schedules and tender hereto annexed, shall form part and parcel of this agreement.

* * * * *

"In case of any breach by the contractor of any one of more of the stipulations aforesaid in clauses 1 to 7 (both inclusive), or of any one or more of the provisions contained in the First and Second Schedules hereto, it shall be lawful for the Council, instead of claiming payment to them by the contractor of liquidated damages payable by the contractor . . . in respect of such breach, to determine this contract, and in such case the said Council shall have power to deduct from the sum payable by it under this contract any expense which the Council shall incur in having such completion as aforesaid effected agreeably with the specification referred to in the Second Schedule hereto annexed."

* * * * *

The first schedule to the contract dealt with hours of labour. The

second contained lists of prices at which goods, &c., were to be supplied under the contract, and "General Conditions," of which the following were material:—

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"2. No work is to be executed or material supplied without an official order for the same having been first delivered to the contractor.

"3. All matters and things referred to in the several schedules and forms of tender are to be commenced and carried on with due diligence, and with such expedition as the Borough Engineer may require, and he is to be at liberty to provide such additional requisite labour, material, &c., at the cost of the contractor, should the contractor fail in carrying out to the satisfaction of the Borough Council the orders which may from time to time be given to him.

* * * * *

"5. The list of probable quantities required is only given for the guidance of the contractor, and must not be taken as binding the Borough Council in any way.

* * * * *

"7. The Borough Council may, if it think proper, without in any way vitiating this contract, execute on its own account, or employ other contractors and workmen, and obtain supplies of materials, labour, and other matters from other parties for the execution of any works which may be ordered by it.

* * * * *

"9. The contractor is to supply all materials, &c., in such quantities as may be required; and also any materials and other matters not enumerated in these schedules are, if ordered, to be provided by him; the price thereof is to be ascertained by the Borough Engineer and his decision thereon is to be final and binding."

The plaintiff purchased horses, carts, harness, &c., required for the carrying out of his part of the contract, and supplied the same under the orders of the borough engineer until November 10, 1901, when the defendants ceased to give him any further orders, and employed another contractor in his place. Being told that he would not be again employed under the contract, he sold off his horses, harness, and carts, and discharged his men, and he brought this action to recover the actual loss which he had thus incurred from the alleged breach of the contract.

At the trial it was admitted that there was no "good cause" for ceasing to employ the plaintiff, and that nothing he had done, either personally or by the acts of his servants, had made him liable to a penalty for breach on his part of any of the terms of the contract.

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The jury found a verdict for the plaintiff, and assessed the damages at £419.

Ridley J. on further consideration held that the contract imposed no obligation on the defendants to employ the plaintiff, and that their liability was limited to paying at the price fixed for work done by him in accordance with orders given from time to time by the borough engineer. He therefore entered judgment for the defendants.

The plaintiff appealed.

Atherley Jones, K.C., and Clavell Salter for the appellant. The question of law in this case is, shortly, whether where one person on the invitation of another person has offered to perform work, the carrying out of which involves the expenditure of money, there is, in the absence of an express contract on the part of the latter person to employ the former to perform that work, an implied contract to employ him to perform the work. There is no express contract here that the plaintiff should be the contractor for the year in question for the carrying out of the necessary scavenging work, and if for any portion of that period no such work for some reason or other was necessary, no claim for payment of any kind could have been made by the plaintiff. So long, however, as there was scavenging work to be done, and so long (as was the case here) as there was no "good cause" for ceasing to employ the plaintiff, the defendants were, we submit, bound to employ him to do the work. Ridley J. held that under the contract the defendants had an option to employ anyone they pleased, and no doubt the words in the first clause of the contract, "Whenever thereto required by the Borough Engineer," are capable of being read as giving them such an option; but it is submitted that they should be read as merely limiting the things to be supplied or the services to be rendered. The plaintiff incurred great expense in procuring the necessary horses and carts. It is necessary in order that the contract may be construed reasonably and the true intention of the parties given effect to, for the Court to imply an undertaking by the defendants to employ the plaintiff. The defendants knew that the plaintiff had been put to expense, and it must be taken they impliedly agreed to employ him for the work that was required to be done during the continuance of the contract, which at their request he had purchased horses and carts to carry out. That was the principle on which the *Moorcock* (1889) 14 P. D. 64; 58 L. J. P. 73, was decided, and on that case we rely.

[They cited also *Burton v. Great Northern Railway* (1854) 9 Ex. 507; *Churchward v. Reg.* (1865) L. R. 1 Q. B. 173; and *Great Northern Railway v. Witham* (1873) L. R. 9 C. P. 16; 43 L. J. C. P. 1.]

Tindal Atkinson, K.C., and *H. Courthope Munroe* for the respondents were not called upon.

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COLLINS M.R. This is an appeal from Mr. Justice Ridley in a case tried by him with a jury. The learned judge left, quite properly, the questions to the jury which might become very material in a certain view of the contract, and the jury gave a verdict for some £420 damages; but the learned judge kept in his own hands the right to consider what the rights of the parties were on the contract itself, and it is really upon the meaning of the contract that the whole question in this case turns. He came to the conclusion that the contract itself did not give to the plaintiff the remedy which he had sought, and in respect of which the jury have given him the sum I have named for damages, and judgment was therefore entered for the defendants.

Now the plaintiff is a contractor who made with the defendants a contract for the supply of horses and carts to the defendants to do scavenging, and the whole question turns upon what is the nature and extent of the obligation undertaken by the defendants in this case. The plaintiff, having become bound by a contract which gave the defendants the right to have the services of carts and horses at a fixed sum, complains that after a given date within the year they ceased to employ him, and he claims damages against them as for breach of a contract to employ him during the year, that is, to find employment for him and pay him for it at the prices named in the contract. On the other hand, the learned judge, on the construction of the contract, has come to the conclusion that there was no obligation undertaken by the defendants to find work for the plaintiff, and that there was no obligation upon him to supply horses and carts except upon the requirement, that is, the demand, of their engineer, and no contract undertaken by them to pay for the use of those carts and horses except when they had been in point of fact ordered by their engineer.

Now really that is a question of the construction of the contract. There does not appear to be much doubt of the law in this matter; but it is a simple question of what is the construction of the contract. We are not at liberty to speculate upon what the parties might have desired to provide on the one side or the other; we must be bound by the words that they have used.

The contract is in this form. First there is a tender sent in—not very much turns upon the tender, because all the tenderer proposes to do is to “supply all and every the materials and labour men-

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tioned and referred to and described in the form of contract and schedules hereto annexed and the specifications set out in the second schedule thereto and in accordance with the conditions of the said form of contract and schedules." So we have to look at the form of the contract and schedules to find out what the conditions were upon which he was willing, when he tendered, to supply the subject matter of his undertaking. Then this is the obligation according to the recital: "Whereas the said contractor has tendered to supply horses harness and drivers and also horses harness drivers and carts or vans as may be required at the prices named in the specification" for a year, that is, the time named in the specification.

It is said in the first instance for the plaintiff that "as may be required" there in the recital means "as may be in fact needful or requisite," which is another word used in the contract, "to the defendants"; that is to say, that it is enough for him to prove that they have need of carts, horses, and vans in order to put upon them the obligation of calling upon him to supply them.

Then we come to the next clause in the contract, where we find, if it were wanted, a definition of the word "required" which has been used in the recital: "Now these presents witness that the said contractor," and so on, "shall and will whenever thereto required by the Borough Engineer of the said Council, supply and deliver horses harness," &c., and then lower down, "and also shall and will provide all manual labour," &c., "that may be requisite for executing the orders of the said Council or its Engineer." So that the obligation undertaken by him was to meet a requirement imposed upon him. That is the obligation, and the whole obligation, he undertakes in the matter, and following as it does after the recital in which the word "required" is used, it seems to me to show quite clearly that "required" is used in the same sense in both parts of the agreement, and that the obligation upon him is to obey the mandate of the engineer. He does not succeed in proving the performance of the condition if he succeeds in proving that the Council had need of certain articles, but fails to show that any requisition to him for those articles had been made. I need not go through the contract in detail, because I find a confirmation of the same view right through. For instance, farther down in the same clause: "And further that in case the said contractor shall not deliver and supply with due diligence and with such expedition and quality as the Borough Engineer may require all materials required by him to be supplied, it shall and may be lawful for the said Council to order any qualified person or persons to supply the said materials."

Then I come to a very important clause at the end of the contract

in the general conditions. It is: "The Borough Council may if it think proper without in any way vitiating this contract execute on its own account or employ other contractors and workmen and obtain supplies of materials labours and other matters from other parties for the execution of any works which may be ordered by it." It is quite impossible to accept that as a part of the contract consistently with holding that there was an obligation on the Council to employ the plaintiff if they wanted a thing done. Therefore it seems to me quite clear, on the face of this contract, that the only right the contractor has against the Council is that if they order from him certain things which he undertakes to supply, they order them at the prices named in the schedule.

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I do not think I need in this case really have given any judgment further than that which was given by Ridley J. It seems to me to have exhausted the matter; but in deference to the argument that Mr. Atherley Jones addressed to us to-day, I propose to say just one word upon what was most pressed upon us, and that is the authority of the case of *Churchward v. Reg.* (1865) L. R. 1 Q. B. 173. Mr. Atherley Jones relied very strongly upon two passages in the judgment delivered by Cockburn C.J. in that case, but we cannot construe one contract by the terms of another. So far as there are principles of law laid down, of course they are applicable; but when it comes to the consideration of one set of words, one cannot get any help in construing another set of words not identical. It seems to me that that consideration really disposes of that which is most relied upon by Mr. Atherley Jones.

The learned Chief Justice in *Churchward v. Reg.* is dealing with a very special contract, whereby Mr. Churchward had undertaken with the Government—not merely to supply them when wanted—but to have ready for the purpose of carrying the mails a given number of steamers equipped in a certain way. That is the initial obligation on the part of the contractor,—that he is to produce or find, or at all events to have ready, a given number of steamers with certain special requisitions as regards them, and then, for the sum of £18,000 a year, he is to have those steamers and carry the mails in them whenever the Commissioners may require him to do so. The sum of £18,000, by the terms of the contract, had to be a sum provided by Parliament. So unless the £18,000 was provided by Parliament, he could not claim that sum—he could not show a fair performance of the condition precedent to his right to receive the £18,000, the remuneration for having the ships ready. Being in a difficulty in regard to suing for the consideration of £18,000, because the condition precedent to his right to get it had not been fulfilled inasmuch

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as Parliament had not found the money, what he did was to sue upon an implied contract to employ his ships for the purpose of carrying the mails. The Court held—and Ridley J. has relied upon that part of their decision—that there was no implied contract by the Government to use these ships for the carrying of the mails, and therefore that he could not sue for damages because they had for a certain given time abstained from sending any mails by his ships.

Now comes the point relied upon by Mr. Atherley Jones. The learned judge came to the conclusion that the cause of action set up failed because there was on the terms of this contract no contract expressed or implied to employ the ships. He then takes a supposititious case; it was not necessary for the decision of the case which he had before him. He says that if so-and-so and so-and-so had happened, he might then have thought that there was an obligation to use the ships for each particular voyage. For instance, he says, at p. 197: "If indeed the contract had been to pay, not in the shape of an annual subsidy, but according to the number of mails conveyed, then we might have been at liberty, and perhaps bound to imply the covenant which is contended for on behalf of the suppliant, because in that case he might have had his vessels in readiness, have incurred all the attendant expenses, and, although at all times ready and willing to fulfil his part of the contract, yet inasmuch as his remuneration was to depend, not on his being constantly ready and willing, but on the fact of mails being conveyed by his vessels, it would be but reasonable to infer a covenant to employ him. But according to my view of the present contract, so long as Mr. Churchward was prepared to carry out all the terms of the contract to which he had bound himself, I think—supposing the question of the fund for payment had not been involved—he would be entitled to insist upon the performance of the contract, so far as the payment of his remuneration was concerned, at the end of the year, although only one mail bag might have been required to be carried by him in the course of a week, or even if none at all had been sent to him by the Post Office requiring him to convey it. I say, therefore, on the first view of the case, it is unnecessary to imply any covenant to employ." He does suggest that in certain circumstances, which do not exist in that case, there might have been an obligation implied to pay him for the journeys whether he took them or whether they relieved him from taking them or not. But as I have already said, that is a speculative case to begin with, and it is in reference to a contract in which the very first and most cardinal provision was an obligation undertaken by the contractor to procure and have ready the certain specified ships. That is a

different contract altogether, it seems to me, from one which is limited to this: "I will pay you whenever I want your services." There, under the contract between the contractor and the Government, the first thing to be done was to bring into existence—that was part and parcel of the contract—the implements by which the contract might be carried out, and it is with reference to such a contract that the Lord Chief Justice puts a hypothetical case, and suggests that in that hypothetical case it might be possible to imply a contract, which he did not and could not imply in the case before him. I express no opinion whatever upon whether the right which he suggested there could be implied, but it is obvious that it was only in reference to a contract so different in its terms from this that it could not have any real analogy to the contract we have to deal with. It is enough to say that the contract we have to deal with is a clear and unambiguous expression of the limit of the extent of the obligation accepted by the defendants, and it seems to me that the plaintiff has failed to show, and that it is impossible to say, that there has been any breach of the obligation imposed on the defendants, and which the defendants undertook. It seems to me, therefore, that the judgment of Ridley J. was right, and that this appeal fails.

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MATHEW L.J. I am of the same opinion. It is said for the plaintiff that he undertook to do the work mentioned in the contract in question, and that there was an implied obligation on the part of the defendants to permit him to do that work and employ him for the purpose. No doubt, if there was nothing more to be said, there was the undertaking on the one side that I have mentioned and the obligation arising on the other; but it is said for the defendants that that obligation is precluded and excluded by the special terms of the contract. Their position was that the plaintiff was always bound to do such work as was required by their engineer, and further, they stipulated that they might take away the whole or any part of the work from him at any time during the course of the contract without his being entitled to complain. It is said to be hard and unreasonable to construe the contract in that way, but we are familiar with a complaint of this sort on the part of contractors. Contractors enter into these contracts which place them under, or, as it were, at the mercy of the other contracting party. Why? Because they do not look ahead, and do not anticipate or foresee the difficulties that are provided for, and which may arise.

Now here the contractor expected there would be no difficulty whatever in his being allowed to execute the work and make the provision mentioned in the contract for the period of a year. But

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for reasons that we need not go into, it appeared to the Council after a certain time that it was desirable to take the matter out of his hands. And they did so. That is his grievance. He says they had no right to do so.

Now I do not propose to go through the clauses to which my Lord has referred. It appears to me perfectly plain. The Council stipulated that they should have the power to take the contract out of the contractor's hands. That is the result of clause 7 of the general conditions. They further stipulated that their engineer should require what the contractor should do under the contract, and he was not entitled to do any other work than work so specified by the engineer. Their position therefore gave them an option as to the extent to which they should employ the contractor under the contract, and under those circumstances it is clear that it is impossible to imply the term that the contractor must be employed to do all the work they required.

So much for the construction of the contract. It excludes, as it appears to me, the possibility of any such implication as the plaintiff insists upon.

Now with reference to *Churchward v. Reg.* (1865) L. R. 1 Q. B. 173. It is not the first time that a difficulty has been felt in appreciating the judgment of the Lord Chief Justice in that case. It can only be done by carefully examining the case made on the part of the suppliant. He was entitled, as he said—and, indeed, in point of fact there is no doubt about it—by his contract with the authorities to the payment of £18,000 a year for many years upon the condition that he should have ready such steam vessels as were required to carry the mails. He was entitled to sue for the £18,000. There, however, was a clause in the contract which provided that the money should only be paid out of Parliamentary funds; and Parliament would not grant it. But it occurred to those who were advising him that an ingenious way might be adopted of escaping from this difficulty as to Parliament providing funds. It was said that the contract, carefully construed, clearly contemplated an additional agreement on the part of the authorities to allow the suppliant to carry all mails. If he was not permitted to carry all mails, he would be in a position, as the Lord Chief Justice pointed out, at any rate to argue with some degree of confidence that he was entitled to be paid for a breach of contract in that respect. He wholly failed to make out that there was any such implied contract. He was only entitled to insist upon carrying those mails which he was required to carry. He was therefore driven back to the stipulation as to the £18,000 a year, and in that respect he failed owing to the difficulty

Parliament made. It is an instance, and a good instance, of the way in which an implication may be excluded by the terms of the contract. 1908.

In this case it seems to me clear that the learned judge was quite right in holding that the terms of the contract prevented the plaintiff from claiming to do all the work. Moon v.
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For these reasons I think that this appeal must be dismissed.

COZENS HARDY L.J. I also agree that the appeal must be dismissed, and I should be content not to add anything except out of deference to Mr. Clavell Salter's argument. I think he said everything that could possibly be urged in support of his view. His contention was shortly this: that the contract must be read as a contract to supply all needed horses and carts for scavenging, &c., at an agreed price, and then, as auxiliary to that primary obligation, to be ready to do that at such times and places as the borough engineer may require. If the first two clauses of the contract stood alone, I could not take that to be the true meaning. The contract is not to supply always, but only, whenever required, to supply whatever the borough engineer may require. The only obligation which is imposed upon him is to execute the orders of the Borough Council or their engineer. I cannot find in those clauses any such primary and overriding obligation as is suggested.

But the matter does not rest there. Even if there were any doubt as to the meaning of those clauses, it appears to me that such doubt entirely disappears when you come to the general conditions, and particularly clause 7, which the Master of the Rolls has referred to. In short, we are asked to imply a covenant which is inconsistent with, and indeed repugnant to the terms of the contract. That is impossible for us to do. I think the judgment of Ridley J. was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff—Hocklin, Washington and Pasmore.

Solicitors for the defendants—Marsden and Son.

Reported by Erskine Reid, Esq., Barrister at-Law.

High Court of Justice.

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CHANCERY DIVISION.

Jan. 13, 14.

In re BEARD'S TRUSTS; BUTLIN *v.* HARRIS.

Education—Endowment—Gift to voluntary school—Gift over on school ceasing to be supported by voluntary subscriptions or becoming subject to control of school board—Local education authority—Education Act, 1902 (2 Edw. VII. c. 42), ss. 1, 5, 6, 7, 10, 11, 13, 23, and 25.

A testator, who died in 1891, bequeathed certain bank shares, producing about £115 a year, to the managers for the time being of a voluntary school on trust to apply the income towards the annual expenses of the school so long as it should be "supported by voluntary subscriptions as now and heretofore . . . in addition to the Government grant," but in the event of its "ceasing to be so supported or becoming subject to the control of a school board," then to the vicar and churchwardens of the parish for the fabric of the church. Up to the testator's death the school had been supported mainly by the testator, but partly also by voluntary subscriptions from other persons, in addition to the parliamentary grant and an endowment of £15 a year. Since his death there had been no voluntary subscriptions, the endowment, together with the £115 and the Government grants, being substantially sufficient for carrying on the school. There was, however, an overdraft at the bank of about £60, for which the managers were personally liable to the bankers.

Held (1), upon the construction of the will, that the school had not ceased to be supported by voluntary subscriptions, inasmuch as the managers must be regarded as subscribers to the extent of the overdraft for which they were liable; and

(2) That the local education authority under the Education Act, 1902, was not the same as the school board, inasmuch as it was differently constituted, and was elected by a different constituency.

Held, therefore, that the gift over had not taken effect.

THIS was an originating summons taken out by the trustees of the will of G. H. A. Beard, late of Leonard Stanley, Gloucestershire, for the determination by the Court of the question whether, according to the true construction of the will and in the events which had happened, the trustees might and should transfer and pay to the vicar and churchwardens of the parish of Leonard Stanley certain shares in Lloyd's Bank, Limited, representing the present investment of the proceeds of sale of the 30 shares in the County of Gloucester Bank, Limited, which by the will were bequeathed to the managers for the time being of the Leonard Stanley National School upon the trusts therein mentioned, and the dividends thereon as from the

commencement of the Education Act, 1902, or how the same should be dealt with.

The testator, by his will, dated January 13, 1886, made the following bequest:—"I give and bequeath to the managers for the time being of the Leonard Stanley National Schools my thirty shares in the County of Gloucester Bank Limited or if I shall have sold the same or part thereof in my lifetime after the date hereof such a sum of money (to be taken from that portion of my personal estate exclusively as I can by law make chargeable with legacies for charitable purposes) as shall appear from my accounts or otherwise to have been the produce of such bank shares so sold to be held by the said managers with power to change investments similar to those affecting my stock and shares in the Great Northern Railway upon trust to pay and apply the interest or income thereof in or towards the annual expenses of the said schools so long as the said schools shall be supported by voluntary subscriptions as now and heretofore (or by a voluntary rate) in addition to the Government grant but in the event of the said schools ceasing to be so supported or becoming subject to the control of a School Board then and in that case I declare direct and bequeath that the said Bank shares or the investments for the time being representing the same shall go and be transferred or paid to the vicar and churchwardens for the time being of the parish of Leonard Stanley aforesaid to be held by the Vicar and Churchwardens for the time being upon trust to pay and apply the interest or income thereof in or towards the repairs improvement or restoration of the fabric of the church of the said parish in such manner as the Vicar and Churchwardens of the same parish for the time being shall in their uncontrolled discretion see fit And I declare that it shall be lawful for the Vicar and Churchwardens of the said parish for the time being from time to time as they in their absolute discretion shall see fit to apply all or any part of the principal of such Bank shares or the investments for the time being representing the same in the same manner as they are to apply the dividends thereof."

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The testator died on May 4, 1891.

At the date of his death the testator was entitled to the 30 shares so bequeathed by him as above mentioned, and such shares were transferred by his executors into the names of managers for the time being of the Leonard Stanley National School. These shares were now represented by 77 shares of £50 each in Lloyd's Bank, Limited, standing in the names of such managers.

The Leonard Stanley National School was the only school carried on in the parish of Leonard Stanley. The school-house was

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provided by voluntary subscriptions and erected upon land belonging to a private owner, for which the managers paid a rental of one shilling a year. There was no trust deed relating to the school, but it was founded and had always been conducted as a Church of England school.

Prior to the death of the testator the school had no endowment except a small income of about £15 a year, and the remainder of the expenses of the school other than such as were defrayed out of the Government grants were provided by voluntary subscriptions. Since the testator's death the shares had produced an income of about £115 a year, which, together with the Government grants and the £15 endowment, was sufficient to support the school without the necessity for voluntary subscriptions, and voluntary subscriptions were not in fact raised or called for. Money had, on occasion, been provided by a friend, and at times, when expenditure had been in excess of income, the managers had on their own responsibility met the difficulty by an overdraft at the bank, but the amount of the overdraft was small, and the total debt due to the bank did not exceed about £60.

In consequence of the passing of the Education Act, 1902, a question arose whether the income of the shares as from the "appointed day" mentioned in the Act was applicable towards the annual expenses of the school or otherwise as directed by the Act, or whether the shares and the income therefrom should from that date be transferred and paid to the vicar and churchwardens for the time being of the parish of Leonard Stanley, to be applied by them in accordance with the trusts of the gift over contained in the will, and on May 23, 1903, the trustees took out the present summons.

G. Cave, for the trustees, referred to sections 1, 5, 6, 7, 10, 11, 13, and 23 of the Education Act, 1902.

W. Baker, for the managers. The Act has not in any way affected the construction of the will, the trust being to apply the income towards the annual expenses of the school. The school has not "ceased to be supported by voluntary subscriptions." The present deficit will have to be made up by voluntary subscriptions. The managers are still bound to maintain the school buildings in repair, and for this purpose it will be necessary for them to resort to voluntary subscriptions. The gift over has not therefore taken effect.

George Lawrence for the Gloucestershire County Council. I adopt the same argument. It is also submitted that the will means that the gift over is not to take effect so long as the school is supported

otherwise than by having recourse to the rates. Having regard to section 10, the financial result of the Act is that the school is £50 a year better off without coming upon the rates than it was before the Act was passed. Further, it is clear that the school has not become "subject to the control of a school board," for by section 5 school boards are expressly abolished.

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J. Gale, for the vicar and churchwardens. The gift over has taken effect. Whether or not the school has ceased to be supported by voluntary subscriptions is a question of fact. The managers are in debt owing to the absence of these subscriptions. So far as the endowments and Parliamentary grants did not meet the expenses, money has been borrowed. The managers may have hoped to pay it off out of savings of income from endowments under the new Act. There will, in fact, be sufficient excess of income from endowments and grants. But in fact, since the testator's death, the voluntary subscriptions have ceased, and the school has "ceased to be supported by voluntary contributions." Further, the school has "become subject to the control of a school board." School boards are still continued under a new guise under the name of the local education authority. By section 25 (2) and Schedule III. references to school boards are to be treated as references to the local education authority, and under section 13 the endowment goes, in part at least, to the county council.

BYRNE J. read the material parts of the will and continued:— During his lifetime the testator appears to have found moneys for the repair and management of the school, which was built upon land for which it seems that only the sum of one shilling a year is paid. There were, I understand, other voluntary contributions by subscribers to the school, but as to how much they amounted to when they were paid there is no information before me. Up to the time of the testator's death funds were mainly provided by him and by voluntary subscriptions as required. There was a small endowment of £15 a year, which was available for the support of the school, and still is so. After the testator's death one Jones used sometimes to find money, but there was no need to collect money generally, or to call for voluntary subscriptions, for the endowment and the income of the trust fund were practically sufficient to meet the expenses of the school from year to year, except that some small sum over and above the receipts was from time to time expended, for which the managers took on themselves to get credit from the bank upon their own personal liability. In all these years there has only accrued due a small debt

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of not more than £60 or so in all. If the bank should require the repayment and the money be not forthcoming from other sources, the managers have taken on themselves the responsibility to repay it; and if they should do so, as they would have no right to recover it against anyone else, they would have to bear the loss, and in effect become themselves subscribers for the necessary amount. In consequence of this gift of the testator and the passing of the Education Act, 1902, there will be, if the testator's gift is available in addition to the £15 endowment and the Parliamentary grant, ample funds for carrying on the school without the necessity of calling for voluntary subscribers, and perhaps sufficient for paying off the debt as well.

It has been argued on behalf of the vicar and churchwardens that the gift over has taken effect upon the ground that since the death of the testator there have been no subscriptions either periodical or otherwise over all this time. It is said that under the will the gift over was to take effect either if the school should cease to be "supported by voluntary subscriptions as now and heretofore," or if it should become "subject to the control of a School Board." As to the second of these alternatives, I am satisfied that it has not taken effect, as the school has never come under a school board. The local education authority is now the county council, which, it is true, has many duties to perform which were formerly done by the school board, but the recent Act has expressly abolished school boards in so many words, and the new local education authority is elected by a different body of electors, has a different constituency, and has different duties to perform from those of the old school board.

As to the first alternative, can it be said that the school has ceased to be "supported by voluntary subscriptions as now and heretofore"? See how it was supported before the testator's death. It was by voluntary subscriptions so far as the endowment (and Government grants) were insufficient. Now the testator, knowing this, makes a bequest in aid of the endowment for the time being existing. He must be taken to have had it in contemplation that the voluntary subscriptions would be only such as should be necessary, together with the endowments (and grants), to support the school. I must arrive at the conclusion that there has not been yet any forfeiture of the legacy under this clause.

I hold, therefore, that the gift over to the vicar and churchwardens has not taken effect.

Solicitors for the Trustees—Le Brasseur and Oakley, for Edward Brownlow Haygarth, Cirencester.

Solicitors for the Managers and Vicar and Churchwardens—Walker and Rowe, for J. Lapage Norris, Stroud. 1904.

Solicitors for the Gloucester County Council—Field, Roscoe, & Co.

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Note.

It would seem to follow from what Byrne J. held in the above case, that if there was a legacy for the benefit of a school, with a gift over in the event of its becoming subject to the control of a school board, the gift over would not take effect even if the school were transferred to the local education authority and thus became a provided school, though this result would be obviously in substance entirely contrary to the testator's objects.

High Court of Justice.

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KING'S BENCH DIVISION.

Nov. 24.

GILES v. LONDON COUNTY COUNCIL.

Negligence—Cricket ground controlled by London County Council—Injury sustained by player—Upright metal indicators marking pitch—Obvious and apparent danger.

The London County Council permitted cricket to be played on certain open land vested in them for the purpose of recreation. In order to regulate the play, the Council caused the several pitches to be indicated by metal flags on posts. The plaintiff was injured while playing by running against the post indicating the pitch. The post had been removed from its original position on the pitch by one of the players and placed upright elsewhere. The post indicating a pitch was not required by the Council or the groundsmen to remain upright during play, though it was required to be left upright at the close of play.

Held, that there was no evidence of negligence for which the Council were responsible.

ACTION for damages for personal injury alleged to be due to the negligence of the defendants, tried before Kennedy J. and a common jury.

The statement of claim was to the following effect :—That the plaintiff was an infant, aged 17, and assistant librarian at the Cripplegate Institute, London, and sued by his father as next friend. That the defendants were the County Council of London acting under the Local Government Act, 1888, and other Acts, and were the owners and occupiers of, and had the control over, the public park or recreation ground or close known as Hackney Marshes, London, N.E., on which public sports such as cricket take place by their leave and licence. That the defendants further invited young persons desirous of playing cricket to enter upon certain parts of the said close, and by means of certain permits issued to such young persons, or the clubs of which such young persons were members, allocated cricket pitches to the said persons or clubs who were thus desirous of playing cricket. That the defendants enforced certain regulations for the management of the said close generally and of the said cricket ground in particular. That the defendants wrongfully erected and maintained certain dangerous or improper posts on the cricket ground of the said close for the purpose of demarcating one cricket pitch from another, and these posts bore at the top indicators of iron or some other metal on which different numbers appeared to indicate the different cricket pitches. These

indicators had pointed ends protruding in a dangerous or improper manner and position. That by the negligence of the defendants, or by the directions of their servants acting under their authority, express or implied, the posts in question were required to remain in an upright position on the cricket ground during the playing of games upon the different pitches. That on or about July 12th, 1902, the plaintiff, who was a member of the Cleveland Cricket Club, was lawfully playing in a cricket match on the close as aforesaid on the invitation, or alternatively by the leave and licence of the said Council, and while so playing the point or points of the indicator as aforesaid ran into his right eye and destroyed the sight thereof. That the injury was caused by the defendants or their servants wrongfully allowing the posts to remain in the close during the progress of a match, or at all, or in insisting upon their so remaining, and thereby the posts were dangerous to persons lawfully entering upon the ground. Alternatively the plaintiff alleged that the injury was caused by reason of the defendants' negligence in not sufficiently protecting the said posts, or in using dangerous or improper posts in view of the particular place and circumstances, or in not having the posts which carried the painted indicators sufficiently high, or in requiring and insisting that the posts should stand erect, or in requiring and insisting that the said posts should stand within the boundary of every particular cricket pitch. In either alternative the plaintiff said further that notice had been given to the defendants or their servants of the danger arising as set forth by means of complaints which had been made (a) by the plaintiff, (b) by other members of the club, and (c) by other members of the public, to the defendants or to their servants, or to both, as to the danger caused by the said posts to the players. Particulars were given of the injury sustained.

By their defence the defendants admitted that Hackney Marshes were vested in them, and that parts were set apart for cricket subject to certain regulations. That for enabling intending players and other members of the public to find and come safely to the particular pitch allotted to them, the defendants provided a number of indicators, that is to say, metal flags having numbers painted upon them and attached to the tops of iron uprights about 4 feet 6 inches high. They denied the alleged invitation and leave and licence, and said that the plaintiff was using the pitch as a member of the public pursuant to Acts of Parliament, bye-laws, and regulations, and that they were under no duty to the plaintiff beyond that arising from such user. They denied that the indicators were dangerous or improper, or that the groundsmen were their agents to receive complaints. The alleged injuries to the plaintiff were not occasioned by any negligence on the part of the

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defendants or their servants, but were the result of an accident incidental to the game of cricket, or were caused by the plaintiff's own want of care. If the indicator was in an unsafe position the plaintiff knew it and might have removed it, but the plaintiff voluntarily took the risk of playing where he did.

In pursuance of a master's order, the plaintiff gave further particulars as follows:—(a) the indicator was affixed to the top of the post placed in juxtaposition to pitch No. 12 on which the plaintiff and his club were playing; (b) the post with the indicator were placed before the game commenced by a person or persons employed by the defendants to keep the ground at or near the centre of the pitch. The players were directed by the groundsmen to remove the post from the centre when play commenced, but were required by the groundsmen to replace the post in an upright position elsewhere on the pitch; (c) the plaintiff sustained the injury whilst fielding for a ball which had been driven towards the indicator by another player; (d) the post was placed about 20 yards to the rear and slightly to the right of the batsman's wicket, by the wicket keeper of plaintiff's club, because the defendants' groundsmen had insisted on the post remaining in an upright position on the pitch.

At the trial it was not proved that the post with the metal flag had been placed in an upright position where it was by the direction of the groundsmen against the protest and in spite of the complaints of the plaintiff and the members of his club, nor that the groundsmen insisted on the post standing upright during play.

Dickens, K.C., and *Dalry* for the defendants submitted at the close of the plaintiff's case that there was no case to go to the jury.

E. H. Coombe (N. G. H. Child with him), for the plaintiff, cited: *Harrold v. Watney*, 1898. 2 Q. B. 320; 67 L. J. Q. B. 771; *Osborne v. London and North-Western Railway* (1888), 21 Q. B. 220, 57 L. J. Q. B. 618; *Heaven v. Pender* (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702; *Lax v. Darlington Corporation* (1879), 5 Ex. D. 28; 49 L. J. Ex. 105, and *Tarry v. Ashton* (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260.

KENNEDY J. Upon the question as to whether or not there is evidence in the case upon which the jury can find negligence on the part of the defendants, I am of opinion there is none. There is nothing to show that the accident to the plaintiff was caused either by the negligence or by the want of reasonable care of the defendants. The club of which the plaintiff is a member and a number of other cricket clubs have leave given them to play cricket on an open space or

recreation ground under certain regulations. The members of these clubs are none of them children, and if young men of their own accord play cricket with an open and obvious danger plainly apparent, the owners of the ground cannot be liable for negligence if an accident take place. These indicator posts and metal flags are in no sense a concealed danger, nor are they in the nature of a lurking danger for which the owner would be responsible. Nor were any of the players of such an age as to cast upon the defendants a special duty in regard to their protection, as in the case of *Harrold v. Watney*, 1898, 2 Q. B. 320; 67 L. J. Q. B. 771, where a child of four years of age was injured by the fall of a defective fence. Here the plaintiff and the other members of the club came to the ground solely in the pursuit of pleasure and voluntarily incurred risk of danger. There is no evidence that the defendants or their groundsmen required that these flag posts should stand upright during the time play was going on. All that the latter insisted on was that they should be found standing upright when the groundsmen came round to collect them at the close of the day. Again, this particular flag post was placed where it was, not by any servant of the defendants but by a member of the plaintiff's own club—one of his friends. Were I to sum up the present case to the jury my difficulty would be to point out to them where the negligence of the defendants was to be found; and that is the real test and shows that there is no case to leave to them. There must be judgment for the defendants.

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Dec. 10.

BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL *v.* MILLARD.

Bye-laws—Deposit of plans—Plan comprising several houses—Deviation from plans—Decision on information in respect of one house—Subsequent information in respect of another house.

A plan deposited with a local authority by a builder, under bye-laws requiring every person who erects a building to deposit plans thereof, comprising more than one house, constitutes a separate and independent plan of each house. If the builder deviates from the plans, and separate informations are preferred against the builder for failing to deposit plans before building in respect of several houses, it is not competent to justices who have dismissed the first summons that came before them, because they considered the deviations unimportant, to adopt the same course with regard to the subsequent informations on the ground that the matter is res judicata. It is their duty to hear evidence in each case, and deal with each information upon its merits.

CASE stated by justices for the West Riding of Yorkshire, who had dismissed, on the ground that the matter was *res judicata*, an information preferred by the appellant Council against the respondent, a builder, for that he, on April 21, 1903, then being a person intending to erect certain buildings at 35 and 37 Great Central Avenue, Balby, unlawfully did not give to the said Council notice in writing of such intention, and did not at the same time deliver or send to their surveyor complete plans and sections of every floor of such intended buildings, contrary to bye-law 99 of the said Council's bye-laws.

Upon the hearing the following facts were proved :—

That the respondent was the owner of a building estate situate at Carr Hill, Balby.

Certain bye-laws in respect to new streets and buildings were in force within the urban district of Balby-with-Hexthorpe.

No. 99 of such bye-laws provided as follows [the case set out the bye-law at length, but as it was in the usual form, and nothing turned on its particular terms, it is unnecessary here to set out more than appears below] :—

“Every person who shall intend to erect a building shall give to the Council notice in writing of such intention . . . and shall at the same time deliver or send or cause to be delivered or sent to their

surveyor at his or their office complete plans and sections in duplicate of every floor of such intended building"

The respondent had some years since deposited with the appellants a block plan of his estate at Carr Hill, together with a plan and section of certain types of houses intended to be erected thereon, marked c.

The respondent, in the year 1903, and on or before April 25, 1903, erected upon his estate at Carr Hill two dwelling-houses, numbered 35 and 37 Great Central Avenue, Balby, and the justices found that in erecting such dwellings the respondent had deviated from the plan and section marked c in certain respects. [The case described these deviations, but nothing turned on their particular nature.]

On March 21, 1903, the justices had already heard and determined a similar information preferred by the appellants against the respondent for non-compliance with bye-law 99 in respect of the dwelling-house, No. 33 Great Central Avenue, aforesaid, adjoining the said dwelling-houses, Nos. 35 and 37. Upon the hearing of this last-mentioned information it was proved that the plan marked c had been deviated from in certain respects, but the justices had held that such deviations did not amount to such substantial alteration or deviation from the deposited plans as to make the plans followed new plans, and therefore dismissed the said last-mentioned information.

In erecting the dwelling-houses, Nos. 35 and 37 Great Central Avenue, the deviations made by the respondent from the plan marked c were to all intents and purposes the same as the deviations made by him in erecting the dwelling-house, No. 33 Great Central Avenue, aforesaid.

On the part of the respondent it was contended that the deviations from the deposited plans were the same in each case, and that the matter had already been heard and determined, and was *res judicata*.

On the part of the appellants it was contended that the offence with which the respondent was charged was the omission to deposit plans of the houses Nos. 35 and 37 Great Central Avenue; that as such houses were entirely distinct from the house No. 33 Great Central Avenue, the question was one of fact for the justices, and that it was for them to determine on the evidence before them whether the houses Nos. 35 and 37 Great Central Avenue were built in accordance with the plan marked c, and if they were not it was the justices' duty to convict the respondent, and that the matter was not *res judicata*, the facts of each case being not the same but merely similar.

The justices were of opinion that, in erecting the dwelling-houses Nos. 35 and 37 Great Central Avenue, the deviations made by the respondent from the plan marked c were the same as the deviations

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made by him in erecting the dwelling-house No. 33 Great Central Avenue, and that the matter had been already heard and determined, and was *res judicata*, and they dismissed the information without hearing it on its merits.

The question for the opinion of the Court was whether the justices upon the above statement of facts had come to a correct determination and decision in point of law.

Macmorran, K.C., and *Scholefield* for the appellants. The respondent was found to be varying the plans he had deposited, and the appellants gave him notice to deposit fresh plans. This he failed to do, and they then proceeded against him for deviation in regard to the house No. 33 Great Central Avenue, but the justices dismissed the case. He then received notice to deposit fresh plans in respect of the adjoining houses, Nos. 35 and 37, and further proceedings were instituted which the justices dismissed as *res judicata*. No doubt they would have reconsidered the matter had they thought they were at liberty to do so. It is clear they should have done so, because the offence is a separate one in respect of each house, and a deviation from a plan in respect of one house does not cover a deviation, though similar, in the case of the house next door.

Israel Davis for the respondent. This is a case of common law estoppel, and the plea of *res judicata* can be supported on the authority of *Outram v. Morewood* (1803) 3 East 346, at p. 354. It is clear that the justices have decided the second case before them on precisely the same grounds as they decided the first; and, *prima facie*, they ought not to hear the same case over again. [LORD ALVERSTONE C.J. referred to *James v. Masters*, 1893, 1 Q. B. 355.] To hold otherwise would tend to an abuse of procedure as laid down by Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665; 59 L. J. Q. B. 159. This is a very different case from *Reg. v. Gaunt* (1867) L. R. 2 Q. B. 466; 36 L. J. M. C. 89, where justices reheard a bastardy summons upon the ground that their previous dismissal had been obtained by false evidence.

Macmorran, K.C., in reply, cited *Reg. v. Hutchings* (1880) 6 Q. B. D. 300; 50 L. J. M. C. 35. [He was stopped.]

LORD ALVERSTONE C.J. I am of opinion that in this case we must give effect to the view pressed upon us by Mr. Macmorran. Where the bye-laws of a local authority require every person intending to build to deposit plans of every floor of the building, a plan comprising a number of proposed houses constitute a separate and independent plan of each house; and if there be a departure from the plan of a

particular house it does not follow that the departure from the plan in the house next is precisely the same, or that deviations in the erection of a block of houses numbered 1 to 10 are necessarily the same as deviations in another block numbered from 10 to 20. In the present case it appears that a number of deviations from the deposited plan were shown in the instance of the house No. 33 Great Central Avenue, none of which in the opinion of the justices were of sufficient importance to warrant them in convicting the respondent. Then a second information was laid in respect to alleged deviations from the plan in the erection of the adjoining houses, Nos. 35 and 37 Great Central Avenue; and there is nothing in the case as stated to show that they attempted to go into the questions of these deviations severally complained of at all; they were apparently content to take it that they were precisely the same as in the case of No. 33, which they had already considered unimportant. I am of opinion that they were not entitled to refuse to hear the second information on its merits because they had come to the conclusion that the alterations in or deviations from the plan in the erection of the houses Nos. 35 and 37 were to their mind the same as those in No. 33. The case must therefore go back to them to hear the information as to Nos. 35 and 37 on its merits; but when they have done so, if they are still satisfied that the deviations are precisely the same as those which they considered unimportant in the instance of the house numbered 33 they can properly dismiss it.

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Case remitted.

Solicitors for the appellant—Speechley, Mumford, and Craig, for Allen, Doncaster.

Solicitors for the respondents—Halse, Trustram, & Co., for A. Muir Wilson, Sheffield.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

NOKES AND ANOTHER v. ISLINGTON BOROUGH COUNCIL.

Bye-laws—Reasonableness—Metropolis—Water-closet accommodation—Lodging-houses—Bye-law requiring owner of house let in lodgings to provide water-closet accommodation—Want of provision for notice to owner before commencement of proceedings—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) ss. 37, 39, 94.

Section 39 of the Public Health (London) Act, 1891, which gives the London County Council power to make bye-laws "with respect to water-closets . . . and the proper accessories thereof in connection with buildings" authorises the making of a bye-law prescribing the amount of water-closet accommodation that must be provided in any particular class of building, such as a building let in lodgings.

But, having regard to the provisions of section 37 of the Act empowering the sanitary authority to give notice to the owner of any house requiring him to provide sufficient water-closet accommodation, and imposing penalties for failure to comply with the notice, a bye-law under section 39 requiring the "owner," within the definition in the Act, of a house let in lodgings to provide a given amount of water-closet accommodation, and imposing a penalty for default, without requiring any notice to be given to him before the penalty is incurred, is unreasonable and bad.

CASE stated by a metropolitan police magistrate before whom the appellants had been convicted, upon a complaint preferred by a sanitary inspector on behalf of the respondents against them at the Clerkenwell Police Court, for that they the appellants being the owners, as defined by the bye-laws of the London County Council made under section 39 (1) of the Public Health (London) Act, 1891, of a certain lodging-house (as defined by the said bye-laws), situate and being No. 19, Corinth Road, North Road, within the Borough of Islington, did not provide and maintain from March 3, 1903, to April 20, 1903, in connection with the said house water-closet, earth-closet, or privy accommodation, of not less than one water-closet, earth-closet, or privy, for every twelve persons; contrary to the provisions of the said bye-laws and of the said Act.

At the hearing of the complaint it was proved that the appellants were agents for letting and collecting, and in fact collected the rent of No. 19, Corinth Road, in the borough of Islington, between March 3 and April 20, 1903, and during such period the said house contained nine rooms and one water-closet only and no earth-closet or privy. That in July, 1902, the said house was let out in tenements to members

of more than one family, and that the appellants collected the rents of the several tenements from the tenants thereof. That in September, 1902, the whole of the tenants of the said house were ejected by the appellants. That from September, 1902, to January, 1903, the house was unoccupied. That in January, 1903, the whole of the said house was let to one tenant, C. Gates, at the rent (which was a rack rent) of £36 per annum, payable £3 per month in advance. That on January 5, 1903, three rooms only in the said house were occupied by six people. That on March 3, 1903, the whole of the rooms in the said house were occupied and continued to be occupied till April 20, 1903, by sixteen people who constituted four separate families.

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That the rooms in the said house not required by the said C. Gates, for his own occupation were let by him to lodgers from whom he received rent on his own account. That on March 11, 1903, an intimation of the existence of a nuisance was left on the premises at 19, Corinth Road, aforesaid, and also at the appellants' office. That on March 25, 1903, a letter calling attention to the fact that the nuisance so intimated had not been abated was sent to the appellants, to which they replied by a letter of the following day stating that they were not the "landlords."

It was objected on behalf of the appellants :—

(a) That the bye-law No. 26 of the London County Council made under section 39 (1) of the Public Health (London) Act, 1891, so far as the same required the landlord or owner of any lodging-house to provide and maintain in connection with such house water-closet accommodation in the proportion of one water-closet for every twelve persons, was *ultra vires* and illegal, and that the magistrate had no jurisdiction to deal with the complaint; and further

(b) That before any offence could be committed against the said bye-laws, if valid, a notice from the sanitary authority was necessary; and also

(c) That the said bye-law, if valid, did not apply to the appellants, as they were not the owners of the said premises within the meaning of the said bye-laws.

The magistrate overruled the said objections, and convicted the appellants as aforesaid.

The question upon which the opinion of the Court was desired was whether the magistrate's decision, overruling the said objections, was right in point of law.

The bye-law under which the question arose is No. 26 of a series of bye-laws made by the London County Council under section 39 of the Public Health (London) Act, 1891, and allowed by the Local Government Board on June 22, 1893.

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Bye-law 26, after making certain general provisions as to the cleansing of water-closets, &c., and certain special provisions as to the cleansing of water-closets, &c., of which two or more lodgers in a lodging-house are entitled to the use in common, proceeds as follows:—

“The landlord or owner of any lodging house, shall provide and maintain in connection with such house, water-closet earth-closet or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy, for every twelve persons.

“For the purpose of this bye-law, a ‘lodging-house’ means a house or part of a house which is let in lodgings or occupied by members of more than one family. ‘Landlord’ in relation to a house or part of a house which is let in lodgings, or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest) by whom or on whose behalf such house or part of a house is let in lodgings or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting. ‘Lodger,’ in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, means a person to whom any room or rooms in such house or part of a house may have been let as a lodging or for his use or occupation.

“Nothing in this bye-law shall extend to any common lodging house.”

The following provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) are material:—

Section 37 (1). It shall not be lawful newly to erect any house or to rebuild any house pulled down to or below the ground floor without a sufficient ashpit furnished with proper doors and coverings, and one or more proper and sufficient water-closets according as circumstances may require. . . .

(3). If at any time it appears to the sanitary authority that any house, whether built before or after the commencement of this Act, is without such ashpit or water-closets as aforesaid, the sanitary authority shall cause notice to be served on the owner or occupier of the house, requiring him forthwith, or within such reasonable time as is specified in the notice, to provide the same in accordance with the directions in the notice; and, if the notice is not complied with, the said owner or occupier shall be liable to a fine not exceeding five pounds, and a further fine not exceeding forty shillings for each day during which the offence continues; or the sanitary authority, if they think fit, in lieu of proceeding for a fine may enter on the premises and execute such works as the case may require, and may recover the expenses incurred by them in so doing from the owner of the house.

Section 39 (1). The county council shall make bye-laws with respect to water-closets, earth-closets, privies, ashpits, cesspools, and receptacles for dung, and the proper accessories thereof in connection with buildings, whether constructed before or after the passing of this Act.

(3). It shall be the duty of every sanitary authority to observe and enforce the bye-laws under this section; and any directions given by the sanitary authority under

this Act shall be in accordance with the said bye-laws, and so far as they are not so in accordance shall be void.

Section 94 (1). Every sanitary authority shall make and enforce such bye-laws as are requisite for the following matters ; (that is to say)

(a) For fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family . . .

(d) For enforcing the drainage of such houses, and for promoting cleanliness and ventilation in such houses.

(e) For cleansing and limewashing at stated times of the premises.

* * * * *

Woodfin for the appellants. The provisions of bye-law 26 in question in this case are bad, both as being *ultra vires* and as being unreasonable. In the first place, they are special provisions as to lodging-houses, and the power to make bye-laws as to lodging-houses is given by section 94, not section 39, and is vested in the sanitary authority and not in the county council. Section 39 contemplates bye-laws as to the structure and fittings of water-closets, not as to the amount of water-closet accommodation to be provided in any particular house. Section 37 shows that the determination of the sufficiency of water-closet accommodation is the work of the sanitary authority and not that of the London County Council. Further, the provisions of bye-law 26 in question are unreasonable and bad as being repugnant both to the statute under which the bye-law is made and to the common law. They are repugnant to the common law because they empower the sanitary authority to compel the owner of the premises—not the landlord who lets the lodgings—to do a tortious act against his tenant. The bye-law in fact purports to provide that the owner may be punished if he does not do what he has no power to do. The provisions of the bye-law in question are also unreasonable and repugnant to the statute because no provision is made for notice to the owner, while section 37 (3) clearly contemplates that notice should be given to the owner before he can be punished for failing to provide proper water-closet accommodation. A bye-law under which the owner can be summoned without notice is not consistent with that section.

Courthope Munroe for the respondents. The provisions of bye-law 26 in question are within the scope of section 39, and are not such provisions as are contemplated by section 94. The Public Health (London) Act, 1891, is largely a consolidation Act, re-enacting among other enactments many of the provisions of the Sanitary Act, 1866. Section 94 of the Act of 1891 corresponds to section 35 of the Act of 1866 ; but the provisions in the last-mentioned section specifically authorising the making of regulations by the nuisance authority—as the sanitary authority was then called—as to the provision of privy accom-

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modation in lodging-houses, are not re-enacted in section 94 of the Act of 1891. This shows that it was thought that the matter was covered by the bye-law making power of the London County Council under section 39.

The bye-law cannot be held to be unreasonable consistently with the principles upon which the Court now proceeds in determining upon the reasonableness of bye-laws: *Salt v. Hall* (1903) 1 L. G. R. 753; 88 L. T. 868; *Pomeroy v. Malvern Urban District Council* (1903) 1 L. G. R. 825; 89 L. T. 555.

It is true that the bye-law imposes no obligation on the sanitary authority to give notice, but in fact notice is always given.

The appellants were clearly "owners" within the meaning of the bye-law, for the definition of "owner" in section 141 of the Act must be read into the bye-laws.

Woodfin in reply. Section 37 contemplates notice, and bye-law 26, as it stands, contemplates none, therefore it is unreasonable.

LORD ALVERSTONE C.J. I think the objection taken to this bye-law by Mr. Woodfin in the way he has stated it is a good objection. In reply, he summarised his argument very concisely by stating that it was objected that the bye-law was unreasonable because in the analagous circumstances under section 37 it is contemplated that the sanitary authority shall give a specific notice; that this bye-law contemplates none, and therefore the bye-law is unreasonable. I think in substance that is a good objection.

I have no doubt whatever as to the power of the County Council to make a bye-law on the subject. I think the point taken by Mr. Woodfin originally that this must be regarded as a lodging-house bye-law, and that inasmuch as lodging-house water-closet accommodation is governed by section 94 this lodging-house bye-law for providing water-closets is bad, is not a good point. I agree with Mr. Courthope Munroe's argument that section 39 is a re-enactment with some amendment of the old provision, putting upon the County Council the duty which was previously put upon certain other local authorities.

I think, therefore, that this bye-law is quite within section 39. That these sanitary powers ought to be construed liberally we have often pointed out. It is competent to the County Council to provide in their water-closet bye-laws that there shall be what they think at any rate a right and proper *minimum* of water-closet accommodation in respect of any tenement or any class of tenement; but that does not decide the question, for reasons which I think will appear to be obvious. Sub-section (3) of section 39 imposes the duty upon the sanitary authority

of observing and enforcing the bye-laws under that section. The bye-laws themselves contemplate that any person who offends against one of the bye-laws shall be liable for every such offence to a penalty of £5.

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This case illustrates the importance of there being some notice given to the person complained of. Messrs. Nokes collected the rent which Gates paid, and I agree with the argument of Mr. Courthope Munroe that having regard to section 141 they ought to be treated as standing in the position of their clients; there is no doubt about that. On the other hand, Gates is the person responsible for allowing more than the twelve persons to be in the house with one water-closet. Therefore, it is a case in which injustice may be done if proceedings are taken against people who may have partly parted or wholly parted with the control of their premises unless some notice is given to them before proceedings are taken, because they may attempt to put pressure, as they did here, on their tenant to reduce the number. But why I think the bye-law which does not contemplate any notice being given to the landlord as owner, before he is proceeded against for a penalty, is bad, is because I find that section 37 (3) under which the sanitary authority have power with regard to any house, whether built before or after the commencement of the Act, to say what is sufficient water-closet accommodation for a given number of people, and to give a statutory notice calling upon the owner to carry out the terms of the section under a penalty of £5, contemplates that the sanitary authority shall give notice to the owner before proceedings are taken. I think, therefore, this objection to a bye-law for a breach of which a penalty is imposed, especially when it is intended to be put in force against people who are not in fact owners, but put in the position of owners, is a good one, and that there should be the same kind of notice given before proceedings are taken as is contemplated by section 37. I think, therefore, that this bye-law, which provides that the landlord or owner shall provide and maintain water-closet accommodation, and does not make provision for a notice to be given before proceedings are taken, is not a reasonable bye-law.

LAWRANCE J. I agree.

KENNEDY J. I only wish to say, what of course my Lord intended to say, that bye-law 26 is bad in the respect which my Lord has pointed out in a judgment in which I entirely concur, because it must be read with bye-law 28, under which the proceedings were taken. Bye-law 26 indicates something which is to be done, and bye-law 28 says that where there is a breach of any of the foregoing

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- bye-laws, penalties may be inflicted both for the breach and also for its continuance if continued.
- Appeal allowed.*
- Solicitor for the appellants*—Alfred D. Levi.
- Solicitor for the respondents*—Bramall.
- Reported by* Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

See the cases of *Stiles v. Galinsky* and *Nokes v. Islington Borough Council* (No. 2), *post*, p. 341, and the note thereto.

High Court of Justice.

KING'S BENCH DIVISION.

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NOKES AND ANOTHER v. ISLINGTON BOROUGH COUNCIL (No. 2).

Bye-laws—Reasonableness—Lodging-houses—Cleansing in first week in April—Duty imposed on landlord—Want of provision for notice—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94.

A bye-law under section 94 of the Public Health (London) Act, 1891, with regard to lodging-houses and houses occupied by members of more than one family, imposing on the "landlord" (within a definition including a person receiving or entitled to receive the rack rent of the premises, or a definition including a person receiving or who, if the premises were let at a rent, would receive, the profits arising from the letting of the lodgings) an obligation to cause the premises to be cleansed in the first week of April in every year, but containing no provision entitling the landlord to notice before he becomes liable to a penalty for its breach, is unreasonable and bad.

THESE were two cases stated by metropolitan police magistrates which were argued together.

STILES v. GALLINSKY.

In this case the magistrate, Mr. Mead, had dismissed an information preferred by the appellant against the respondent for that the respondent, being the landlord of a lodging-house, to wit, 166, Stepney Green, did not in the first week of the month of April last cause every part of the premises to be cleansed, contrary to the bye-law in such case made and provided. The case was as follows:—

1. The appellant is a sanitary inspector and inspector of lodging-houses under the Council of the metropolitan borough of Stepney.

2. The respondent is the landlord, within the meaning of the bye-laws hereinafter referred to, of the lodging-house in question, which is within the borough of Stepney, and is registered under the bye-laws.

3. Evidence was given that on March 18, 1903, the appellant visited the house and found the rooms and staircase dirty. He again visited the house on the 14th April and he found the same state of dirt, so that it was clear that no cleansing had been done during the first week of April.

On June 11, 1902, the Council of the borough of Stepney, under section 94 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), made bye-laws which have been duly allowed by the Local Government Board with respect to houses let in lodgings. A copy of these bye-laws is annexed and made part of this case.

4.—12. [The case in these paragraphs set out extracts from the Public

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Health (London) Act, 1891, and from the bye-laws. It will suffice to say here that the bye-law in question in the case, No. 14, provided that the "landlord"—an expression defined in the bye-laws—of a lodging-house should, in the first week in April in every year, and at such other times as the condition thereof might render it necessary, cause every part of the premises to be cleansed. The material clauses of the bye-laws are quoted verbatim, *post*, pp. 344, 345.]

13. I was of opinion that so much of the first clause of bye-law 14 as requires the annual cleansing by the landlord was invalid on the following grounds:—

- (a) Being *ultra vires*.
- (b) Being repugnant to the laws of England.
- (c) Being repugnant to the provisions of the Public Health (London) Act, 1891.
- (d) Being unreasonable.

I, therefore, dismissed the summons.

Ground A.—I considered that section 94 (d) and (e) of the Public Health (London) Act, 1891, did not empower the Borough Council to cast an obligation upon a "landlord" which did not already exist at common law or by statute, but merely entitled them to regulate the duties of persons already responsible by requiring, *e.g.*, periodical performances.

So far as (e) of the above section is concerned I thought that "stated times" meant "stated intervals," not a particular week in the year. The form of section 1 (3) of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), fortified me in this opinion: "All inside walls . . . shall . . . be limewashed once at least within every fourteen months, to date from the time they were last limewashed."

Ground B.—The bye-law is repugnant to the laws of England because in the absence of express covenants there is no obligation upon a reversioner even to repair, much less to cleanse, any premises which have been let to a tenant for any term, at any rate unless the state of the premises in consequence of dirt or non-repair is a nuisance of which he has notice, and it was in his power to abate the nuisance by putting an end to the tenancy. None of these conditions are appended to the bye-law.

Ground C.—Under the Public Health (London) Act, 1891, and the Public Health Act, 1875, the following state of things must exist before any obligation additional to the common law can be cast upon the owner (the equivalent of the "landlord" under the bye-law):—

- i. A nuisance injurious to health; and

ii. (a) Inability to find the person by whose act default or sufferance the nuisance exists ; or

(b) structural defect the cause of the nuisance ;

any legislation attempted beyond this is, therefore, repugnant to the public health statute.

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Ground D.—The bye-law is unreasonable because :—

I. The code of which it forms part is inconsistent A concurrent liability to cleanse an exclusive staircase (bye-law 11) is placed upon the lodger, and to cleanse a common staircase the keeper (bye-law 13), yet in the case of the lodger's own room, which is the most private part of the house, the landlord is exclusively liable.

As an illustration of the absurdity of this arrangement, if a lodger in removing filth under bye-law 10 spilt upon his staircase he as well as the landlord can be prosecuted for failing to cleanse ; but if the mess which the lodger may cause is in his private room he can call upon the landlord to perform the office and prosecute him under the bye-law if he fail : *Badcock v. Sankey* (1890) 54 J. P. 564.

II. Even if the bye-law would be otherwise good in making the landlord responsible, it is unreasonable, because it does not cast a primary, or a least a concurrent, liability upon the lodger to cleanse his rooms, and also relieves the keeper, who has more immediate control of the premises than the landlord, from all liability in the matter, either concurrent or prior, so far as the rooms and exclusive staircase are concerned.

III. The position of the landlord is such that the bye-law generally is unreasonable. The necessity for cleansing a room arises from hour to hour and from day to day, and it would be impossible for a landlord to exercise such vigilance and control that whenever a lodger's room requires cleansing he must be on the spot to perform the operation. He may receive no benefit whatever from the lodging-house business ; in fact, his house may be so let against his wishes. In the absence of express covenants he has no right beyond that which the bye-law may confer to enter the premises, and in order to comply with the bye-law he must, first, arrange with the keeper to enter the house, and, secondly, ask the lodger to enter the room. The performance by a stranger of the delicate task of cleansing another person's furnished room would inevitably lead to friction and difficulty, especially as the landlord has no liability or even right with regard to the furniture. It is impossible to cleanse a room effectually unless the furniture forms part of the same operation.

IV. The requirement of the bye-law that the landlord shall cause every part of the premises to be cleansed at such other times than the first week in April, as the condition thereof might render it necessary,

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renders the cleansing in the first week of April superfluous, and on that ground the bye-law is unreasonable.

V. The bye-law in limiting the annual cleansing to a single week in the year is unreasonable. The definition of lodging-house is so wide as to comprise not only overcrowded houses in squalid streets, but also comparatively higher rented houses which are occupied by members of more than one family, *e.g.*, a clergy house or a house where a paying guest is received, so that in the borough of Stepney the houses unaffected would be extremely few.

The difficulty of securing sufficient labour to cleanse thoroughly nearly every house in the borough at the same time would be almost insurmountable, and the cost would be enormous, especially when under the same bye-law the whole of the premises must be limewashed within the same week as that in which the cleansing must be done.

The week selected, too, may be one of the most inconvenient in the whole year, as it may comprise not only Good Friday but also Easter Monday and the subsequent holidays.

14. The questions for the opinion of the Court are—

1. Whether the part of the bye-laws in question is *ultra vires*.
2. Whether it is repugnant to the laws of England.
3. Whether it is repugnant to the provisions of the Public Health (London) Act, 1891.
4. Whether it is unreasonable.

If the Court decide any of these questions in the affirmative, my decision is to be affirmed; if all in the negative, then the case is to be remitted to me with such directions as the Court may think fit.

The following were the material provisions of the bye-laws in question in this case:—

“1. . . . ‘Lodging-house’ means a house or part of a house which is let in lodgings or occupied by members of more than one family.

“‘Landlord,’ in relation to a house or part of a house which is let in lodgings, or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises, and whether he resides on the premises or not) who receives or is entitled to receive the rack rent of a lodging-house.

“‘Keeper,’ in relation to a house or part of a house which is let in lodgings, or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings, or for occupation by members of more than one family, or who for the time receives or is entitled to receive the profits arising from such letting, whether on his own account or as agent or

trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent. . . .

"10. Every lodger in a lodging-house shall cause all solid or liquid filth or refuse to be removed once at least in every day from every room which has been let to him, and shall once at least in every day cause every vessel, utensil, or other receptacle for such filth or refuse to be thoroughly cleansed.

"11. In every case where a lodger is entitled to the exclusive use of any staircase, landing, or passage in such house, such lodger shall cause every part of such staircase, &c., to be thoroughly cleansed from time to time.

"13. The keeper of a lodging-house shall cause every common passage or staircase in such house to be thoroughly cleansed from time to time as often as may be requisite.

"14. The landlord of a lodging-house shall in the first week in the month of April in every year, and at such other times as the condition thereof may render it necessary, cause every part of the premises to be cleansed.

"He shall at the same time, except in such cases as are hereinafter specified, cause every area, the interior surface of every ceiling and wall of every water-closet belonging to the premises, and the interior surface of every ceiling and wall of every room, staircase and passage in the house to be thoroughly limewashed. . . .

"19. Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuous offence to a further penalty of forty shillings for each day after written notice of the offence from the council."

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NOKES AND ANOTHER v. ISLINGTON BOROUGH COUNCIL. (No. 2.)

In this case the magistrate, Mr. D'Eyncourt, had convicted the appellants for the breach of a similar bye-law in force in the metropolitan borough of Islington. The case was as follows:—

1. The appellants are auctioneers and house agents and are the landlords, within the meaning of the bye-laws, of the premises referred to in the complaint, and did not in the first week of the month of April of the present year cause every part of the said premises to be cleansed as required by the said bye-laws.

2. The house in question contains ten rooms and was not cleansed in the first week of April according to the said bye-law. Some of the rooms were whitewashed and papered in December, 1902, and the rest of the cleansing was not carried out till May, 1903.

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3. It would take two men from a week to a fortnight to cleanse such a house in accordance with the bye-laws.

4. The builder who was employed by the appellants, had orders to cleanse fifteen other registered lodging-houses at the same time as these premises, and five other houses belonging to the appellants, and stated that he was of opinion that he could not have carried out the cleansing of all these houses during the first week in April. He did not, however, receive his orders to cleanse these premises until some time in April, and did not commence until the beginning of May. Other evidence was given to the effect that with one or two weeks' notice an almost unlimited supply of such labour as was necessary for complying with the bye-law could be obtained during the first week in April.

5. Upon the evidence before me I came to the conclusion that if it was necessary that the cleansing should be carried out in any one week the first week in April was the most suitable, having regard to the condition of the labour market and all other matters.

6. There are about 530 registered houses let in lodgings in the borough of Islington, and coming under the bye-laws. The appellants own a considerable number of such houses. There are in the whole of London 16,000 such houses.

7. There are 11,400 persons in the borough of Islington engaged in the house building trade, of whom 3,936 are painters and 3,452 labourers, which forms a larger proportion in the whole population than the same class form in the neighbouring boroughs.

The cleansing required by the bye-law in the said houses can to a very large extent be carried out by unskilled labour.

8. A copy of the bye-laws accompanies this case.

9. It was contended on behalf of the appellants that the said bye-law was unreasonable and *ultra vires*, and therefore invalid in that it was practicably impossible that all such houses could be cleansed in the space of one week.

10. I was of opinion that although there might be some difficulty in complying with the bye-law, yet as there was no impossibility in doing so, the bye-law was not so unreasonable as to be invalid in law, and I did so determine accordingly and fined the appellants.

The question for the Court is whether my determination was right.

The material provisions of the bye-laws in question in this case which were made by the Vestry of the parish of St. Mary, Islington, and duly allowed by the Local Government Board were as follows:—

“1. . . . ‘lodging house’ means a house or part of a house in the parish of St. Mary, Islington, which is let in lodgings or occupied by more than one family.

“‘Landlord’ in relation to a house or part of a house which is let

in lodgings or occupied by members of more than one family means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings, or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent.

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"2. A lodging-house shall be exempt from the operation of these bye-laws until the landlord of such lodging-house shall have been required in pursuance of bye-law 5 to furnish the statement of particulars therein-mentioned.

"5. The landlord of a lodging-house, within a period of fourteen days after he shall have been required by a notice in writing signed by the clerk to the sanitary authority and duly served upon or delivered to such landlord to supply the information necessary for the registration of such house by the sanitary authority, shall . . . furnish to the sanitary authority a true statement of the following particulars with respect to such house, that is to say—(a) The total number of rooms in the house. (b) The total number of rooms let in lodgings or occupied by members of more than one family . . .

"6. A register shall be kept by the sanitary authority of all houses let in lodgings or occupied by members of more than one family in the parish of St. Mary, Islington, to which the sanitary authority from time to time resolve that the bye-laws shall apply.

"7. No house shall be placed upon the register until so resolved at a meeting of the sanitary authority. Upon the passing of any such resolution the sanitary authority shall cause notice thereof to be served at the house in question, together with a copy of these bye-laws; and the bye-laws shall operate in respect of such house so long as the same is let in lodgings, or occupied by members of more than one family.

"13. Every lodger in a lodging-house shall cause all solid or liquid filth or refuse to be removed once at least in every day from every room which has been let to him, and shall once at least in every day cause every vessel, utensil, or other receptacle for such filth or refuse, to be thoroughly cleansed.

"14. In every case where a lodger in a lodging-house is entitled to the exclusive use of any staircase, landing, or passage in such house, such lodger shall cause every part of such staircase, landing, or passage to be thoroughly cleansed from time to time as often as may be requisite.

"16. The landlord of a lodging-house shall cause every common

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passage or staircase in such house to be thoroughly cleansed from time to time as often as may be requisite.

"17. The landlord of a lodging-house shall, in the first week of the month of April in every year, cause every part of the premises to be cleansed.

"He shall, at the same time, except in such cases as are hereinafter specified, cause every area, the interior surface of every ceiling and wall of every water-closet belonging to the premises, and the interior surface of every ceiling and wall of every room, staircase and passage in the house to be thoroughly lime-washed

"21. Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the sanitary authority"

George Elliott for the appellant in *Stiles v. Gallinsky*. The magistrate was wrong in holding that bye-law 14 imposes anything upon the landlord repugnant to the common law. At common law there is no obligation on a landlord to keep premises in a sanitary condition in any sense. And a bye-law is not repugnant to the common law merely because it imposes an obligation which the common law does not impose. Nor is the bye-law repugnant to the Public Health (London) Act, 1891. That Act by section 4 (1) in certain cases imposes the obligation of abating a nuisance on the landlord; but it is not repugnant to the Act to impose a further obligation on the landlord, which the Act does not itself impose. The bye-law is within the scope of section 94 of the Act of 1891. That section contemplates the imposing of obligations as to the cleansing of lodging-houses on the landlord. The landlord is the only person upon whom the obligation can be effectually imposed, in view of the transitory nature of the tenancies of this class of property.

R. Cunningham Glen (*Clavell Salter* with him) for the respondent. In making these bye-laws the Borough Council have attempted to usurp the province of the Legislature. Bye-law 14 casts upon every landlord the duty of annually cleansing a lodging-house in the first week of April. It is not confined to registered lodging-houses, but it applies to all houses, irrespective of the amount of rent, which happen to be let in lodgings, or to be occupied by members of more than one family. The presence of a paying guest in a private house would be sufficient to bring the bye-law into operation. It imposes a penal obligation upon the landlord in respect of premises which may be entirely out of his control, and on which he would be a trespasser if he entered. The

bye-law is unjust and unreasonable: *Wallen v. Lister*, 1894, 1 Q. B. 312; 63 L. J. M. C. 51; *Kruse v. Johnson*, 1898, 2 Q. B. 91; 67 L. J. Q. B. 782. It is an oppressive piece of legislation to put this primary liability upon the landlord irrespective of the tenant or of the amount of the rent of the house. The nuisance, if there be one, arises from the acts of the tenant. The bye-laws make no provision for notice to be given to the landlord before proceeding against him for a penalty. It is again most unreasonable that a lodging-house which had been well and sufficiently cleansed at some time in the year prior to the first week in April, should be again cleansed in that week. This is legislating, and a borough council can only regulate by their bye-laws; they cannot legislate. The bye-law is inconsistent in making the cleansing take place at any time when it is necessary in the year and then obliging it to be performed in one particular week as well.

George Elliott in reply. The point that the landlord cannot enter to do the cleansing without being a trespasser is met by section 116 of the Public Health (London) Act, 1891, which expressly provides for cases where the occupier of premises prevents the owner from carrying into effect any provision of the Act. That section would effectually assist the landlord if he met with opposition from the tenant: *Parker v. Inge* (1886), 17 Q. B. D. 584; 55 L. J. M. C. 149; *Lancaster v. Barnes Urban District Council*, 1898, 1 Q. B. 855; 67 L. J. Q. B. 744.

Clarke Williams for the appellants in *Nokes v. Islington Borough Council*. These bye-laws are repugnant both to the common law and to the Public Health Acts of 1875 and 1891. The landlord is to receive no notice, and the offence is complete without it. There is absolutely no limitation on the value of the premises, and the bye-laws are as applicable to the most highly rented as to the most squalid houses. It is enough if the house be occupied by members of more than one family. Such a bye-law is outside the intention of the Act altogether. In this very case there is no suggestion that the premises were in fact dirty; yet the appellant has been convicted of the technicality of not cleansing them in the first week of April. The bye-law fixes a particular week, while even in the Factory and Workshop Act, 1901, which is a very stringent piece of legislation, the Legislature has stopped short at requiring cleansing once in 14 months. It is repugnant to the principle of the Public Health Acts that the landlord should have no opportunity of making good the defect. Upon the point of notice the case is governed by *Nokes v. Islington Corporation* (No. 1) (1903) 2 L. G. R. 334, where it was held that a bye-law was bad which did not provide for notice to be given to the person

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complained against. Again, the definition of "lodging-house" in the bye-laws is so large that it might include flats in Whitehall Court or a highly-rented house in which there was one paying guest. And a bye-law such as that in question here is utterly unreasonable in the case of property of that character. Upon the facts found in this case the first week in April is the most inconvenient week in the year, including as it does Easter in most years. The bye-law makes it an offence not to cleanse a house in this particular week whether it is dirty or not. In this case it is not found that the house required cleansing.

Courthope Munroe for the respondents [called upon as to the point that the bye-law made no provision for notice to the landlord only]. The bye-laws do in effect provide for notice. Bye-law 2 exempts lodging-houses unless and until the landlord has been required to furnish certain particulars. And bye-law 7 provides in effect for notice of the bye-laws being given where a house is brought within their operation. *Nokes and Another v. Islington Borough Council* (1903) 2 L. G. R. 334, has no application here. That was a decision on a bye-law relative to water-closet accommodation. The definition of landlord in these bye-laws is the same as that of keeper in the *Stepney* case, which has first been argued. Even though at first sight these bye-laws may appear to be somewhat harsh, yet their application is in the hands of a responsible local authority who are quite prepared to see that no harshness nor injustice takes place. They are not, in fact, the least likely to be applied at all in the wholesale way suggested, irrespective of the value of the premises or the amount of rent paid.

Clarke Williams in reply. Bye-law 7 only provides for notice to be given at the house; it does not mention the landlord. Here the landlord is the person who merely collects the rents; he is not even the keeper; and he cannot trespass on the premises. It is not the Act that is complained of, but the bye-law which goes beyond it. The landlord may have to take proceedings before a magistrate to enable him to enter.

LORD ALVERSTONE C.J. We are glad to have heard these cases so thoroughly argued as they have been; and no one who has heard the able arguments on either side, which have greatly assisted us, could fail to be struck by the extreme importance of the questions raised by each of these cases. In coming to the conclusion I have done, which is adverse to the bye-law in question in each case, I desire it to be thoroughly understood that I am in no way interfering with the discretion given to local authorities to frame bye-laws. That discretion should never be interfered with unless some legal principle is abrogated by the

bye-law. In all practical questions, where power has been given to the local authority to make bye-laws, I am clearly of opinion that there should be no interference on the part of the Court unless in view of the preservation of some legal principle; and I entirely agree with the late Lord Russell C.J., who said, in *Kruse v. Johnson*, 1898, Q. B. 91; 67 L. J. Q. B. 782, that bye-laws which had been framed by local authorities should never be lightly set aside, and that the ground for setting them aside at all must be an extremely strong ground.

Regarding the particular purposes as to which the bye-laws in each of these cases were framed, I can only say that I think there can be no real difficulty in framing them in such a way as to get rid of the difficulties which have arisen, and have been pointed out to us in each case. They may have followed the model bye-laws as has been pointed out, but even so I have come to the conclusion that these bye-laws, framed as they are, cannot be supported. Dealing first with the *Stepney* case, *Stiles v. Gallinsky*, the objection I take to the bye-laws, and the ground upon which I consider them unreasonable and incapable of being supported, is this, that they are so framed as to render persons, not morally responsible, liable to penalties without notice of the breach of the bye-laws. Bye-law 14 is an instance of this. It provides that "the landlord of a lodging-house shall in the first week in the month of April in every year *cause* every part of the premises to be cleansed." This word "cause," to my mind, gives rise to the difficulty; for cause means not merely to take steps, but to see the work carried out. According to the definition in bye-law 1, "'landlord,' in relation to a house or part of a house which is let in lodgings, or occupied by members of more than one family, means the person (whatever may be the nature or extent of his interest in the premises, and whether he resides on the premises or not) who receives or is entitled to receive the rack rent of a lodging-house." I do not proceed to read the definition of "keeper," because I can readily understand there is far less ground of objection if the seeing of the thing done, and the work carried out, be confined to the keeper who manages the house. In both cases it seems to me that there is a distinction between the occupier or keeper of the lodging-house, and the landlord or owner of it—between the person who resides on the premises and the person who does not. And the objection to the bye-law appears to me to be that under certain circumstances a person who merely receives the rack rent might become amenable to the bye-law and liable to penalties under it. I see no objection whatever to a bye-law which under certain circumstances places responsibility on the landlord, or under which a landlord, who may have entered into an agreement with, and taken a covenant from, a responsible agent, may be called on to perform the

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work. I see no objection to such a responsibility being cast upon the landlord; but the objection to this particular bye-law is that a landlord who might be utterly unaware that the requirements of the bye-law had not been complied with would be subjected to penalties without any notice of its breach having been served upon him. I am accordingly of opinion that the bye-law is unreasonable because it contains no provision that the persons who are made primarily responsible for seeing the work of cleansing done or causing it to be carried out shall receive the necessary notice.

In the *Islington* case the contention was that the definition of "landlord" in the bye-laws was far narrower than in the *Stepney* case, and confined responsibility to persons who were in fact keepers of lodging-houses. I cannot agree that that contention has been made out, for I still think that the definition upon the construction of the bye-laws in that case might include the person who gets the profit of the letting, that is to say, any ordinary landlord.

I am of opinion that in both the cases before us the bye-laws, designed with the very best intentions, require remodelling, not from the point of view of removing liability from the landlord, but from the point of view of giving him reasonable and proper notice before subjecting him to penalties. It has been somewhat vigorously contended in both cases that the bye-laws were unreasonable, inasmuch as they fixed the first week of the month of April for this annual cleansing, because of the frequent occurrence of Good Friday and the following Easter holidays in that week, and the consequent difficulty in obtaining the necessary labour to carry out the cleansing in that particular week. For myself I should not have interfered with the bye-laws on that particular ground. I think the object and meaning of the regulation is to fix dates, but I am certainly of opinion that if these bye-laws be remodelled this particular date ought to be reconsidered. The substitution of the week at the end of April might, I should think, remove all objections on this score. This is entirely a question, however, upon which the judgment of public authorities, aided by their particular knowledge of localities and requirements, should be allowed to prevail, unless good reason in law can be shown for interfering with it. Had it rested with me I should not have held the bye-law bad on that particular ground. But for the reasons I have given in relation to the absence of any provision for notice to the landlord before subjecting him to a penalty, I feel bound to hold the bye-law unreasonable in both cases, and accordingly the appeal in the *Stepney* case will be dismissed, whilst the appeal in the *Islington* case must be allowed.

WILLS J. I am entirely of the same opinion, and desire to adopt

everything that has fallen from my Lord with regard to the omission in the bye-laws of provision for notice to the landlord, the person thereby made responsible for this annual cleansing under a penalty. It appears to me that the framers of these bye-laws have made a mistake in endeavouring to make the same hard and fast rules apply to all cases. They are quite inapplicable to a large class of houses occupied by "members of more than one family." It is not too much to say that in very large areas in the best parts of London there are many houses occupied in this way. Yet these bye-laws purport to apply not only to the ordinary class of lodging-house, but also to houses of a better kind. Take, for instance, the case of a house at the West-end occupied, as is frequently the case, by more than one doctor for professional purposes. I know one where the names of six medical men appear on one door. In such a case the definition of "lodging-house" in these bye-laws would apply, and a house so occupied would fall within them. Again, the definition of landlord in these bye-laws includes the person who receives the rack rent; and they place an intolerable burden upon him if it be necessary that he should personally see to the work of cleansing required being carried out in every house, whatever its class, of which he receives the rack rent. To hold the landlord responsible because every house of every kind that he owns is not cleansed in the first week in April in every year, and to subject him to a penalty for breach of such a bye-law is something against all good sense and fair-play. The person struck at ought to know what his tenants are doing before he is made amenable to such a bye-law. I must protest against Mr. Munroe's argument that although these bye-laws might be harsh and unjust if applied all round, yet the local authority must be trusted not to put their bye-laws in motion except in certain cases which they may consider proper. I entirely object to legislation that is so unfair in itself, that it is said that in certain cases it will never be enforced.

With regard to the work being done in one fixed week in April. the application of the bye-law raises this difficulty. It often happens that Easter falls in the first week in April, in which case at least on three days no work could be done, yet we have it found as a fact in the *Islington* case that the work required to be done would take two men a week or a fortnight to do it. In the present year four days out of the seven would be excluded. The result is that persons may be called upon to perform in two or three days a week or a fortnight's work. A bye-law which has such an operation as this has certainly not been properly conceived or considered by its framers.

For these reasons I am of opinion that the bye-laws in question in both cases are unreasonable and cannot be upheld.

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KENNEDY J. I have come to the same conclusion with reluctance because help of the helpless depends largely on bye-laws such as these. I am unable to see, however, how these bye-laws can be supported, for the reasons given by my learned brethren, and therefore agree that they are not to be supported. Still it cannot be disputed that persons who keep lodging-house property in an insanitary condition are hard to hit, because they invariably have some one intermediate who is not necessarily responsible, but whose care of the premises would be greater if the landlord looked after him. In the *Stepney* case I agree that to make the landlord responsible without notice was unfair and I hope the local authority will pass a bye-law that will in future give him all proper and reasonable notice. I do not concur in the argument that has been addressed to us as to the undesirability of fixing a definite period within which the cleansing of lodging-houses is to be performed, even though it be a short one. Authorities must not be hampered or interfered with in laying down some reasonably convenient fixed period.

Appeal in the first case dismissed.

Appeal in the second case allowed.

Solicitors for the appellant in the first case—C. V. Young and Son.

Solicitors for the respondent—George Vandamm & Co.

Solicitors for the appellants in the second case—C. V. Young and Cowper.

Solicitor for the respondents—A. M. Bramall.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

Section 94 of the Public Health (London) Act, 1891, is practically identical as regards the subjects on which it gives power to make bye-laws with section 90 of the Public Health Act, 1875, except that section 90 of the Act of 1875 does, while section 94 of the Act of 1891 does not, mention enforcing the provision of privy accommodation as one of the subject-matters of the bye-laws. This distinction is, however, of little practical importance, seeing that, according to *Nokes v. Islington Borough Council* (No. 1) (1903) 2 L. G. R. 334, the London County Council may make bye-laws on this subject under section 39 of the Act of 1891.

The Local Government Board have issued a series of model bye-laws (series No. XIII.), under section 90 of the Public Health Act, 1875, and several of the bye-laws in this series seem to be open to the objection which was held to be fatal to the bye-laws in question in the present cases and in *Nokes v. Islington Borough Council* (No. 1). That is to say they impose obligations, under penalties, upon persons falling within an artificial definition of "landlord," with reference to houses let in lodgings, or occupied by members of more than one family, without making any provision for notice to the landlord before the penalty is incurred. Practically, accordingly, these cases must apparently be regarded as upsetting to a large extent the model bye-laws in question.

One of the objections taken to the bye-laws, both in the above cases and in *Nokes v. Islington Borough Council* (No. 1), was that an obligation was imposed on the "owner" or "landlord" which he might be unable to fulfil without committing a trespass.

In the above cases Lord Alverstone C.J. referred to this objection in terms which, though he expressed himself so guardedly that it is very difficult to understand how far his judgment goes in this respect, seem to imply that he thought this objection ill founded. It is to be regretted that the Court did not go more fully into this matter; for certainly bye-laws imposing upon persons coming within an artificial definition of "owner" or "landlord," obligations depending upon the uses to which the property is put for the time being present great difficulties.

It is obvious that a bye-law cannot be good which imposes penalties on a person for failure to fulfil obligations which he cannot lawfully fulfil. If, therefore, a bye-law of the kind under discussion is to be held good, it seems clear that it must be either on the ground that the person on whom the obligation is imposed has by virtue of the bye-law itself, or *aliunde*, such right of entering on the premises as will enable him to fulfil the obligation, or on the ground that it would be a good defence to proceedings for a breach of the bye-law for the defendant to show that he was in fact unable to fulfil the obligation for want of any such right.

It was argued in *Stiles v. Gallinsky* that the necessary right of entry is given by section 116 (2) of the Public Health (London) Act, 1891, to which there are corresponding provisions in section 306 of the Public Health Act, 1875. This might be so as regards an obligation imposed on the "owner" of the premises within the statutory definition of that term, though the right of entry is given only for the purposes of "carrying into effect the provisions of this Act," and it is a serious question whether these words include carrying into effect the provisions of a bye-law made under the Act. But, both in the model bye-laws and in the bye-laws in question in *Stiles v. Gallinsky*, the person on whom the obligation is imposed is the "landlord" within a definition which is not identical with the statutory definition of "owner," and which may in peculiar circumstances point to a person who would not be such owner.

In this connection reference may be made to *Scarborough Corporation v. Scarborough Union* (1876) L. R. 1 Ex. D. 344; 34 L. T. 768; 40 J. P. 726; *Reg. v. Trimble* (1877) 36 L. T. 508; s.c. nom. *Reg. v. Cumberland JJ.* 41 J. P. 454; *Letterkenny Commissioners v. Collins* (1891) 28 L. R. Ir. 235; *West Hartlepool Corporation v. Robinson* (1897) 77 L. T. 387; 46 W. R. 218; 62 J. P. 35; *London County Council v. Lewis* (1900) 69 L. J. Q. B. 277; 82 L. T. 195; 64 J. P. 39; and *Broadbent v. Shepherd* (No. 2), 1901, 2 K. B. 274; 70 L. J. K. B. 628; 84 L. T. 844; 49 W. R. 521; 65 J. P. 499, as well as to the cases of *Parker v. Inge* (1886) 17 Q. B. D. 584; 55 L. J. M. C. 149; 55 L. T. 300; 51 J. P. 20; and *Lancaster v. Barnes Urban District Council*, 1898, 1 Q. B. 855; 67 L. J. Q. B. 744; 78 L. T. 355; 46 W. R. 623; 62 J. P. 405, which were cited in argument in *Stiles v. Gallinsky*.

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Feb. 1.

SURREY COMMERCIAL DOCKS CO. v. BERMONDSEY BOROUGH COUNCIL.

Buildings—Relation of general Act to special Act—Inconsistency—Implied repeal—Buildings erected under general powers in dock company's Act—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76—Surrey Commercial Dock Act, 1894 (57 & 58 Vict. c. lxxvii.), s. 4.

By a special Act of 1894 the appellant company were empowered to execute certain specified works within the limits of the dock undertaking carried on by them in London under a special Act of 1864, by which the company were constituted, and, in connection therewith, to make and maintain, inter alia, all necessary and proper buildings and other works and conveniences within certain limits of deviation.

Under these powers the appellants erected, within the limits of their undertaking, and within the limits of deviation, certain buildings not specially authorised by the Act of 1894, but in substitution for buildings removed in the course of the execution of the specially authorised works.

Held, that the appellants were under no obligation before laying the foundation of such buildings to give notice to the local authority under section 76 of the Metropolis Management Act, 1855 (which requires a person before beginning to lay the foundation of a new building in London, and before laying any drain to communicate with a sewer of the local authority, to give notice to that authority, and gives that authority certain powers of control over such foundations and drains), on the ground that the interference and control involved in the section was inconsistent with the statutory powers conferred on the appellants.

The principle laid down in City and South London Railway Company v. London County Council, 1891, 2 Q. B. 513; 60 L. J. M. C. 149, approved and extended.

Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe (1903) 1 L. G. R. 551; 88 L. T. 772, distinguished.

SPECIAL case stated by a metropolitan police magistrate, as follows :—

1. The appellants appeared before me on the 5th and 12th days of June, 1903, in answer to a summons issued by me on the 29th day of May, 1903, upon the complaint of Frederick Ryan, town clerk of the metropolitan borough of Bermondsey, on behalf of the Mayor, Aldermen, and Councillors of the said borough, that the appellants on or before the 3rd day of April, 1903, unlawfully and without having given seven days' notice in writing to the said Mayor, Aldermen, and

Councillors of the borough, did begin to lay or dig out the foundation of a new building in Feriland Yard, Redriffe Road, in the said borough, contrary to the provisions of section 76 of the Metropolis Management Act, 1855. Upon the hearing of such summons, the facts hereinafter stated were proved or admitted.

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2. The appellants are a company constituted and incorporated under the Surrey Commercial Dock Act, 1864, for the purpose of carrying on the undertaking defined in section 15 of such Act, and for executing the works authorised by such Act and for maintaining such undertaking and works.

3. The docks, basins, lands, buildings, and other premises, conveniences, and works defined in section 15 and authorised by section 53 of the Surrey Commercial Dock Act, 1864, are surrounded by and contained within dock fences and gates, within which the appellants have and exercise all the powers conferred upon them by the Surrey Commercial Dock Act, 1864, the Surrey Commercial Dock Act, 1894, and the Acts incorporated with such respective Acts or amending the same.

4. Portions of the appellants' said premises upon which warehouses, workshops, and other buildings are erected are entirely surrounded by water, as shown upon the plan hereto annexed, and none of the portions so surrounded can be drained by gravitation into any sewers of the respondents outside the appellants' said premises. It would, however, be possible to drain them by syphons under the locks, but this would necessitate pumping and be very expensive. The said plan forms part of this case and is hereinafter referred to as "the said plan."

5. The respondents are under and by virtue of the London Government Act, 1899, the successors of the Vestry of the parish of Rotherhithe, in which parish, now part of the borough of Bermondsey, the appellants' premises are situate, and are the local authority for the purposes of section 76 of the Metropolis Management Act, 1855, and sections 37 and 38 of the Public Health (London) Act, 1891. The appellants' said premises are also situate within the district of the Port of London sanitary authority, which authority exercises certain powers under the Public Health (London) Act, 1891, within the appellants' premises under certain Orders hereinafter referred to.

6. By the Surrey Commercial Dock Act, 1894, the appellants were empowered to make and maintain the works described in section 4 of such Act which works included "(E.) a new road (No. 1) and sewer commencing in Swing Bridge Road and terminating in Rotherhithe Lower Road and the raising and alteration of the levels of Swing Bridge Road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer." In connection with the works specially

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authorised by the said section, or any of them, the appellants were empowered by the said section to make and maintain, *inter alia*, all necessary and proper embankments, approaches, roads, buildings, yards, and other works and conveniences, and to alter, break up, stop up and divert any pipes, wires, tubes, sewers, drains, and other works on or under any limits of deviation shown on the deposited plans which might be acquired by or belong to them.

7. Pursuant to the powers conferred on them by section 4 of the Surrey Commercial Dock Act, 1894, the appellants made the works mentioned in sub-paragraph E. of such section and raised the level of the said Swing Bridge Road. The raising of the level of the said Swing Bridge Road has rendered it necessary for the appellants to construct an inclined approach for wheeled vehicles from such road to a yard belonging to the appellants called Feriland Yard on the south side of the said Swing Bridge Road. Such inclined approach will when completed occupy the site of certain buildings in the said yard. The said buildings consist of an engineer's office and a workshop for fitters and blacksmiths, and in order to construct the said approach it is necessary that the appellants shall demolish the said buildings and erect other buildings instead thereof in the said yard. The appellants have demolished the engineer's office and are about to demolish the workshop for fitters and blacksmiths. They have constructed a temporary approach from and to the said Swing Bridge Road to and from the said yard, and have erected a new workshop in the yard which is to be used in connection therewith for the purposes of the appellants' undertaking instead of the said fitters' and blacksmiths' workshop. The respective situations of Swing Bridge Road and Feriland Yard and of the said buildings are shown upon the plan. The engineer's office and workshop for fitters and blacksmiths are hatched purple and the said new workshop (hereinafter called "the said new building") is coloured red on the plan. The temporary approach is coloured yellow on the plan; and the permanent approach when completed will be in the position shown partly by what is described on the said plan as "entrance," and will be continued in a straight line in a southerly direction as indicated by the red dotted lines.

8. The appellants did not give to the respondents any notice of their intention to lay or dig out the foundation of the said new building, but prior to erecting the same the appellants deposited with the Port of London Sanitary Authority detailed plans and specifications thereof. Such plans and specifications were duly approved by the said Port Sanitary Authority and the said new building was erected in conformity therewith.

9. Certain of the powers of a local authority under the Public Health (London) Act, 1891, and the Public Health Acts Amendment Act, 1890, have been conferred upon the Port of London Sanitary Authority by Orders of the Local Government Board under section 112 of the Public Health (London) Act, 1891, but not, *inter alia*, sections 37 and 38. The said Port Sanitary Authority wrote to the appellants' manager a letter of which the following is a copy:—

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"Sir,—In order to avoid any uncertainty in the minds of your officers as to the exact position of the Port Sanitary Authority with reference to sanitary matters, I have to point out that the Port Sanitary Authority is the local authority within the dock walls.

Will you kindly give instructions to your dock officials that no sanitary works should be carried out without first submitting detailed plans and specifications thereof to this office and obtaining official sanction?

Sanitary works will include all works in connection with the erection, alteration, and repair of water-closets or privies, urinals, drains, &c. Such an instruction will save the Dock Company much trouble and expense.

Your obedient servant,

W. COLLINGRIDGE,

Medical Officer of Health."

10. On behalf of the appellants it was contended that the erection of the said new building was rendered necessary by the raising and alteration of the Swing Bridge Road. That such erection was a work the appellants were authorised by section 4 of the Surrey Commercial Dock Act, 1894, to make. That the respondents had no power to control them in the exercise of their powers under the section, and that the appellants were under no obligation to serve notice on the respondents of their intention to lay or dig out the foundations of the said new building under section 76 of the Metropolis Management Act, 1855, that section so far as buildings erected pursuant to their special Act were concerned having been repealed by implication by the special Act. In support of the appellants' contention the following cases were cited:—

City and South London Railway v. London County Council, 1891, 2 Q. B. 513; 60 L. J. M. C. 149; *London County Council v. London School Board*, 1892, 2 Q. B. 606.

11. On behalf of the respondents it was contended that the appellants were bound to give them notice under section 76 of the Metropolis Management Act, 1855, which section provides, *inter alia*, that before beginning to lay out or dig the foundation of any new

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house or building within any parish or district, seven days' notice in writing shall be given to the vestry by the person intending to build such house or building.

That there was no clause in the Surrey Commercial Dock Act, 1894, expressly repealing section 76 of the Metropolis Management Act, 1855.

That the powers conferred by the Surrey Commercial Dock Act, 1894, nor any other Act conferring powers upon the Dock Company, could not be held to repeal by implication section 76 of the Metropolis Management Act, 1855, unless it could be shown that the two Acts were inconsistent.

That there was no inconsistency in the appellants' having power to erect buildings and giving the respondents the notice specified in section 76 of the Metropolis Management Act, 1855, the following cases being quoted in support of the respondents' contention: *White-chapel Board of Works v. Crow* (1901) 65 J. P. 549; *Uckfield Rural District Council v. Crowborough District Water Company*, 1899, 2 Q. B. 664; 68 L. J. Q. B. 1009; *Grand Junction Waterworks Company v. Hampton Urban District Council* (1898) 62 J. P. 566; *London County Council v. Wandsworth and Putney Gas Company* (1900) 64 J. P. 500; and *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (1903) 1 L. G. R. 551; 88 L. T. 772.

That the contention of the Port Sanitary Authority that they are the sole local authority with reference to sanitary matters is not true in view of the fact that the particular powers conferred upon the Port Sanitary Authority by the Orders issued by the Local Government Board, dated March 25, 1892, December 29, 1894, and June 30, 1898, neither specifically excluded the powers of the respondents arising under the Metropolis Management Act, 1855, nor their powers as a sanitary authority arising under the Public Health (London) Act, 1891, other than those transferred by such Orders. Among the powers not so transferred are the powers under section 76 of the said Act, and it was urged on behalf of the respondents that unless they were entitled to notice under section 76 of the Metropolis Management Act, 1855, buildings might be erected without their knowledge as in the present case, and so without any opportunity on their part of securing in their construction compliance with the provisions of the said sections.

12. I found as a fact that the said new building was a building within the meaning of the Metropolis Management Act, 1855, and had been erected by the appellants upon land belonging to them within the limits of deviation shown on the deposited plans referred to in section 4 of the Surrey Commercial Dock Act, 1894, and that the erection of the said new building had been rendered necessary by the raising and

alteration of the levels of the said Swing Bridge Road authorised by the last-mentioned section.

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13. I was, however, of opinion that the provisions of section 76 of the Metropolis Management Act, 1855, are not inconsistent with the provisions of section 4 of the Surrey Commercial Dock Act, 1894, and I therefore held that the provisions of section 76 of the said Act of 1855, requiring notice to be given to the respondents before beginning to lay or dig out the foundations of any building within that section, were not repealed with regard to buildings erected by the appellants pursuant to section 4 of the said Act of 1894, and that the appellants had been guilty of the offence alleged in the said summons. I accordingly convicted the appellants of the said offence, and ordered them to pay a penalty of twenty shillings together with five guineas costs.

14. The question for the opinion of the Court is whether or not my said determination was correct in law.

Macmorran, K.C., and *R. Cunningham Glen* for the appellants. Section 76 of the Metropolis Management Act, 1855, is not applicable, for the appellants have by the statutory authority of their Act of 1894 the power of deciding as to and the responsibility of constructing drains within their statutory area. So far as section 76 is concerned the respondents have no jurisdiction to require the appellants to give them notice before commencing to dig out the foundations of these buildings. They are necessary buildings which the appellants are empowered to erect under their special Act within a defined area. Within the ascertained lines of deviation they have power to make all works necessary for their undertaking. The case is governed by *City and South London Railway v. London County Council*, 1891, 2 Q. B. 513; 60 L. J. M. C. 149, and *London County Council v. London School Board*, 1892, 2 Q. B. 606. The appellants have duly deposited plans with the Port Sanitary Authority, and are under no obligation to give notice to the respondents under section 76, because so far as new buildings erected in accordance with their special Act of 1894 are concerned the provisions of that section are impliedly repealed. Notice to the respondents under section 76 is no good unless they can specify the work to be done or compel the appellants to do anything effective under it. *Whitechapel Board of Works v. Crow* (1901) 65 J. P. 549, and *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (1903) 1 L. G. R. 551; 88 L. T. 772, relied on by the respondents before the magistrate, are not in point, because here the interference and control involved by the application of section 76 of the Metropolis Management Act are inconsistent with the powers conferred on the appellants by their special Act of 1894. If there had been no inconsistency

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between the general enactments and the special enactments there in question the decisions in the *London County Council* cases would have been the other way, as was remarked by Ridley J. in his judgment in *Uckfield Rural District Council v. Crowborough District Water Co.*, 1899, 2 Q. B. 664; 68 L. J. Q. B. 1009. *London County Council v. Wandsworth and Putney Gas Co.* (1900) 64 J. P. 500, is distinguishable upon the same ground. It would be inconsistent with an Act which empowers the appellants to raise a street and do all necessary works in that behalf, that the provisions of section 76 should apply in the way the respondents contend. Sections 27 and 29 (8) of the Act of 1894 support the appellants' contention. Section 27 provides expressly that the appellants are not to erect their buildings in front of the general building line. And section 29 (8) expressly enacts that all buildings erected by the appellants for certain particular purposes shall be subject to the Metropolis Management and Building Acts. Neither of these enactments was necessary if the respondents' contention is right.

Avory, K.C., and *Biron* for the respondents. The effect of the two last-mentioned sections is that if and when there was likely to be a conflict between the general Act and the special Act the former should prevail. Even if there be a specific authority in the later Act empowering the appellants to erect a certain building there is no inconsistency in the former Act saying that the building shall be erected in a particular way. The present case is governed in principle by *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (1903) 1 L. G. R. 551; 88 L. T. 772. In the special Act of 1894 there are no provisions for the drainage of any building the appellants may put up corresponding with those of section 76 of the general Act, and that Act contains no exemption for buildings belonging to dock companies, although such an exemption was expressly given by section 6 of the Metropolitan Building Act, 1855 (19 & 20 Vict. c. 122). Again, the London Building Act, 1894, contains a special exemption. There is no implication in the special Act of 1894 to exclude the general law. This structure is found to be a building within section 76 of the Metropolis Management Act, 1855, and it does not follow that the respondents will force upon the appellants the compliance with any unreasonable requirement. Unless the general law be excluded by the special Act the provision of section 75 and 76 of the general Act of 1855 must be applied to any building in the Metropolis: *Uckfield Rural District Council v. Crowborough District Water Co.*, 1899, 2 Q. B. 664; 68 L. J. Q. B. 1009.

Macmorran, K.C., in reply.

Cur. adv. vult.

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Feb. 1, 1904. LORD ALVERSTONE C.J. read the judgment of the Court as follows :—

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This is a special case stated by Mr. Paul Taylor, one of the metropolitan magistrates, and raises a point of some importance under section 76 of the Metropolis Management Act, 1855. The appellants are the Surrey Commercial Dock Company, and the respondents the Corporation of Bermondsey, the successors of the Vestry of Rotherhithe. The area of the appellants' docks is within the area of the borough. The appellants are a company incorporated under the Surrey Commercial Dock Act, 1864 (27 Vict. c. xxxi.), for the purpose of carrying on the undertaking mentioned in section 15 of that Act. The statute of 1864 does not appear to contain any clause dealing specially with the Metropolis Management Act, 1855, unless it be section 125, upon which no reliance was placed by the respondents. In the year 1894 the appellants obtained statutory powers to make certain alterations in their dock premises, all of which were situated within the area of their undertaking under the Act of 1864, and by section 4 of the Act of 1894 (57 & 58 Vict. c. lxxvii.), the Company were authorised to make and maintain among other works "a new road (No. 1) and sewer commencing in Swing Bridge Road and terminating in Rotherhithe Lower Road and the raising and alteration of the levels of Swing Bridge Road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer." This section, in enumerating the works, gave the Company power, subject to the provisions of the Act, to make and maintain all necessary and proper sewers, drains, culverts, buildings, yards and other works, break up, stop up, and divert any pipes, sewers, drains and other works, on or under any lands within the limits of deviation. The appellant company subsequently raised the level of the Swing Bridge Road, as they were empowered to do under this section, and constructed the new bridge; and this alteration involved the occupation of the site of certain buildings of the yard, among others a workshop for fitters. In consequence the appellants demolished the workshop for fitters and erected a new workshop upon another site within the ambit of their dock premises, such site, as the plans attached to the case show, being wholly surrounded by docks. It was contended on behalf of the respondents that prior to the commencement of digging out the foundations of the new workshop it was incumbent upon the appellants to give notice to the respondents under section 76 of the Metropolis Management Act, 1855, and that the foundations must be laid at such a level as would permit the drainage of the workshop in accordance with the Act, and as the respondent council should order, and that any drains

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from the workshop must be constructed in accordance with the directions of the vestry under that section. It was contended on behalf of the appellants that, having regard to the statutory powers already referred to, it was not incumbent upon the appellant company to give a notice under section 76, but the power and responsibility of deciding as to any drains within the statutory area was vested in the appellant company, and that the respondents had no jurisdiction, at any rate so far as section 76 was concerned, in the matter. Beyond the sections to which we have already referred no direct assistance can be gathered from any other sections, but it is not unimportant to observe that section 19 does require notice to be given to the respondents, where any work to be done, by virtue of the Act of 1894, may pass over, under, or by the side of, or interfere with any sewer under their control, and section 27 imposed restrictions with regard to the building line upon buildings erected upon land purchased by the Company, and subsection (8) of section 29 subjected any buildings erected or provided by them to the provisions of the Metropolitan Building Act, 1855. The learned magistrate decided that the new workshop was a building within the meaning of section 76; that it had been erected upon land belonging to the appellants within the limits of deviation shown on the deposited plans referred to in section 4 of the Act of 1894; but he held that the provisions of the Act of 1894 were not inconsistent with section 76 of the Metropolis Management Act, 1855, and that therefore the appellants ought to have given notice.

The question appears to us to be one of considerable difficulty. In favour of the respondents it may be urged that the new workshop is not a work specially authorised by the Act of 1894, but is only consequential on the demolition of the old workshop in consequence of the alteration of the bridge road necessitated by the raising of the level of the Swing Bridge Road, and if this be so, that does not seem to be any reason why the provisions of a general Act, applicable to the area in which the proposed building is situated, should not apply. Upon the other hand, it may be urged that the control of the respondents in the matter of foundations is inconsistent with the power and duty of the Dock Company properly to maintain the works within their area, and that the statute clearly contemplates that the duty of providing the necessary works and taking the proper precautions for their construction and maintenance should rest with the Dock Company.

In this view it would, of course, be inconsistent with this argument that the Metropolitan Borough Council should be able to deal with the question of the depth of foundations, which might in some cases affect the stability of other works which the Dock Company were authorised and empowered to maintain. In favour of the appellants the judgment

in the *City and South London Railway v. London County Council*, 1891, 2 Q. B. 513; 60 L. J. M. C. 149, was relied upon; and to a certain extent it is an authority in their favour. It does not, however, seem altogether to conclude the case. That was a case in which the London County Council complained that a station erected by the City and South London Railway Company did not conform with the general building line. The Court of Queen's Bench and the Court of Appeal decided that the company were not bound by the provisions of the Metropolitan Management Act in this respect, and that notwithstanding that the building could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense. In that case the Court of Appeal held that if the buildings which the railway company were erecting were buildings necessary for the statutory purpose, it was not within the power of the County Council to dictate how in particular the company should arrange their buildings, and how in particular they should construct them. That case cannot be regarded as a direct authority for the point raised in the present case, because, as we have already pointed out, the work here constructed was not a work expressly authorised as in the *City and South London* case, but it was only something which the Company found it necessary to do in consequence of a building previously existing having been destroyed by the works specially authorised. It is, however, found by the learned magistrate in paragraph 12 of the case that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the Swing Bridge Road authorised by section 4 of the Act of 1894. Upon the whole we are of opinion that the principle ought to be extended to this case. It seems to us that dealing with a statutory undertaking as to which both the rights and the obligations are imposed by statute upon a particular body, express enactment, or a clear implication, is necessary in order to transfer the responsibility to a body acting under a general statute. We also think that to a certain extent the reference to the Metropolitan Management Acts in the later sections of the Statute to which we have referred confirms this view. We, however, decide the case upon the broad principle that the interference and control involved in section 76 of the Metropolitan Management Act, 1855, is inconsistent with the powers conferred upon the appellants under their statutory authority. It was said that this view was contrary to the decision of this Court in the *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe* (1903) 1 L. G. R. 551; 88 L. T. 772, but when that case is examined this will not be found to be so. In that case a question arose as to notice being given to a number of public authorities, and it was alleged that because a Provisional Order, confirmed by Act of

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Parliament, gave the Board of Trade and the Postmaster-General certain rights of control over the character of the structures, that excluded the necessity of complying with the provisions of the London Building Act, 1894. The Court decided in that case that the protection given to one class of the public by the control of those two authorities, namely, the Board of Trade and the Postmaster-General, ought not to deprive the public of the protection given to them by the London Building Act. That decision obviously in no way conflicts with the judgment which we are giving.

For the above reasons we are of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants—W. R. Millar and Sons.

Solicitor for the respondents—Fredk. Ryall, Town Clerk.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

CAREY v. BEXHILL CORPORATION.

1908.

Dec. 8.

Streets—Private street works—Objections—Grounds of objection—Objection that alleged street is not a “street” within the meaning of the Act—Admissibility of evidence that alleged street is a highway repairable by the inhabitants at large—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 5, 7.

For the purpose of showing that an alleged street does not come within the definition of “street” in section 5 of the Private Street Works Act, 1892, an owner of premises whose notice of objection is framed under section 7 (a), as an objection that the alleged street is not a street within the meaning of the Act, may give evidence that the alleged street is a highway repairable by the inhabitants at large, as if the notice had been framed under section 7 (b) specifically raising the objection that the street is so repairable.

Quære, whether on the hearing of an objection under the Act the justices can amend the notice of objection so as to let in evidence which would be inadmissible under the notice as drawn.

CASE stated by justices for the county of Sussex, who had disallowed certain objections taken by the appellant to proposals of the respondent Corporation for the execution of private street works in Springfield Road, Bexhill, under the Private Street Works Act, 1892.

Upon the hearing of these objections the following facts were admitted or proved before the justices:—

The Bexhill Urban District Council passed a resolution on October 17, 1898, that the surveyor be instructed to prepare plans, sections, estimates, specifications, and provisional apportionments for the making up (among other streets) Springfield Road.

The surveyor accordingly prepared the plans, sections, estimates, specifications, and provisional apportionments, which were approved by the Council by resolution on August 21, 1899. The resolution was never formally rescinded.

On September 1, 1902, the Council resolved to proceed with Springfield Road as to the north portion lying between Holliers Hill Road and the south side of Cambridge Road, making up both carriageway and footpaths to the full width of 36 feet, and as to the south portion lying between the south side of Cambridge Road and a point 200 feet south of Beaconsfield Road, where the difficulty had arisen, making up only the carriageway, kerbing, and channelling.

On October 20, 1902, the Council passed the following resolution,

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notice of which was afterwards duly published, viz.:—"That the specifications, plans and sections, estimates and provisional apportionments of proposed private street works of sewerage levelling paving metalling flagging kerbing channelling and making good such part of Springfield Road as lies between Holliers Hill Road and the south side of Cambridge Road, and sewerage levelling metalling kerbing channelling and making good such part of Springfield Road as lies between the south side of Cambridge Road and a point 200 feet south of Beaconsfield Road, now submitted to the District Council by the surveyor be approved without modification or addition; and that the necessary steps be taken for the carrying out of such works in accordance with such specifications, &c., and also in accordance with the Private Street Works Act, 1892." Copies of this resolution were duly served in accordance with section 7 of the Act of 1892.

The appellant is the owner of two freehold pieces of land having frontages of 82 feet 8 inches and 95 feet 9 inches respectively to the lower portion of Springfield Road referred to in second part of the resolution lastly recited; and the total estimated apportionment charged on him is £134 9s. 10d.

Within the time prescribed by the Act the appellant gave to the Council the following notice:—"I hereby give you notice that I, the undersigned, being the owner of certain land numbered 7 and 8 on the plan and provisional apportionment relating to the portion of the said road referred to in the said resolution, and therein shown as liable to be charged with part of the expenses of the above-mentioned works, object to your proposals in the matter on the following grounds:—(1) That the alleged part of a street does not form part of a street within the meaning of the Act; (2) that there has been a material informality in respect of the resolution, inasmuch as another resolution approving of other plans without modification or addition, and that the necessary steps be taken to carry out other works in the same street, have never been carried out and the resolution has never been rescinded; (3) that the proposed works are insufficient or unreasonable, and that the estimated expenses are excessive."

At the hearing the borough surveyor proved in his evidence in chief that Springfield Road led to another road called Beaconsfield Road, and that there was a public footpath running along part of the site of the proposed road on the south-east side, that is to say, on the south-west to the appellant's land, but he stated this footpath was not repairable by the inhabitants at large, and had never been repaired by the Urban District Council. He added that if it were the Corporation would have to repair all the footpaths in the district. The justices refused to admit evidence by the appellant that it was a highway repair-

able by the inhabitants at large, on the ground that no notice of this objection had been given under section 7, subsection (b), of the Private Street Works Act, 1892.

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It was contended on behalf of the appellant that he was entitled to call evidence of the existence of a highway repairable by the inhabitants at large, because although he had not given notice of the objection under subsection (b) of section 7 of the Private Street Works Act, 1892, he had given notice under subsection (a). He relied upon the difference in the definition of the word "street" in section 5 of the Private Street Works Act, 1892, and the definition in the Public Health Acts. The appellant also relied on *Rishton v. Haslingden Corporation*, 1898, 1 Q. B. 294; 67 L. J. Q. B. 387. He further contended that as the respondents were in no way taken by surprise the justices should amend the notice of objection. The justices decided that in order to give them jurisdiction under this Act the question of whether the street were in the whole or in part a highway repairable by the inhabitants at large must be specifically raised upon a notice of objection given under section 7, subsection (b), and that a notice under subsection (a) alone is not sufficient to enable the objector to raise the point. They also held that in view of section 8 (2) of the same Act they had no power to amend the notice of objection.

The questions for the decision of the Court were—(1) Whether the justices were right in excluding evidence of the existence of a footpath repairable by the inhabitants at large without notice of objection having been given under subsection (b); (2) whether the justices had jurisdiction to amend the notice, and, if so, were bound to do so in favour of the appellant.

The material provisions of the Private Street Works Act, 1892, are sufficiently referred to in the judgment of Lord Alverstone C.J.

Macoun for the appellant. The justices were wrong in excluding evidence that the public footpath running along part of the side of the proposed street was repairable by the inhabitants at large. The notice given under clause (a) of section 7 was enough, having regard to the definition of street, to let in the evidence. The fact that clause (b) is superfluous if clause (a) is given its natural meaning is not sufficient to lead the Court to cut down the meaning of clause (a). The justices were also wrong in refusing to amend the notice and to adjourn the hearing. Section 8 contains an express power of amendment, and the last two lines of subsection (1) of that section empower the justices to "adjourn the hearing and direct any further notices to be given."

Macmorran, K.C., and *C. A. M. Barlow* for the respondents. There was no power to amend the notice of objection. The jurisdiction of

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the justices only exists with regard to the notice given, and to allow such an amendment as is suggested in this case would be tantamount to allowing a fresh objection to be taken out of time. The objection taken will not let in evidence that the street is in whole or in part a highway repairable by the inhabitants at large. Clause (a) of section 7 is intended to deal with a state of facts entirely different from those contemplated by subsection (b). It is to meet the case where the contention is that the alleged street is not a street at all, as, for instance, in *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; S.C. *nom*, *Reg. v. Sheffield (Recorder)* 53 L. J. M. C. 1. If the objection be that the alleged street is a highway repairable by the inhabitants at large it must be specifically raised under subsection (b); for it is the clear intention of the Act that the local authority are to be informed of the precise case they have to meet, and be prepared accordingly.

LORD ALVERSTONE C.J. I do not quite understand why the view expressed against the admissibility of this evidence was insisted on. I have no desire to hold that there is no power to amend the notice of objection. Should it be necessary to give judgment on that point, we might find it necessary to hear further argument; but it must not be thought that we are, at present, prepared to hold that justices hearing objections of this nature cannot, in a case where they may consider it desirable, and subject to any question as to costs, adjourn a case so that a further notice may be given. But that is a question upon which we do not, at the present moment, give any decision. It seems to me that this evidence was admissible upon the notice which was given. Section 7 admits of notice being given: "(a) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act; (b) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." The definition of street is given in section 5 as follows: "The expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large." Under section 7 (a) the owner may give a notice traversing all the allegations of fact that must be proved to show that the street is a street as defined by the Public Health Acts, and is not a highway repairable by the inhabitants at large. It may possibly happen that such a notice would put other matters in issue; but I cannot understand why it should be thought that evidence may not be given of that which would prevent a street coming within the definition of "street" in section 5. It seems to me it would be quite possible, as has been pointed out by Mr. Macmorran, that if it were necessary to raise that

question alone it could be done under clause (b) of section 7. I think myself that the two clauses (a) and (b) of section 7 do in a measure overlap, at any rate to the extent that a street may be said not to be a street within the Act because it does not fulfil the condition of not being a highway repairable by the inhabitants at large. I do not think that an objector under clause (a) is to be limited to disproving the first part of the definition in section 5, and not allowed to adduce evidence to show that the alleged street does not comply with the second part of the definition. I think the justices were wrong in excluding the evidence in this case, and that they ought to have received it. Therefore, without deciding whether or not the justices could have allowed the appellant to amend his notice and adjourn the hearing, we are of opinion that the case must go back to them in order that they may receive the evidence, and if any further point arises it can come up before us again.

LAWRANCE and KENNEDY JJ. concurred.

Appeal allowed. Case remitted.

Solicitors for the appellant—Lovell, Son, and Pitfield, for E. R. Willett, Bexhill.

Solicitor for the respondents—F. G. Langham, Hastings.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

Feb. 5

LINZELL v. FELIXSTOWE AND WALTON URBAN DISTRICT COUNCIL.

Bye-laws—Buildings—Exempted buildings—Building not “adapted to be used . . . as a place of habitual employment for any person in manufacture, trade, or business”—Stable for horses used in business.

A stable in which horses belonging to a builder are kept and in which they are fed and groomed is not a building “adapted to be used . . . as a place of habitual employment for any person in any manufacture, trade, or business” within the meaning of a clause in the model form exempting from building bye-laws any building which shall not exceed certain dimensions, and shall not, inter alia, be “constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment for any person in any manufacture, trade, or business,” and shall be at a certain distance from other buildings and property. Such a stable, fulfilling the necessary conditions as to dimensions, &c., is therefore exempt from bye-laws containing the exemption in question.

CASE stated by justices for the county of Suffolk before whom the appellant had been convicted and fined for a breach of bye-laws made by the respondent council with respect to new buildings in their district.

The appellant, a building contractor, had been summoned to answer an information laid by the respondents' clerk, which charged that he, on February 17, 1903, at Felixstowe, having erected a new building in Orwell Street there, unlawfully did not cause such building to be enclosed with walls of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together as provided by bye-law 10 of the bye-laws in force in the said urban district with respect to new streets and buildings, but did cause the same to be enclosed with walls of timber contrary to the bye-law and to the form of the statute in that case made and provided.

Bye-law 10 provided that: “Every person who shall erect a new building shall except in such cases as are hereinafter specified cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together—(a) with good mortar compounded of good lime and clean sharp sand or other suitable material; or (b) with good cement; or (c) with good cement mixed with clean sharp sand;

Provided always—(a) that where a new building intended for use as a dwelling-house shall be distant not less than fifteen feet from any adjoining building not being in the same curtilage, the person erecting such new building may construct its external walls of timber framing and in accordance with the following regulations . . .”

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Bye-law 2, clause (i), exempted from the bye-laws “any building which shall not exceed in height thirty feet as measured from the footings of the walls, and shall not exceed in extent 125,000 cubic feet and shall not be a public building, and shall not be constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment for any person in any manufacture, trade, or business, and shall be distant at least eight feet from the nearest street, and at least thirty feet from the nearest building and from the boundary of any adjoining land or premises.”

At the hearing of the information the following facts were admitted or proved in evidence :—

(a) The building in question which was erected in timber and roofed in wood was divided by partitions which did not extend above the eaves of the roof. That one end was used as a cement store and raw goods store, that the middle portion was used as a timber store, and that the other end was a stable and so used.

(b) The building did not exceed 20 feet in height, and the cubic extent was less than 125,000 cubic feet.

(c) It was not a public building, nor constructed to be used wholly or partly for human habitation.

(d) For the respondents it was admitted that no part of the building excepting the stable was adapted to be used for habitual employment in any manufacture, trade, or business.

(e) It was admitted that the stables constituted the infringement.

The appellant contended that the building upon the aforesaid facts was exempted under the bye-laws.

The respondents contended that the building was constructed or adapted to be used as a place of habitual employment for any person in any manufacture, trade, or business, and that therefore it was not exempted.

The justices were of opinion that the building was not exempted under the bye-laws.

The question for the opinion of the Court was whether the conviction was right and ought to be affirmed.

In the course of his evidence for the prosecution before the justices the surveyor to the respondent council said: “I do not think any part of the building except the stables is adapted to be used for habitual employment in any manufacture, trade, or business. The horses being

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employed by Linnell in his trade constitute in my opinion habitual employment. If the stable were done away with the objection would end. If the stable had not been put up the committee would not have objected."

Ashton for the appellant. This stable is not a place of habitual employment of persons in any trade ; it is a stable in which a building contractor puts his horses when not at work. The respondents' surveyor urged that this use of the horses by the appellant constituted an habitual employment of the man who fed and groomed them. To uphold such a contention would be to stretch the bye-law too far. This is not a public building or place of habitual employment and is exempt from the operation of the bye-laws.

R. Cunningham Glen for the respondents. This is purely a question of fact for the justices, and the appellant is hit by bye-law 10 as a person erecting a new building which the bye-law requires to be made of stone, brick, or other incombustible material. The bye-laws are made under section 157 of the Public Health Act, 1875, for the prevention of fire and for the provision of drainage. A stable is a class of building to which drainage regulations are singularly applicable. Again this is a place in which there must be an habitual employment of the person who attends to the horses. It has been erected for the purpose of the builder's business and is used wholly in connection with that business, and is the habitual place of employment of his man who attends to the horses.

Ashton replied.

LORD ALVERSTONE C.J. This case seems to be a striking instance of the absolute necessity of using some discretion and common sense in drafting bye-laws. I sympathise very much, if I may be allowed to say so, with Mr. Glen's contention. I think it is ridiculous that stables should be exempt from drainage. It is most desirable that stables should be subjected to drainage, but in the name of all that is common sense why cannot the framers of the bye-laws say stables if they mean stables.

When we look at the framing of this bye-law it does not tend to assist the builder or anybody else to know what they may do. Bye-law 10 begins by including every building. So far there is no difficulty. Then there are a long series of exemptions in bye-law 2, which precedes bye-law 10, and clause (2) exempts any building which shall not exceed 30 feet in height and does not contain more than 125,000 cubic feet and which complies with certain conditions.

The building in question consists of one structure in timber, roofed

in wood and divided by partitions. One end is used as a cement store, the middle portion as a timber store, and the other end as a stable. It is admitted by the respondents that no part of the building except the stable is adapted to be used for the habitual employment of a person in a manufacture, trade, or business.

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I think the magistrates have stated this case, not as a finding on the facts, but they have stated the facts as regards the building, and ask us whether these facts are within the words of the bye-law. It seems to me that this stable is not, within the words of the bye-law, a place for the "habitual employment of any person in a manufacture, trade, or business," because the horses in it are groomed and kept by a horse-keeper who is employed by the builder.

I must say, if this building is exempt, as it is under the portion of the bye-law relating to height and extent, then if it is to be brought in again by the later words of the bye-law, those words ought to be more reasonably clear than "adapted to be used . . . as a place of habitual employment for any person in any manufacture, trade, or business." It cannot be that because a man grooms a horse that that is a trade or business. The words are meant, in my opinion, to refer to persons who are employed in manufactories or in trade or business in the nature of carrying on the trade which is the trade of the person whose building it is. While I agree that it is desirable that there should be bye-laws which should include the drainage of stables, I think this bye-law is not sufficient to make this building, which is not 30 feet high, come within it. I think, therefore, the appeal must be allowed.

WILLS J. I agree.

KENNEDY J. I am of the same opinion.

Appeal allowed.

Solicitors for the appellant—Field, Roscoe, & Co.

Solicitors for the respondents—Baker and Lees, for F. B. Jennings, Felixstowe.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

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COURT OF APPEAL.

July 17, 20, 24.

MOORE v. TODD.

Streets—Private street works—Covenant to maintain road until "taken to" by local authority—Recovery of expenses of private street works executed by local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 41.

The defendant in the course of developing certain building land in the year 1888 formed a road on the boundary between his property and land of the plaintiff, and laid a sewer under it. The plaintiff contributed towards the expense, and in consideration of such contribution the defendant covenanted that it should be lawful for the plaintiff and his tenants to use the roadway, and that the plaintiff should not be under any liability "to contribute to the maintenance or repair of the said roadway and sewer" or any works connected therewith, but that the same should be solely maintained by the defendant "until the same should be taken to by the parish or some other local or public authority."

In 1900 the local authority made the road up under section 150 of the Public Health Act, 1875, at the expense of the frontagers, and afterwards declared it a highway repairable by the inhabitants at large.

Held, that the plaintiff was not entitled under the covenant to recover from the defendant the share of the expense of making up the road apportioned on the plaintiff under the section, as the work done by the local authority was not mere maintenance and repair.

Decision of Bigham J. (1 L. G. R. 113) reversed.

APPEAL from a decision of Bigham J. (1 L. G. R. 113) in an action tried before him without a jury, in which the plaintiff claimed £108 under a covenant in a deed, and, in the alternative, the like sum for damages for breach of the said covenant.

In the latter part of 1881 the defendant, the Rev. John Wood Todd, of Forest Hill, Kent, purchased a freehold building estate at Beckenham, of about 80 acres, between which and land belonging to the plaintiff, John Moore, there was an old lane known as the Green Lane, leading from the Bromley Road to Scott's Lane.

In order to develop the defendant's land it was necessary that a new and wider road with proper drainage, &c., should be made in the place of this lane, and inasmuch as such road would ultimately be for the benefit of the plaintiff's land as well as that of the defendant's, it was agreed that the plaintiff should contribute £250 towards the defendant's expenses, which amounted to a far greater sum. By a deed

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dated November 22, 1888, and made between the plaintiff, of the one part, and the defendant, of the other part, after reciting that the defendant, being desirous of developing his lands for building purposes, had recently widened the roadway between his and the plaintiff's land by throwing part of his own land into the same, and had constructed a sewer or main drain under the said roadway, and had metalled and made up the surface of the said roadway, and that the plaintiff had agreed to contribute £250 towards the expenses incurred by the defendant in executing the works aforesaid upon condition of having such grant and covenant by the defendant as were thereafter contained, it was witnessed that the defendant granted and covenanted with the plaintiff that it should be lawful for the plaintiff, his heirs and assigns and his and their tenants, to use the said roadway, and the said sewer or main drain under the said roadway, and "that the said John Moore, his heirs or assigns or his or their tenants, shall not be under any liability to contribute to the maintenance or repair of the said roadway and sewer or main drain or any works connected therewith, but that on the contrary the same and every part thereof shall be wholly and solely maintained by the said J. W. Todd, his heirs, executors, administrators or assigns unless and until the same shall be taken to by the parish or some other local or public authority."

In 1900 houses had already been built on each side of a portion of this new road, then named "Oakwood Avenue," beginning at the Bromley Road end, and at the instance of persons occupying these houses the Beckenham Urban District Council, who had adopted Part III. of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), but had not adopted the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), served notices upon the frontagers on June 9, 1900, to sewer, level, metal, pave, kerb, flag, channel, and make good this portion of Oakwood Avenue under section 150 of the Public Health Act, 1875, and as the notice was not complied with executed the work and charged the frontagers with the cost. On May 28, 1901, after the works had been completed, the Council, by notice under section 41 of the Public Health Acts Amendment Act, 1890, declared that the portion of the street so made up as from and after that date should be a highway repairable by the inhabitants at large.

The amounts payable by the respective owners in respect of their frontages were in due course apportioned, and the plaintiff ultimately paid the sum of £108, which he sought to recover in the present action. He claimed that in breach of the covenant the defendant had neglected to maintain the roadway, and in consequence the plaintiff had been compelled by the local authority to contribute to the maintenance

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and repair of the road, and to pay, and, on 5th October, did pay, £108 in respect thereof.

By his defence the defendant admitted the deed, but denied that he had neglected to do any of the matters mentioned in the statement of claim, or that he had in any way broken his covenant. He pleaded that the claim by the local authority was in respect of the sum apportioned as the plaintiff's share as a frontager on the road of the expense incurred by the local authority after they had taken to the road and sewer or main drain and not otherwise; and, further, whether they were taken to or not, that such sum of £108 was not paid to the local authority for maintenance or repair of the road within the meaning of the deed, but was paid to it in respect of the works mentioned in the notice given by the authority to the plaintiff under section 150 of the Public Health Act, 1875.

Bigham J. held that the plaintiff was entitled under the covenant to recover from the defendant the share of the expense of making up the road apportioned on the plaintiff under the last-mentioned section. The decision of Bigham J. is reported 1 L. G. R. 113.

The defendant appealed.

C. A. Russell, K.C., and *C. C. Scott* for the defendant. The Public Health Act, 1875, s. 150, empowers the local authority to call upon owners and occupiers to sewer, flag, &c., but the question here is what liability the defendant took upon himself. His liability did not extend to the making up of the road: *Lister v. Lane*, 1893, 2 Q. B. 212; 62 L. J. Q. B. 583; *Wright v. Lawson* (1903) 19 *Times* L. R. 203, 510. The public authority would not take over this road unless lighting, as well as the sewerage and paving, were done, but there can clearly be no obligation on the defendant to pay for lighting. The defendant cannot be called upon to bear the cost of transforming the road altogether. He is only liable for maintenance and repair.

Bankes, K.C., and *Colam* for the respondent. The road is not taken over by merely giving notice to the frontagers, but by the public authority declaring it repairable by the inhabitants at large under the Public Health Acts Amendment Act, 1890, s. 41. The burden of the covenant by the defendant continues until the road is taken over by the public authority: *Attorney-General v. Bidder* (1881) 47 J. P. 263. The defendant's covenant means that he must maintain the road from time to time until it is actually taken over. The covenant covers all the works which were done here.

[VAUGHAN WILLIAMS L.J. referred to "Glen on Highways" (2nd ed.), p. 299.]

C. A. Russell, K.C., in reply. The covenant was never intended to

enable the plaintiff to get rid of his liability under the Public Health Acts.

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Cur. adv. vult.

VAUGHAN WILLIAMS L.J. The question here is what is the object and meaning of the covenant. I think it appears to be very clear from the latter part of the covenant that the road was to be wholly and solely maintained by the defendant until it should be taken over by the local authority. The question really is whether the defendant is liable to indemnify the plaintiff against the sum which the plaintiff has been called upon to pay by reason of the local authority exercising their rights of paving, sewerage, &c., under the Public Health Act, 1875. I confess for my own part that I do not think the answer to that question is perfectly plain. I think there is a good deal to be said for the conclusion at which Mr. Justice Bigham arrived. Really his decision was based upon the word "contribute" followed by the words "unless and until the same"—that is, the road—"shall be taken to by the parish or some other local or public authority." The learned judge thought that these words pointed to a liability for the works which had been required by the local authority. Though I think there is a great deal to be said for that view, I am not satisfied that it is correct. I think the word "contribute" may properly be limited to contributions for maintenance and repairs which from time to time become necessary for the roadway which had been made up by the defendant, and to the expense of which the plaintiff had contributed. As both my learned brethren take that view very strongly, and I agree with it, I think that this appeal should be allowed.

ROMER L.J. The sole question before us is the construction of this deed, and I agree with the conclusion of Lord Justice Vaughan Williams. It is to my mind reasonably clear that the defendant was not bound to alter or improve the road, but only to repair and maintain it as he had made it up. I have looked to see what it was that the local authority required to be done for making up the road. They did not require mere works of repair and maintenance of the existing road, and I cannot see anything which would come under the head of maintenance or repair. What is required was in substance and in fact works of alteration and improvement. It appears to me that the plaintiff has failed to establish any liability on the part of the defendant. I do not think any ambiguity is introduced by the use of the word "contribute." It seems to me the natural word to use to express the liability of the plaintiff. The defendant had made up the road for the benefit of himself and the plaintiff, and the plaintiff had been asked to contribute towards the cost. It might have been

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thought that unless something was said the plaintiff would have continued liable to contribute.

STIRLING L.J. I am of the same opinion, though I have not arrived at this conclusion without some hesitation, as Mr. Justice Bigham took an opposite view. My view agrees with that expressed by my learned brethren. The question turns on the construction of the defendant's covenant. The deed deals with an existing roadway over which the plaintiff has an easement. We must consider what the position of a person who has an easement of this kind granted to him would be in the absence of express stipulation. Incident to that easement is a right to go on and repair, &c. *Primâ facie* he would have to keep the road in repair if he wished to enjoy his right of passage, and the question would be whether the general law applied in this case. The object of the covenant was to show how the liability to repair and maintain was to be borne in the circumstances of this case. The result, putting it shortly, was that the liability was thrown on the defendant, and he was bound to keep the existing road in repair. The powers under section 150 of the Public Health Act, 1875, extend to matters which the plaintiff could not require the defendant to do; and the local authority have required works to be executed for which the defendant was not liable. It seems to me that in these circumstances it would really impose on the defendant a larger burden than would be imposed by the deed if fairly construed, if the decision of Mr. Justice Bigham should be upheld.

Appeal allowed.

Solicitors for the appellant—Badham and Cousins.

Solicitors for the respondent—F. C. Matthews & Co.

High Court of Justice.

KING'S BENCH DIVISION.

HILL v. PANNIFER AND OTHERS.

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Mar. 4.

Poor rate—Recovery—Distress—Costs of levy—Distress (Costs) Act, 1817 (57 Geo. III. c. 93)—Distress (Costs) Act, 1827 (7 & 8 Geo. IV. c. 17)—Distress for Rates Act, 1849 (12 Vict. c. 14) s. 1.

The Distress for Rates Act, 1849, by authorising, in connection with the levy of distress for poor rates and certain other rates, the levy of the reasonable charges of taking, keeping, and selling the distress, has removed, as regards these rates, the limitations imposed on such charges, where the amount due does not exceed £20, by the Distress (Costs) Acts, 1817 and 1827.

CASE stated by justices for the county of Suffolk, as follows :—

On September 24th, 1903, a complaint was heard before the petty sessional court at Hadleigh, wherein the appellant, Robert William Hill, alleged that the respondents or some of them, having sold or caused to be sold certain goods of the appellant, to satisfy a poor rate for the parish of Bildeston, in the county of Suffolk, and certain costs and charges, levied by distress upon the goods, on or about July 28th, 1903, levied and received from the appellant, and retained and took from the produce of such goods sold, greater costs and charges than are mentioned and set down in the schedule to the Distress (Costs) Act, 1817 (57 Geo. III. c. 93), to wit, a charge of 14s. for the expenses of an "auctioneer," contrary to the provisions of that statute and of the Distress (Costs) Act, 1827 (7 & 8 Geo. IV. c. 17), and the Distress for Rates Act, 1849 (12 Vict. c. 14).

Upon the hearing of the complaint it was proved that the respondent Robert Pannifer, was assistant overseer, and the other respondents, Gumsey and Shipp, overseers of the poor for the parish of Bildeston.

On July 2nd, 1903, Pannifer obtained from two justices a warrant of distress against the appellant, directing him to make distress of the goods of the appellant, and to sell the same, if within the space of five days after making the distress, the sum of £1 then due and owing from the appellant in respect of poor rate, and the further sum of 5s. 1d. the costs of obtaining the warrant, were not duly paid by the appellant.

Pannifer made distress upon the goods and demanded the payment of the amount set out.

On July 13th, the appellant paid the amount claimed, except 1s. or the amount due in respect of poor rate, and that sum he declined to pay.

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On July 28th, 1903, Pannifer sold the appellant's goods to satisfy the unpaid balance of the rate, and after the sale he gave the respondent a statutory notice of costs and charges as required by the Distress (Costs) Act, 1817.

The sum realised by the sale was £1 5s. from which the respondents took and retained, in addition to the sum of 1s. for the rate, the following costs and charges:—Levy 3s. ; taking, keeping, and use of room, &c., 6s. 3d. ; auctioneer 14s. ; and paid the balance of 9d. to the appellant.

The sum of 14s. was one-third of a fee of two guineas paid by the respondent to an auctioneer in respect of the sale at one time of the goods of the appellant, and of two other ratepayers against whom distress warrants had been granted.

In these matters Pannifer acted under the authority of the other respondents.

It was contended before the justices by the appellant that the costs and charges to which the respondents were entitled were limited by the Distress (Costs) Act, 1817, as applied to the levy of a distress in respect of poor rates by the Distress (Costs) Act, 1827, and that the charge of 14s. for the auctioneer's fee was an excessive and illegal charge.

The appellant further contended that the Distress for Rates Act, 1849, did not entitle the respondents to reimburse themselves by appropriating any higher or other costs or charges than those which were authorised by the Distress (Costs) Act, 1817, as applied to proceedings for the recovery of poor rates.

On behalf of the respondents it was contended that the words of the Distress for Rates Act, 1849, s. 1, and the express provisions of the warrant of distress, which cited those words, entitled them (notwithstanding the earlier provisions of the Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827), to deduct and retain from the proceeds of the sale of the appellant's goods, costs and charges—to wit, in the words of the Act "the reasonable charges of selling"—in excess of and other than those specified in the schedule to the Distress (Costs) Act, 1817, and that the last-mentioned statute must be considered to be *pro tanto* revoked and amended.

The justices were of opinion that the respondents' contention was right, and found that the charge of 14s. was a reasonable and proper charge, and one that by law could properly be made in the circumstances of the case, and therefore they dismissed the complaint with costs, but stated this case for the opinion of the Court on the question of law raised by the proceedings.

The Distress (Costs) Act, 1817 (57 Geo. III. c. 93), contains the following provisions:—

Section 1. No person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress . . . than such as are fixed and set forth in the schedule hereunto annexed . . .

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Section 2. If any person or persons whatsoever shall in any manner levy, take, or receive from any person or persons whatsoever, or retain or take from the produce of any goods sold for the payment of such rent, any other or greater costs and charges than are mentioned and set down in the said schedule . . . it shall be lawful for the party or parties aggrieved by such practices to apply to any one justice of the peace . . . for the redress of his, her, or their grievance . . . and if it shall appear to such justice that the person or persons complained of shall have levied, taken, received, or had other and greater costs and charges than are mentioned or fixed in the schedule hereunto annexed . . . such justice shall order and adjudge treble the amount of the moneys so unlawfully taken, to be paid by the person or persons so having acted to the party or parties who shall thus have preferred his, her, or their complaint thereof, together with full costs.

* * * * *

Schedule of the Limitation of Costs and Charges on Distresses for small rents.

	£	s.	d.
Levying distress	0	3	0
Man in possession, per day	0	2	6
Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods.			
Stamp the lawful amount thereof.			
All expenses of advertisements, if any such	0	10	0
Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale.			

The Distress (Costs) Act, 1827 (7 & 8 Geo. IV. c. 17), provides as follows:—

All the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act [The Distress (Costs) Act, 1817] contained shall extend and be construed to extend, and shall be applied and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever, in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments, or impositions shall not exceed the sum of twenty pounds . . . and that such costs and charges, and no other, shall be taken and payable as the costs and charges of the levy and disposition of such distresses . . .

The Distress for Rates Act, 1849 (12 Vict. c. 14), provides as follows:—

Section 1. It shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for

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the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England or Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum, such as they may deem reasonable, for the costs and expenses which such overseers or surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress.

Section 8. The forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.

SCHEDULE.

* * * * *

[C. 1.]

Warrant of Distress against one Ratepayer.

Whereas These are therefore to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B. ; and if within the space of [*five*] days after the making of such distress the said sum, and the sum of . . . for the costs incurred by the said [churchwardens and overseers or surveyors] in obtaining this warrant, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale you retain the said sums of . . . and . . . rendering the overplus, on demand, to the said A. B., the reasonable charges of taking, keeping, and selling the said distress being first deducted

Robson, K.C., Bodkin, and Bruce Williamson for the appellant. The main question in this case is whether the provisions of the Distress (Costs) Acts, 1817 and 1827, limiting the charges that can be made in connection with the levy of distress for rent or for rates or taxes, where the amount due does not exceed £20, have been impliedly repealed, as regards poor rate, by the Distress for Rates Act, 1849. It is submitted that they have not been so repealed.

The Act of 1849, after a preamble reciting that provision has been made for the recovery of poor rate and highway rate by distress and sale, but that no provision is made for levying the costs of the overseers or highway surveyors in the recovery of such rates, proceeds by section 1 to empower the justices in any distress warrant for the levy of these rates, or of any other rate recoverable in like manner, to order that a sum for the costs of obtaining the warrant shall also be levied "together with the reasonable charges of the taking, keeping, and selling of the said distress." It is upon these last words of the section that the respondents rely. But it is submitted that they have not the effect of removing the limitations imposed by the Acts of 1817 and 1827. That they were not intended to have this repealing effect is, it

is submitted, abundantly clear for more than one reason. In the first place, at the time when the Act of 1849 was passed there was power to levy the charges, not by virtue of any specific statutory provision, but by virtue of the power to levy the rate itself, which, as had been held, included power to levy enough to cover such charges: *Moyse v. Cocksedge* (1748) Willes 636. The preamble to the Act of 1849, therefore, in reciting that there was no provision for the levy of the costs incurred by the overseers, was referring to the costs of obtaining the warrant only. That there was no power to give the overseers the costs of obtaining the warrant was true. There had previously apparently been power to give such costs under an Act of 1778 (18 Geo. III. c. 19). But the provisions of that Act as to giving costs on summary proceedings had been wholly repealed by the Summary Jurisdiction Act, 1848, and, though replaced for most purposes by the provisions of that Act, had not been replaced with reference to proceedings for the recovery of poor rate. Accordingly the object of section 1 of the Act of 1849, as shown by the preamble, was to enable the costs of obtaining the warrant to be levied, which could not be done as the law stood. There is nothing to suggest an intention to amplify the existing power of levying the costs of taking, keeping, and selling the distress. The words referring to these costs were, it is submitted, inserted, *ex majore cautela*, and were intended to refer to the existing power to levy such costs. They should be read as meaning either reasonable charges within the statutory maximum, or possibly as meaning the statutory charges.

Again, it is clear that the provisions of the Acts of 1817 and 1827 were left in force as regards distress for rent and distress for taxes and for certain rates not coming within the purview of the Act of 1849, and it is impossible to suppose that it was intended to remove the limitations imposed by the earlier Acts with reference to certain rates and taxes and leave them in existence as to others.

It is very important that there should be a limitation on these charges in the case of distress for poor rate, and that there should be a summary remedy if improper charges are made, inasmuch as distress for poor rate is very generally levied on persons with very small means who are greatly in need of protection.

Further, in any case the charges in the present case were not reasonable. A charge of 24s. on a levy of 1s. is manifestly unreasonable: *Ex parte Arnison* (1868) L. R. 3 Ex. 56; 37 L. J. Ex. 57.

N. Stewart and Nolan for the respondents. It is submitted that the provisions of the Act of 1849 are so inconsistent with those of the Acts of 1817 and 1827 that the later Act must be taken to have repealed the earlier Acts *pro tanto*. Had it been intended to preserve their

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effect as regards the poor rate, it would have been extremely easy for the Legislature to have said so. The argument for the appellant is in substance that all the Act of 1849 was intended to do was to re-enact the statute of 1778 as regards poor rates. But the language of the Act is not at all the language that would have been appropriate for that purpose.

[They referred to *Lumsden v. Burnett*, 1898, 2 Q. B. 177; 67 L. J. Q. B. 661.]

Robson, K.C., in reply.

LORD ALVERSTONE C.J. In my opinion this appeal fails. For the purposes of this proceeding we have here to construe section 1 of the Distress for Rates Act, 1849, and the other sections of that Act and the schedules. The preamble of the Act is as follows :—"Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor, or is rated or assessed in any rate for the highways, in England or Wales, by distress and sale of his goods and chattels, and in default of such distress by commitment to prison until the same shall be paid; but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of the highways in the recovery of the same respectively." If it be a just criticism to say that that is not an accurate recital because it ought merely to have referred to the costs of the obtaining of the warrant, to my mind that does not affect the true construction of the enacting words. Of course the preamble ought to be looked at for the purpose of finding a guide to any construction which is doubtful, or of deciding between two constructions which may be put upon the words. But it seems to me, even if Mr. Robson is right, there is a clear enactment that "it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England or Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum, such as they may deem reasonable, for the costs and expenses which such overseers or surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted"—that deals with the particular point which Mr. Robson said had been left unprovided for by the existing enact-

ments—"together with the reasonable charges of the taking, keeping, and selling of the said distress."

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Then the statutory form of the warrant of distress again contains the words "together with the reasonable charges of taking and keeping the said distress," and directs that if they shall not be paid then the goods and chattels are to be sold, rendering the overplus on demand, "the reasonable charges of taking, keeping, and selling the said distress being first deducted." Mr. Robson says that the earlier statute, the Distress (Costs) Act, 1817, is still in force as extended to poor rate by the Distress (Costs) Act, 1827. The Act of 1827 extended the Act of 1817 to "land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever." Therefore it may be regarded as a general statute. Having regard to the existence of that Act, Mr. Robson suggests that the provisions of the Act of 1849, as to the costs of distress mean one of two things; either they mean reasonable charges within the statutory maximum, or else they mean statutory charges.

I think it would require much clearer words than there are in this statute, and much clearer expression of an indication that the old statutory maximum was to be applied, to enable us to put that construction on the Act. It seems to me we must either find words which state that the charges are limited or are provided by law as now existing, or are to be charges not exceeding those that are already provided in respect of the levying of distress by virtue of these statutes. I cannot help feeling that the Act of 1849 is a special statute with regard to poor rates. It is a statute that is enacted in reference to poor rates, and I can well imagine that the Legislature, in dealing with poor rates, meant to give the overseers, subject to the charge being reasonable, a protection against the costs and charges they had to pay. I am satisfied that this construction has not been put upon the charges which have been allowed to be levied under warrants for poor rates, and I can find no trace of any authority which says that with regard to the Distress for Rates Act, 1849, the maximum scale in the Distress (Costs) Act, 1817, was intended to apply. I think the language of the statute is too strong for us. I think that the statute did mean to say that the overseers of the poor should be entitled to have their reasonable charges for keeping, levying, and selling goods. The magistrates have found the charge of 14s. is a reasonable charge, and I think that this was in accordance with the statute providing that the overseers should have their reasonable charges. Therefore, I think, this appeal should not be allowed.

KENNEDY J. On the whole, though I confess not without very great doubt, I think the view my Lord has taken is the preferable one. It is

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not very easy, I think, in many cases where there is no direct reference in any shape or form in a later Act to an earlier Act, to say whether the proper inference is that the later Act has overruled the earlier Act, and abolished it in so far as its directions or enactments are concerned, or whether we ought not to find some way in which both statutes can be applied to a certain extent, the one merely being treated as modifying the other.

The argument which, I confess, seems to me an argument of considerable power which Mr. Robson has used in this case is this :—That while this last Act—the Distress for Rates Act, 1849—provides that the magistrates may make an order for a distress that shall include the reasonable charges of taking, keeping, and selling the chattels, yet that ought to be read with the Acts of 1817 and 1827, which certainly have never been specifically repealed, and which, in cases of distress for poor rate among other things, have enacted that those charges of taking and keeping shall not exceed a certain sum. It is suggested that the fair construction of the later Act is that the charges are to be reasonable, but not to exceed those which by the two earlier Acts have been thought by the Legislature to be sufficient ; that the later Act means reasonable within these statutory limits, which are imposed by unrepealed Acts of Parliament. It is true that even the later of these Acts is now an old Act, and that costs and charges will vary, but on the other hand it does seem to me that there is a good deal at any rate to be said in favour of the view that when Parliament passes a later Act without reference to an earlier Act, and that earlier Act is one which has been in force for a long time and is therefore well-known, one should try to construe the two consistently, if possible. Another, and it seems to me a still weightier argument was this : The poor rate affects a number of people not of great means with regard to whom Parliament has long ago, as these earlier statutes show, given protection in the form of a limitation of costs. Apparently the procedure for questioning the reasonableness of the charges has disappeared so far as the magistrates are concerned, if the view of the respondents be right. So far as I can see, and so far as the argument has called our attention to the sections, the right of a person who had unreasonable charges attempted to be forced on him in the levying, would be by bringing an action to recover money which had been obtained by a sort of duress. In other words, he would be driven to the ordinary courts instead of having the speedier and cheaper method of going before the magistrates by such a summons as was taken out in the present case.

I think, however, on the whole that we ought to face the conclusion that the Legislature has done two things which are inconsistent. It would have been very easy in the later Act, if it was intended to retain

the old and well-known maximum, to have used such words as "the reasonable charges of taking, keeping, and selling the distress, not exceeding those at present by law allowed." That has not been said ; therefore on the whole, although I think there is a good deal to be said for the other contention, as regards the protection of those upon whom these distresses are made, which seems to me a serious matter, I think the case is strong enough to allow me to say, since Parliament has chosen in the later Act to use the words "reasonable charges" without reference to the past, or the existing limitation, that inferentially the earlier sections so far as poor rate is concerned have been repealed.

CHANNELL J. I agree. I think the only question we have to consider is whether the words of the operative part of the Distress for Rates Act, 1849, are inconsistent with the continued existence of a statutory limit on the charges for these distresses which had previously existed. To me it seems the words are inconsistent. It is inconsistent with there being a limit by way of maximum on the charges to be made to say that the person levying is to have his reasonable costs—the present case shows it. These are costs which do exceed that maximum limit, and which are found to be in fact reasonable. It seems to me, therefore, that the second statute is necessarily inconsistent with the continued existence, not of the other statute as a whole, but of the other statute as applicable to poor rate.

Appeal dismissed.

Solicitors for the appellant—Lloyd George & Co. for Birkett, Ridley, and Francis, Ipswich.

Solicitors for the respondents—Salmon and Son, Bury St. Edmunds.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

1903-4.

Nov. 25, 26,
27, 28:

Dec. 1, 5, 15.
Jan. 20.

KNIGHT v. ISLE OF WIGHT ELECTRIC LIGHT AND POWER COMPANY, LIMITED.

**Nuisance—Noise—Vibration—Smell—Electric Lighting Works—Con-
struction of Works—Natural and ordinary enjoyment of
property—Injunction.**

The proprietress of a private school for young ladies complained of nuisance by noise, vibration, and smell arising from the adjoining works of a company supplying electric lighting by arrangement with a municipal corporation which had obtained a Provisional Order confirmed by Act of Parliament. She commenced proceedings before the defendants' works were completed, and in the interval between the date of the writ and the trial of the action the defendants so improved the construction and management of their machinery as to reduce the causes of the alleged nuisance.

Held—(1) that the acts complained of had frequently been such as, having regard to the circumstances and surroundings of the defendants' property, were in excess of the natural and ordinary course of enjoyment of that property; and (2) that such acts had up to the trial materially interfered with the ordinary comfort of existence of the plaintiff and her household, so that the plaintiff was entitled to an injunction.

WITNESS action.

The plaintiff, Miss Knight, was the lessee for the residue of a term of 21 years from Michaelmas, 1900, at a rent of £250 of a house known as St. Boniface College, with garden and grounds, in the borough of Ryde, and she carried on there a high-class boarding school for young ladies.

In 1899 the Corporation of Ryde obtained a Provisional Order under the Electric Lighting Acts authorising them in the usual way to supply electrical energy for public and private purposes within the area of the borough. By clause 69 of that Order it was provided that nothing in the Order should exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them. This Order was duly confirmed by Act of Parliament. The Corporation afterwards entered into arrangements with the defendants for the erection, maintaining, and working of a generating station within the borough. In pursuance of such arrangements the defendants, in the early part of 1903, acquired, as a site for the purpose of the proposed works, a piece of land adjoining the garden

of the plaintiff's house, and lying to the east thereof, and proceeded to erect thereon the requisite engines, dynamos, and other machinery. The engines were driven by gas produced upon the premises by a system of the character known as the Dowson process, for one of the terms under which the defendants held the site precluded them from erecting any tall chimney shaft thereon. The plaintiff's house was upon a higher level than the defendants' generating station, and there were no intervening buildings. The plaintiff's house was about 90 yards distant from the generating station buildings.

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The immediate neighbourhood was inhabited partly by private residents in good class houses and partly by an artisan population. A railway station was situated at a distance of 300 yards from the plaintiff's house, and in the street on which was the entrance gateway to the defendants' works were a wheelwright's yard and the premises of a corn merchant, who frequently worked a small and ill-regulated gas engine for his cutting machines.

The defendants' works were opened on October 1, 1903, and from that date, if not before, they had supplied the energy for production of electric light to customers. It was hoped by the defendants and the Corporation, and it was to be expected, that the demand for this supply would constantly and greatly increase, and that consequently from time to time considerable additions and extensions would have to be made to the plant and machinery then installed. Before the formal opening of the works, the manufacture of gas for working the engines and the machinery generally had been in operation, and in particular on one occasion, in September, for a period of 90 hours, the engine and dynamos were working without any intermission.

The plaintiff first complained on the 17th September, 1903, of various annoyances to the inmates of her establishment by noise, vibration and offensive smells or vapours produced by the operation of the defendants' works, and in particular alleged that the teaching work of herself and her assistant mistresses was interfered with and that some pupils and other inmates of the house had suffered in health from the same causes. On the 19th September, the defendants' engineer wrote regretting the annoyance and saying that "the plant has only been running for a few days and several alterations have yet to be made. When these are done we are sure that your clients will have no cause for complaint." The plaintiff's solicitor on Saturday, 26th September, again wrote from Ryde threatening proceedings and requesting an "immediate undertaking to abate the nuisances." This letter was addressed to the defendants in London, and on Tuesday, the 29th September, the defendants acknowledged it, and in a letter addressed to the plaintiff's solicitor at Ryde, said they "would take immediate steps to have this matter

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looked into, and everything shall be done to abate any nuisance which may be found to exist." On the same day the writ was issued in London claiming an injunction and damages.

The trial of the action lasted several days after the 25th November, and a large body of evidence was called, the residents in the vicinity of the defendants' works expressing different views of the several alleged causes of nuisance. Evidence was also adduced on behalf of the defendants to show that during the months of October and November successful experiments had been made to improve the running of the machinery, to reduce the hum of the dynamos and to prevent the smell which had at first existed. After the medical evidence, the plaintiff abandoned the complaint as to a particular affection of the mouths of some pupils having been caused by the defendants' works.

Hughes, K.C. (*Manning* with him), for the plaintiff, opened the facts of the case.

Younger, K.C., and *Waggett* for the defendants. The plaintiff has not proved a case for an injunction. There is no proof of injury to her property, structural or otherwise, to bring the case within the law as propounded by Lord Westbury and Lord Cranworth in *St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642, 650; 35 L. J. Q. B. 66. And in any case the Court will weigh most carefully the evidence of prepossessed listeners and discriminate between mental impressions and solid facts: *Gaunt v. Fynney* (1872) L. R. 8 Ch. 8, 13; 42 L. J. Ch. 122. Moreover, in a case of what under ordinary circumstances would be a nuisance, but is in fact only of a temporary character owing to the incompleteness of the structure, that which would be a nuisance if continued but is shown to be temporary will not be restrained by an injunction: *A.-G. v. Sheffield Gas Company* (1853), 3 De. G. M. & G. 304, 320, 340; 22 L. J. Ch. 811; and *Harrison v. Southwark and Vauxhall Water Company*, 1891, 2 Ch. 409; 60 L. J. Ch. 630. The circumstances here are more allied to construction than to user, and all the judgments in *Shelfer v. City of London Electric Lighting Co.*, 1895, 1 Ch. 287, 310, 313; 64 L. J. Ch. 216, decided that section 10 of the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), which bestows upon undertakers general powers under their licence or Provisional Order, applies to construction and not to user; and by section 32 of that Act "works" is made to include "machinery." And, quite apart from construction, the Court will not interfere by injunction where the cause of the complaint is accidental: *Cooke v. Forbes* (1867) L. R. 5 Eq. 166; 37 L. J. Ch. 178, or where it is temporary or occasional: *A.-G. v. Preston Corporation* (1896), 13 T. L. R. 14; *A.-G. v. Cambridge Consumers' Gas Company* (1868), L. R. 4 Ch. 71, 81; 38 L. J. Ch. 94.

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In the present case the plaintiff commenced proceedings prematurely by issuing the writ before the defendants had supplied a single unit of electricity, and that on the very day (29th September) when the defendants had written on the receipt of a letter asking for an undertaking that they would take immediate steps to abate what was complained of. The evidence shows that even if at the commencement from 5th September to 2nd October there may have been, owing to want of completion, occurrences that would otherwise amount to a nuisance even to the plaintiff, yet (1) they were never so serious as the plaintiff in her mental prepossession has suggested, and (2) they were incidental to the completion of works which when completed are not in themselves a nuisance and which in the twentieth century must be permitted in a town.

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Hughes, K.C., in reply. It is true that these are questions of "give and take," and every occupier of property must put up to a certain extent with the inconvenience caused in the ordinary and reasonable enjoyment of property: see per Fry J. in *Fritz v. Hobson* (1880), 14 Ch. D. 542, 556; 49 L. J. Ch. 321; *Bamford v. Turnley* (1862), 3 B. & S. 62; 31 L. J. Q. B. 286; and *Fleming v. Hislop* (1886), 11 App. Cas. 686, 697. But annoyance caused by the unusual use of property may be a nuisance where like annoyance from the ordinary use of it would not be: *Ball v. Ray* (1873) L. R. 8 Ch. 467. The defence that the nuisance is temporary or occasional will not suffice, for an injunction has gone to restrain a circus: *Inchbald v. Robinson* (1869), L. R. 4 Ch. 388, and a "merry-go-round": *Lambton v. Mellish*, L. R. 1894, 3 Ch. 163; 63 L. J. Ch. 929; neither does "temporary" mean "not continuing for ever," or include a case where the complainant can have no knowledge when the nuisance will be abated. With regard to the alleged precipitancy in starting the action, the defendants would make no admission and did not ask for time without prejudice, so that the plaintiff's legal advisers would have been culpably negligent in advising her to wait. This nuisance is especially serious to a school, and the plaintiff is entitled to an injunction and also to an enquiry as to damages.

Cur. adv. vult.

Jan. 20, 1904. JOYCE J., after stating the facts of the case, continued as follows:—Having regard to the positive testimony of the plaintiff and the witnesses called by her, whose veracity and substantial accuracy there is no reason to doubt, and to the acts admitted by some of the defendants' witnesses, I consider it to have been sufficiently proved before me that at various times during the month of September, and for not inconsiderable periods, the works of the defendants were so carried

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on as by noise, offensive smells, and, in some degree, by vibration to occasion a serious interference with the ordinary comfort of the plaintiff and the inmates of her house, and the carrying on of her school. There was some ground for suspecting that these annoyances, or some of them, were injurious to the health of some of the ladies in the plaintiff's house; but I do not consider that to have been established. Generally the annoyances actually experienced were not, in my opinion, trivial or of a kind to be expected from any ordinary and reasonable use by the defendants of the land they had acquired. Nor were they by any means such as would only be complained of by unreasonable or over-fastidious persons. No doubt since the commencement of the action the defendants have by the adoption of various expedients known to mechanical engineers and men of science, and perhaps, under pressure of these proceedings, by exercise of special care in the management, greatly diminished the intensity and frequency of the annoyances complained of. The engines and machinery are not now worked later than 11 p.m., as they were at one time. There is room for further improvement in the works, and the most skilful and careful management will always be necessary to prevent the annoyance complained of from constantly recurring. At times there is no annoyance to complain of. Still, at the date of the trial such annoyance had repeatedly and recently recurred. Even then the works were not in such perfect order, if that perfection were attainable, as to remove altogether the plaintiff's just grounds of complaint. In my opinion, subject to a question to be mentioned presently, the plaintiff had ample justification for the institution of the action, and I hold that the repeated and not merely momentary annoyances occasioned to the plaintiff by the defendants' works amounted to an actionable nuisance, unless the defendants can make out that they were in point of law justified or to be excused. The defendants contend that they were to be so excused, and in support of that contention they rely upon the judgment of Vaughan Williams J. in *Harrison v. Southwark and Vauxhall Water Company*, 1891, 2 Ch. 409; 60 L. J. Ch. 630, where he said: "In the first place it seems to me that, if the defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land, they would not have been responsible as for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one

no doubt causes a considerable inconvenience to his next-door neighbours during the process of demolition ; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance, if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance." Now, accepting that statement of the law, it must be observed that the nuisance or annoyances complained of in the present case did not arise from acts of the nature referred to in the passage which I have read. The plaintiff submitted to any inconvenience that arose from the mere construction of the defendants' works. What she complains of was what she has suffered, and is from time to time still suffering, from the working of the generating station, and the operations carried on, and which will continue to be carried on, there. These I hold to be not an ordinary use of the defendants' property, or in any sense reasonable, if serious annoyance is thereby occasioned to the occupiers of the adjoining house and garden.

Another excuse set up is that the annoyances were only temporary and occasional. The judgment of Bramwell J., in the leading case of *Bamford v. Turnley* (1862) 3 B. & S. 62 ; 31 L. J. Q. B. 286, furnishes a sufficient answer to that. The defendants do not allege, nor has it been shown, that their works could not have been established and set permanently in operation without occasioning a nuisance if the necessary and reasonable precautions had been carefully taken in the first instance. Further, what is complained of is not by any means what happened in some cases that have been referred to, where, once in a way, for a public purpose, there was a breaking up of a portion of a road for some two or three days, after which there was an end of the matter. Upon the whole, I hold (1) that the acts complained of have from time to time, and frequently, been such as, having regard to the circumstances and surroundings of the defendants' property, were in excess of the natural and ordinary course of enjoyment of that property ; and (2) that these acts had up to the trial materially interfered with the ordinary comfort of existence of the plaintiff and her household. Consequently there must be an injunction, during the continuance of the plaintiff's lease, to restrain the defendant company, its directors, servants, and agents from using or working, or causing or permitting to be used or worked, in or upon their generating station and other works adjacent

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to the plaintiff's garden, any engines, dynamos, or other machinery, or from there carrying on the manufacture of gas or any other process, in such a manner as by the production of noise, noxious or offensive smells, vibration, or otherwise to be or occasion nuisance or injury to the plaintiff as lessee or occupier of the house, garden, and premises comprised in her lease. There will also be an inquiry as to damages.

Injunction granted, with inquiry as to damages.

Solicitors for the plaintiff—Beale and Payne, for T. Robinson, Ryde.

Solicitors for the defendants—Clarkson, Greenwell, & Co.

High Court of Justice.

CHANCERY DIVISION.

GREAT TORRINGTON COMMONS CONSERVATORS *v.*
MOORE STEVENS.

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Aug. 3, 4.

Nov. 10.

Dec. 5.

River—Riparian owner—Bed of stream—Island—Ownership of soil—Presumption of "medium filum aquæ"—River running along waste.

By a Commons Act certain common and waste lands were vested in the plaintiffs freed and discharged from manorial rights, but upon the trusts and with the powers declared by the Act for the benefit of the inhabitants of a certain borough. The lands were bounded on one side by a river, and the Municipal Corporation Boundaries Commission Report, 1837, showed a dotted line along the middle of the river as one of the boundaries of the borough. At the locus in quo of this action, the river flowed round a considerable island probably as old as the banks themselves. The plaintiffs were unable to show a documentary title to this island, and it was not proved to be vested in any other person.

In an action against the defendants, the owners of lands on the opposite bank of the river, for an injunction to restrain them from taking gravel from the river-bed at a spot on the island which was on the plaintiffs' side of a line drawn down the middle of the stream and across the island, but was not on the plaintiffs' side of a line drawn down the middle of the arm of the stream flowing on their side,

Held, that the plaintiffs' action failed, as the rule that, where a stream flows between two manors or properties, in the absence of evidence to the contrary, the boundary is to be taken to be the medium filum aquæ, should be applied where there is an island by drawing a medium filum as the boundary through each arm of the stream.

THIS was an action for trespass by the Great Torrington Commons Conservators to restrain the defendants from digging gravel or soil from the moiety of the bed of the River Torridge abutting upon Great Torrington Common, in the county of Devon. The original defendants were J. C. Moore Stevens and his son Colonel R. A. Moore Stevens; during the trial of the action the first-named defendant died, and the proceedings were thereafter continued against Colonel Moore Stevens alone.

The plaintiffs were a corporation incorporated by the Great Torrington Commons Act, 1889 (52 & 53 Vict. c. clxvii.), and were seised in fee simple and in possession under that Act of the Torrington Common and waste lands lying on the right bank of the River Torridge, which near Torrington flows in a westerly and then in a northerly direction. At a point below a railway-viaduct bridge built in 1872,

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where the river was from 150 to 180 feet wide, was an island about a quarter of an acre in extent, its middle high and planted with trees, while its banks were sometimes submerged according to the level of the river. At the date of the trial the larger stream of the river flowed to the west of the island, where it bounded the parish of Frithelstock, but the defendants alleged that the main course was formerly between the island and the common to the east, and that the island was their property, although the plaintiffs or their licensees by depositing in the river waste and rubbish from a quarry might have forced the stream to the west, and so caused the defendants' property to be submerged or washed away. The trespass complained of was on a spot of the river-bed which at low flood of the river was exposed between the south-east corner of the island and the bank of the common, which there rose steeply above it. The defendants had dug and carried away large quantities of gravel, sand, and soil from this place.

The question at the trial was whether the plaintiffs were in possession or entitled to possession of the *locus in quo*. They derived their title from the Great Torrington Commons Act, 1889, the material sections of which were as follows :—

The Act was passed, as stated in its title and preamble, for vesting the Torrington common lands in a body of conservators, and to settle questions between the commoners and the owners of the Rolle estate, who claimed to be entitled to the manor of Great Torrington.

By section 23 the hereditaments specified in the Fifth Schedule (which did not expressly include any part of the river-bed) were vested in the conservators, freed and absolutely discharged from all manorial rights of the owner or trustees of the Rolle estate upon the trusts and for the purposes and subject to the provisions in the Act declared and contained concerning the commons.

Section 26 declared the trusts of the hereditaments specified in the First Schedule to the Act to be for the benefit of certain poor inhabitants of Great Torrington, and subject thereto for such purposes for the benefit of the inhabitants of the borough of Great Torrington, as the conservators should from time to time determine, subject, however, to a proviso that the conservators should always reserve to the inhabitants the right of fishing in the river over the hereditaments specified in the First Schedule.

Section 28 directed the conservators to preserve and resist encroachment upon or appropriation of any part of the commons.

Section 32 empowered them to make bye-laws for various purposes, including "the prevention of the digging or taking of turf sods bog earth gravel clay or other substances."

Section 38 provided that "nothing in this Act or any bye-law of the

conservators shall take away abridge or prejudicially affect any right of common commonable or other like right or any right of way right of sporting or other right in over or affecting the commons other than the manorial rights of or claimed by the owners of the Rolle estate affecting the same and the inhabitants of the said borough of Great Torrington shall at all times have the same right of fishing as is now vested in or is exercisable by the owners of the Rolle estate in that half of the River Torridge or other waters which will adjoin the hereditaments specified in the First and Fifth Schedules to this Act."

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The premises vested in the plaintiffs by the Act were not expressed to include any part of the bed of the river, and a question arose as to the application of the presumption of the boundary being taken to be the *medium filum aquæ* to the case of an island of unproved ownership dividing the stream.

The defendants' title-deeds from 1858 did not show any title to the whole bed. In one deed of 1872 the island was coloured pink as part of the lands conveyed, but even then was excluded from the parcels and computed acreage; in subsequent deeds it remained uncoloured. It was in evidence that the grantor of 1872 had planted the island with trees on the occasion of the wedding of King Edward VII., then Prince of Wales; but there was no evidence that the island had ever been rated.

Evidence was adduced by the plaintiffs of long user of the island by the commoners in cutting brushwood, in grazing their cattle, and fishing from the island and washing clothes from it. Several old inhabitants declared that the main stream of the river had always been on the west or Frithelstock side of the island.

The plaintiffs also relied upon evidence of repute in the map annexed to Part 3 of the Municipal Corporation Boundaries Commission Report, 1837, showing the western boundary of the borough of Great Torrington marked as a dotted line in the middle of the river.

In the course of the argument, which occupied several days, and was more than once re-opened, the defendants' counsel at first asked for a decision on the Act of 1889, and elected to call no evidence; but, later, evidence was adduced as to the diminution and change of the stream by reason of the plaintiffs' acts above referred to, and also as to acts of exclusive ownership of the island—as, for example, the grazing of cattle and cutting of weeds by a miller tenant of the defendants' adjoining property. The deposited plan of the Act of 1889 showed the *locus in quo* to lie to the west of or outside the dotted line there said to represent the "municipal boundary."

Hughes, K.C., and *Gurdon* for the plaintiffs. The Act conveys the

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common lands right up to the bank of the river to the plaintiffs, who are therefore *prima facie* entitled to the bed of the river *ad medium filum aquæ*, subject to the presumption being rebutted: *Micklethwait v. Newlay Bridge Co.* (1886) 33 Ch. D. 133. Here the presumption is supported in the plaintiffs' favour by section 38 of the Act, which saves the fishing rights in half the river where it adjoins the common, and also by the defendants' own title-deeds from 1858, which do not show any title to the whole of the bed. The plaintiffs are entitled to an injunction and nominal damages.

Younger, K.C., and *T. A. Nash* for the defendants. This being an action for trespass, the onus of proof is on the plaintiffs to show that in the general circumstances of the case the *locus in quo* is their property. If this onus is not discharged, the defendants must succeed, whether the island is found to be theirs or not. On the construction of the Act, which governs the case, no part of the river-bed passed under it, and the municipal boundary of Torrington is the eastern river bank. This is like an Inclosure Act, and therefore the ordinary presumption cannot apply: *Ecroyd v. Coulthard*, 1898, 2 Ch. 358; 67 L. J. Ch. 458; see also S.C., *per* North J. in 1897, 2 Ch. 554; 66 L. J. Ch. 751. *Prima facie* an inclosure of a common would not extend to a river adjoining it, because it is not to be assumed that there are any common rights over the river. The true construction of section 38 is that the right of fishing is to adjoin the hereditaments granted, but not to form part of them; the right to the bed of the stream is a territorial right, which the Fifth Schedule, as well as the preamble to the Act, shows that it was not intended should be vested in the plaintiffs. "Inhabitants" in the Act must be taken as the widest term, including "every human being dwelling in the place spoken of": "Maxwell on the Interpretation of Statutes" (3rd ed.), p. 87. The Act so construed has enough to rebut the presumption, even if it is applicable. This case has all the incidents found in *Pryor v. Petre*, 1894, 2 Ch. 11; 63 L. J. Ch. 531, except the valuation, but it has the equally valid fact that here nothing is included but the borough of Torrington. The plaintiffs have not proved their title, and, if necessary, it is submitted that the island did in fact pass to a predecessor of the defendants by virtue of the plan on the deed of 1872. With regard to user, the evidence shows that anybody, whether an inhabitant or a stranger, fished or took gravel from any part of the stream or river-bed that he liked; so also with the grazing of cattle. Such user is not referable to any right of the commoners, actual or presumptive, over half the bed of the stream.

Hughes, K.C., in reply. The Act of 1889 may be construed as a conveyance, and the presumption as to *medium filum aquæ* applies equally in both cases: *Reg. v. Strand District Board* (1863)

4 B. & S. 526, 547; 33 L. J. M. C. 33. The Act must be taken to have passed the soil of the river, as it would be absurd to retain it without the fishing and other rights; and sections 26 and 38 are only consistent with the view that all those rights passed to the plaintiffs in trust for the inhabitants. The deposited plan of 1889 is only binding on the plaintiffs for the purposes for which it was intended, and so does not go to municipal boundaries.

[JOYCE J. referred to *Reg. v. Haughton Inhabitants* (1853) 1 E. & B. 501, 516; 22 L. J. M. C. 89, where Lord Campbell suggested that there could be no estoppel by recital.]

The difficulty in this case arises from the presence of the island dividing the stream. The rule of English law is that the bed of the whole stream is to be taken and bisected for the *medium filum*: *Fleta*, lib. 3, cap. 2, par. 6, translated in *Schultes, Essay on Aquatic Rights* (1811), p. 119; *Bracton*, lib. 2, cap. 2; *Hale, De Jure Maris*, c. 6; *Woolrych on Watercourses* (2nd ed.), p. 48; *Phear on Rights of Water*, p. 11; and *Coulson and Forbes on Water* (2nd ed.), p. 102. The American rule seems to be that the main stream is to be taken and bisected for the *medium filum*, neglecting all side waters: *Angell on Watercourses* (7th ed.), §§ 46, 48; and *Hopkins' Academy Trustees v. Lewis Dickinson* (1852) 9 Cushing, Mass. 544. *Ecroyd v. Coulthard*, 1898, 2 Ch. 358; 67 L. J. Ch. 458, is distinguishable as a case under an Inclosure Act, which this is not, and of a several fishery, whereas here the lord of the manor certainly had no separate exclusive right, even if he had a concurrent right up to the passing of the Act. We rely on the well-established rule as to the presumption, as in *Micklethwait v. Newlay Bridge Co.* (1886) 33 Ch. D., 133, and *Lord v. Sydney Commissioners* (1859) 12 Moore P. C., 473. The decision in *Rex v. Landulph Inhabitants* (1834) 1 Moo. & R. 393, mentioned in the text-books, was shown to be wrong, the river there being tidal, in *Bridgewater Trustees v. Bootle-cum-Linacre Highway Surveyors* (1866) L. R. 2 Q. B. 4; 36 L. J. Q. B. 41.

[JOYCE J. Suppose that one bank of a river belongs to each of two parties and an island to a third, does not a *medium filum* go down each stream?]

Possibly; but this is a case where there is no evidence as to the ownership of the island, and the presumption which arises is as to the *medium filum* of the river as a whole.

Cur. adv. vult.

Dec. 5, 1904. JOYCE J. This is an action by the Great Torrington Commons Conservators in respect of alleged trespass by the removal of gravel from the bed of the River Torridge, which runs by the borough of Torrington. The only real question in the case, I think,

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is whether the plaintiffs are in possession or entitled to be in possession of the *locus in quo*, by which I mean the spot from which the gravel was removed, which is part of the bed of the River Torridge. The plaintiffs are a body created and incorporated by statute—namely, by the Great Torrington Commons Act, 1889. By that Act certain lands or interests were described by reference to a map and are vested in the plaintiffs, and certain of these lands adjoin the River Torridge; but the premises so vested are not expressed to include, in my opinion, any part of the bed of the river. The contention of the plaintiffs is that, on the true construction of the vesting clause in the Act, the lands vested in the plaintiffs thereby comprise the bed of the river where it bounds the lands defined and delineated on the map. No doubt it is the rule that, where a stream flows between two manors or properties, in the absence of any evidence to the contrary the boundary is taken to be the *medium filum* of the stream. In the present case near the *locus in quo* there is an island as old as or older than the bank on either side; and the river is in fact divided into two streams. Is the rule I have mentioned applicable to the whole of the river so that the *medium filum* is to be drawn through the island, or through the stream between the island and the land expressed by the Act to be vested in the plaintiffs? No title is shown by the plaintiffs, in my opinion, to the island, unless it can be got by the application of the rule I have referred to; although, in my opinion, it is well arguable that in the circumstances the plaintiffs are under the statute entitled to half the bed of the stream between their lands and the island. But I do not see my way to hold that they are entitled to anything beyond the *medium filum* of that stream, such *medium filum* being, I think, pretty accurately described by the dotted line on the twenty-five-inch Ordnance map.

Now, it was proved and practically admitted that the *locus in quo* from whence the gravel was taken is not within this line—that is, not on the Torrington side of this line. This spot and the island in question as such are claimed by the defendants. I do not say that they have proved their title. I think they have not; but, on the other hand, the plaintiffs have not proved their title, nor, indeed, do I think that they could under any circumstances prove that they were entitled to this spot in question. The onus is on the plaintiffs to prove their case. In my opinion they have failed to do it; and consequently the action must be dismissed.

Action dismissed.

Solicitors for the plaintiffs—Horne and Birkett, for J. R. Bevan, Great Torrington.

Solicitors for the defendants—Wood, Bigg and Nash, for H. M. James.

HOUSE OF LORDS.

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KENT WATERWORKS COMPANY AND ANOTHER *v.* LAMPLOUGH.

Dec. 14.

Water—Water company—Dividends—Prescribed rate—Deficiency in previous years—Deficiency in the years before incorporation of the Waterworks Clauses Act, 1847—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 75.

A water company to whose undertaking section 75 of the Waterworks Clauses Act, 1847 (which limits the profits that may be divided among the shareholders to the prescribed rate, or where no rate is prescribed to ten per cent., unless a larger dividend is necessary to make up the deficiency of any previous dividend), applies, cannot apply their surplus profits in making up any deficiency below the prescribed rate, or ten per cent. as the case may be, that occurred in years before the section became applicable to the undertaking.

Decision of the Court of Appeal, 1903, 1 Ch. 575; 72 L. J. Ch. 418, affirmed.

APPEAL from a judgment of the Court of Appeal (Collins M.R. and Romer and Cozens-Hardy L.JJ.) affirming a decision of Joyce J.

The action was brought by the respondent on behalf of himself and all other the holders of the 7 per cent. stock of the appellant company for an injunction to restrain the company from paying a dividend on any of its ordinary stock in respect of, or so as to make up, any deficiency, or alleged deficiency, of dividend occurring prior to June 30, 1864, the date of the Kent Waterworks Act, 1864, hereinafter mentioned.

The appellant company was originally incorporated by the Kent Waterworks Act, 1809 (49 Geo. III. c. clxxxix), and immediately before the passing of the Kent Waterworks Act, 1864, was regulated by that Act and amending Acts of 1811, 1850 and 1862.

Until the passing of the Kent Waterworks Act, 1864, there was no limit either upon the rates which the Company might charge for water supplied nor on the rate of dividend which the Company might distribute on its share capital. The Company, however, had never in fact before that Act made sufficient profit to enable it to pay a dividend of 10 per cent. on its paid-up share capital in any year.

By the Kent Waterworks Act, 1864 (27 & 28 Vict. c. cxlvi.), the undertaking of the Company and also the undertaking of another company, called the North Kent Waterworks Company, established by the North Kent Waterworks Act, 1860, were amalgamated into a single undertaking.

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By section 2 of the Act of 1864 the Waterworks Clauses Acts, 1847 and 1863, was incorporated with the Act of 1864, and section 27 of that Act provided that "the several provisions incorporated with this Act of the Waterworks Clauses Acts, 1847 and 1863 . . . apply from and after the passing of this Act to the whole of the undertaking and waterworks of the Company," *i.e.*, the whole amalgamated undertaking. The Act of 1864 also for the first time limited the rates which the Company might charge for water.

Consequently upon the passing of the Act of 1864 the Company became subject to section 75 of the Waterworks Clauses Act, 1847, upon which the present case turned. That section provides as follows:—

"The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."

No other rate of dividend having been prescribed by the Act of 1864, 10 per cent. was the prescribed rate for ordinary stock.

The whole of the Company's share capital had under the provisions of the Companies Clauses Consolidation Act, 1845, been converted into stock and consisted of £708,000 ordinary stock and £160,000 7 per cent. stock. Of this capital the whole of the shares represented by the 7 per cent. stock were created under the Kent Waterworks Act, 1877, which prescribed 7 per cent. per annum as the maximum rate of dividend thereon. Of the shares represented by the £708,000 ordinary stock, shares represented by upwards of £200,000 of such stock were created and issued either under or since the passing of the Kent Waterworks Act, 1864, and consequently since the date when the Company became subject to the Waterworks Clauses Act, 1847. Except in respect of the prescribed rate of dividend the 7 per cent. stock ranked *pari passu* with the ordinary stock.

The Company had paid the full dividend of 7 per cent. on the 7 per cent. stock ever since its creation, and had also been able latterly to pay a steadily increasing dividend on its ordinary stock. Between 1864 and 1881 the profits were not sufficient to pay the full prescribed 10 per cent. on the ordinary capital, and consequently "deficiencies" within the meaning of section 75 of the Waterworks Clauses Act, 1847, accumulated; but such deficiencies had since 1881 been fully made up by excess dividends above 10 per cent. on the ordinary stock of the Company, and there were no deficiencies remaining to be made up unless the Company was (as it claimed to be) entitled to bring

forward as deficiencies the shortages of dividend below 10 per cent. before the 30th June, 1864. No excess dividend beyond 7 per cent. had ever been paid on the 7 per cent. stock.

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The Company being about to treat such shortages as "deficiencies" and to declare and pay dividends on its ordinary stock on that footing, the plaintiff on behalf of himself and all others the holders of the 7 per cent. stock instituted this action against the Company to restrain it from so doing, and moved before Joyce J. for an interim injunction to restrain the Company from paying any dividend on any of its ordinary stock in respect of, or so as to make up, any deficiency or alleged deficiency, of dividend accruing prior to June 30, 1864.

Joyce J. granted the injunction asked.

The Company appealed and the Court of Appeal upheld the decision of Joyce J. It was then agreed that the motion should be treated as the trial of the action, and the injunction was made perpetual. The decision of the Court of Appeal is reported 1903, 1 Ch. 575; 72 L. J. Ch. 418.

The Company appealed to this House.

The appellants contended that the judgment of the Court of Appeal was wrong because according to the true construction of the Kent Waterworks Act, 1864, and the Waterworks Clauses Act, 1847, the appellant company is in the same position with regard to the amount of profits which it may lawfully divide as it would have been in if the provisions of the Waterworks Clauses Act, 1847, or analogous provisions had been inserted in each of its special Acts; because the 75th section and the following sections of the Waterworks Clauses Act, 1847, impose a limitation on the amount of profits which a company subject to that Act may lawfully divide and does not regulate or purport to regulate the rights of the holders of stock or shares in such company; and because the expression "deficiency of any previous dividend" as used in the said section means deficiency in the amount of profits divided in any previous year of the Company's existence and is not confined to deficiencies in any year after the provisions of the Waterworks Clauses Act have been made applicable to the Company.

The respondent contended that on the true construction of the Act of 1864 and of the Waterworks Clauses Act, 1847, the expression "deficiencies of dividend" in section 75 of the latter Act extends only to deficiencies of dividend after the coming into existence of a limit or prescribed maximum, and that the expression "any previous dividend" extends only to dividends previous to the "making up" but subsequent to the imposition of the maximum and the consequent possibility of "deficiencies"; that having regard to the entire alteration of the Company's undertaking owing to the Act of 1864, and the great extension

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of its authorised area and of its privileges and powers, and the completely new conditions introduced by that Act, that Act should be treated as a fresh starting point altogether for the Company and that as from that date the Company's undertaking should be treated as a new undertaking as though the Company had been re-incorporated *de novo* by that Act for the purposes of the amalgamated undertaking; that the Act of 1864 amounted to and should be treated as a parliamentary bargain, accepted by both Companies as a condition of their obtaining the Act, that as from the passing of the Act the Company should be governed by the provisions of the Waterworks Clauses Act, 1847, especially as regards distribution of profits, wholly irrespective of the then past history of either Company, because upon the appellants' construction of section 75 persons who had since the Act subscribed for shares in the Company would receive a larger dividend than an accumulative 10 per cent. per annum on the capital paid up by them, which was contrary to the Waterworks Clauses Act, 1847, and the holders of the stock representing the original shares of the Company would be entitled to receive larger sums by way of dividend than the holder of any other stock in breach of the provisions of the Company's special Acts.

Cripps, K.C., Haldane, K.C., and R. J. Parker for the appellants. The broad principle is that the deficiency of one year in respect of the statutory dividend may be made up out of the surplus of another. If, for example, on a paid-up capital of £100,000 it was only possible in one year to pay £9,000 as dividend it would be permissible the next, if the profits allowed, to distribute 11 per cent. Viewed in that light what is the meaning of the expression "previous dividend which shall have fallen short of the said yearly rate" in section 75 of the Act of 1847? There are no words in the Act to confine the deficiencies to a time since 1864, and, therefore, any deficiencies that have accrued since 1809 and have not been made up can be made up. The word dividend there means what may or is to be divided by the Company. In the Act "any previous dividend" means all or any dividend since the incorporation in 1809 of the Company. The Court of Appeal was misled by the expression "back dividends." There is no question of retrospective action; nothing done in the past is to be undone; future dividends are to be measured by previous dividends, the earlier amounts constituting the measure of the later. The term "prescribed rate" in section 75 must be a 10 per cent. rate, and all the Acts should be read together, and the standard of 10 per cent. made applicable.

Moulton, K.C., Younger, K.C., and Ashworth James for the respondent were not heard.

THE EARL OF HALSBURY L.C. My Lords, this is a case that may be treated very shortly. It depends upon one section, and it exhibits the ingenuity of the learned counsel, that a matter depending upon such a very small number of words could be protracted through three Courts, and argued with the ability and pertinacity with which this case has been argued. For my own part, it seems to me to be absolutely clear, without the faintest shadow of doubt.

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The Waterworks Clauses Act, 1847, is the Act of Parliament which imposed for the first time a limit upon the amount of the dividend that might be distributed among the shareholders, and contains a provision that if that dividend which was to be limited for the future had not been arrived at, then, in distributing the future profits of the Company, that which had fallen short of the prescribed amount, which for the first time was then imposed, might be made up if the Company had made a profit sufficient to supply it. The whole language is very intelligible, and upon the hypothesis that it is the true view of it which both Courts have arrived at, it is very simple.

My Lords, if the gloss which has been put upon it by the learned counsel who argued the appeal were true, I think it would be extremely difficult to reconcile the language with any intelligible meaning, because what is to be made up under section 75 is a "deficiency." A deficiency of what? There is no deficiency at all in any of the years previous to 1864; you can only get a deficiency by bringing in that limit which was for the first time prescribed in 1864. It is an impossible hypothesis. You cannot get a deficiency—there is nothing from which it is a deficiency—unless you import that limitation, a dividend which comes to 10 per cent. Then, if that is the only thing that is to be made up, that deficiency can only arise after 1864; and, according to the plainest rules of construction, you cannot get behind that which for the first time imposed the limit to which the deficiency is to be made up.

Under these circumstances, it appears to me abundantly plain, and I move your Lordships accordingly that this appeal be dismissed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the case is perfectly clear. I am of opinion that for the purpose of adjusting any dividend, and availing itself of the statutory provisions for compensation, the Company cannot go further back than the time when the Act of 1864 came into operation. The Kent Waterworks Company made a fresh start then, with fresh limitations and under new conditions. Before that time there was no prescribed rate of dividend, nor could there be any deficiency of dividend within the meaning of that expression in the Waterworks Clauses Act.

LORD SHAND. My Lords, I am of the same opinion. I have only to add that I am not surprised that Joyce J., when he called for no

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argument from counsel for the respondent, stated that he did not feel any doubt about it. I agree in his judgment, in the unanimous judgment of the Court of Appeal, and in that which your Lordships have delivered.

LORD DAVEY. I think there can be no doubt about this case. I am quite satisfied with the reasons which have been given by Joyce J., and the learned judges in the Court of Appeal.

LORD ROBERTSON. I entirely agree.

LORD LINDLEY. And so do I.

Appeal dismissed.

Solicitors for the appellants—Hollams, Sons, Coward, and Hawksley.

Solicitors for the respondent—Waltons, Johnson, Bubb, and Whalton.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

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LONDON SCHOOL BOARD v. FULHAM BOROUGH COUNCIL.

Drains—Metropolis—Requirements of Sanitary Authority—Removal of Disused Drains—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 76, 83.

The appellant school board laid an entirely new system of drainage for certain buildings belonging to them, leaving in the ground certain old drains which were disused.

Before the work was done certain regulations had been framed by the respondents' predecessors and approved by the respondents, expressed to be with respect to "drainage of houses and buildings and the construction of water closets, &c.," and headed with a reference to, among other enactments, sections 73-79 and 82-85 of the Metropolis Management Act, 1855. One of these regulations, which was called to the attention of the school board, required disused drains to be taken up and destroyed. Plans of their proposals submitted by the school board were approved by a committee of the respondent council, subject to the disused drains being taken up; and the school board by their agents undertook that the drains should be taken up. Subsequently the respondent council passed a resolution expressly requiring the disused drains at the appellants' buildings to be taken up.

Held, that under these circumstances, the appellant school board in failing to remove the disused drains were liable in penalties under section 83 of the Metropolis Management Act, 1855, which provides that if any drain is found on inspection not to have been made according to the directions and regulations of the local authority, every person so offending shall be liable to a penalty.

CASE stated by a metropolitan police magistrate who had imposed a penalty upon the appellants. The case originally came before the Court on March 27, 1903, when it was sent back for re-statement as appears below. The case as re-stated was as follows:—

1. The appellants are the School Board for London and the respondents are the Council of the Metropolitan Borough of Fulham.

On February 13 and May 15, 1902, the appellants appeared before me to answer to a complaint made by John Charles Jackson, medical officer of health for the Metropolitan Borough of Fulham, for that they, being the owners of certain premises, known as the Everington Street Board School, in the said borough, did when reconstructing the drainage thereat "make and provide the drains and connected works and apparatus at the said premises not according to the directions of the Council of the said Metropolitan Borough of Fulham, whereby the defendants, the

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present appellants, were, in pursuance of the Metropolis Management Act, 1855, s. 83, directed that in making and providing the said drains and connected works and apparatus, all brick and other disused drains at the said premises should be broken up and destroyed, and the material forming them and all foul and sewage-charged earth and other substances carefully removed from the said premises, dry earth or ballast or brick rubbish being brought in, if necessary, in place of them, contrary to the statute in that case made and provided."

The following facts were admitted or proved before me in evidence :—

2. The Vestry of the Parish of Fulham had in or about the year 1894 made certain regulations and directions as to drainage of houses and buildings, and the construction of waterclosets in their district, which purported to be made pursuant to the Metropolis Management Act, 1855, ss. 73 to 79, 82 to 85, the Metropolis Management (Amendment) Act, 1862, s. 88, and the Public Health (London) Act, 1891, ss. 37 and 39.

A copy of the said regulations marked "A" is annexed, and may be referred to as part of this case.

[The regulations were headed thus :—

"Vestry of the Parish of Fulham, in the County of London.

"Metropolitan (*sic*) Management Acts, 18 & 19 Vict. c. 120, s. 73 to 79, 82 to 85; 25 & 26 Vict. c. 102, s. 88; Public Health Act, 1891 (*sic*), 54 & 55 Vict. c. 76, s. 37, 39.

"Regulations and directions of the Vestry of the Parish of Fulham as to the drainage of houses and buildings and the construction of waterclosets, &c."

The regulations did not, except by the above heading, show in any way under what authority they purported to be made.]

Regulation No. 29 is as follows :—"All old brick and other disused drains shall be broken up and destroyed, and the materials forming them and all foul and sewage-charged earth and other substances carefully removed from the premises, dry earth, or ballast, or brick rubbish being brought in, if necessary, in place of them."

3. The respondents are the successors of the Fulham Vestry, and adopted and confirmed the regulations and directions aforesaid.

4. The School Board are the owners of the premises aforesaid, and were carrying out new drainage works thereat. The premises consisted of the school buildings and playgrounds, affording accommodation for 1,200 children. The old drains at the said premises had been laid, made, and provided by the appellants in accordance with the requirements of and with the approval of the Fulham Vestry, about twenty years ago. A plan showing the position of such old drains was produced

and shown to me. It is annexed, marked "B.," and may be referred to as part of this case.

5. In carrying out the new drainage scheme the old drains were found to be as shown on the plan, and were from four to 14 feet under ground, and the playground which surrounded the school buildings, and was immediately over the old drains, was covered with tar paving.

6. It may be taken for the purposes of this case that the new drains were not physically joined to or connected with the old disused drains, and were of themselves fit and proper.

7. On the 11th of December, 1901, the respondents passed the following resolution :—

"(a) That all brick and other disused drains at Everington Street Board School be broken up and destroyed, and the material forming them and all foul and sewage-charged earth and other substances carefully removed from the premises, dry earth, or ballast, or brick rubbish being brought in, if necessary, in place of them, and that a copy of this order and requirement be served upon the School Board for London in this behalf.

"(b) That in the event of the School Board for London refusing to comply with the terms of the foregoing order, the town clerk and medical officer of health be instructed to take, if necessary, legal proceedings with respect to such default."

A copy of the said resolution, order, and requirement was duly served on the appellants.

8. In carrying out the new drainage scheme all old drains so far as known were taken out and removed from inside the buildings, and to a distance of eight feet from the external walls, but certain portions of the old drains were left in the ground under the playground, and were not used in the new drainage scheme, and these were cleaned out as far as possible without taking them up, and filled up at the ends with concrete, as shown in the plan.

9. The said drains were constructed for use and were used until so dealt with as aforesaid and formed the soil pipes of the children's closets.

10. All the drains and other connected works of the said premises were from time to time inspected on behalf of the respondents, and it was then found that the said regulation and order of the respondents had not been complied with.

11. The contentions of both parties are set out in my judgment which was given 15th May, 1902, as follows :—

"By the Metropolis Management Act, 1855, s. 83, in case any drain or other connected works hereinbefore mentioned, be found, on inspection, not to have been made or provided

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according to the directions and regulations of the Vestry, . . . every person so offending shall forfeit and pay any sum not exceeding ten pounds . . .

"The Vestry of Fulham made and gave certain regulations and directions purporting to have been made and given under sections 82 to 85 of the Act. Those regulations and directions having been notified to a builder were, in a case against him arising on section 76, held sufficient: *Frost v. Fulham Vestry* (1900), 64 J. P. 629. They have since been formally adopted by the Council of the Borough which has succeeded the Vestry of Fulham.

"Regulation and direction No. 29, that all the brick and other disused drains shall be broken up and destroyed, and the materials, &c., removed from the premises, purports to have been made under the sections of the Metropolis Management Act, 1855, of which the said section 83 is one, and the defendant School Board are summoned for making and providing drains and connected works or apparatus, not according to the regulation or direction of the Council. The regulations or directions were given to the School Board when making a new drain, and they have been required to break up a certain disused old drain near the new one. It was argued for the School Board that the old drain is not a work connected therewith, and that the words "made or provided" in section 83, are inapplicable to the breaking up of the adjacent old drain on the premises. But good reasons having been given for the removal of old disused drains from the vicinity of new ones, I think that regulation and direction No. 29 may fairly be referred to section 83, and treated as having been made and given under it, and that they are valid. If so, the new drain has not been made and provided according to the directions and regulations of the Borough Council, because the old drains have not been destroyed and removed, and the defendants are liable to a penalty.

"I impose a penalty of 40s. and £10 10s. costs."

12. The question respectfully submitted for the opinion of the High Court, is whether I was right in so holding. If the Court should be of opinion that I decided erroneously the conviction is to be quashed, otherwise the conviction is to stand.

Under the Order dated 27th March, 1903, made by the King's Bench Division of His Majesty's High Court of Justice, I re-state this special case by finding the facts as to the terms on which the plans and work were sanctioned. I find those facts to be as follows:—

1. That on the 11th day of December, 1900, the Council served intimation notices under the Public Health (London) Act, 1891, on the School Board that the drains at Everington Street School were defective, and that on the 29th April, 1901, the Council served on the

School Board a statutory notice requiring the School Board to relay and ventilate the said drains according to the regulations of the Council, and that the notice was acknowledged by the School Board on the following day.

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2. That on the 21st June, 1901, the medical officer of health to the Council, by letter of that date, inquired when the Board proposed to do the re-drainage works, and that the School Board replied on the 25th of June, 1901, by letter of that date, to the said medical officer of health stating that the re-drainage of the school had been entrusted to the London Sanitary Protection Association.

3. That on or about the 15th July, 1901, a representative of the London Sanitary Protection Association had an interview with the medical officer of health and produced to him the plan showing the proposed reconstruction of the drainage, on which was marked in reference to the old or then existing drains the words "old drains to be destroyed." The medical officer of health suggested certain alterations with regard to the plan generally which the said representative undertook to make and to amend the plan in accordance therewith. The medical officer subsequently received information that it was not the intention of the London Sanitary Protection Association to remove the old drains.

4. On the 24th July, 1901, Messrs. Fleming & Co., on behalf of the London Sanitary Protection Association, wrote enclosing a plan of the proposed new drainage works at the said premises. On the 25th July, 1901, the medical officer of health wrote to the secretary of the London Sanitary Protection Association, informing him with respect to the old drains it must be clearly understood that all these must be taken up.

5. On the 29th July, 1901, the engineer to the London Sanitary Protection Association wrote a letter to the town clerk giving certain reasons for not taking up the old drains, and at a meeting held on the 1st August, 1901, of the Public Health Committee of the Council, the said last-mentioned letter was considered, and it was resolved as follows:—"That the plans submitted be approved subject to the whole of the old drains proposed to be abandoned being removed, and the portion proposed to be used from the boiler-house being made water-tight."

6. On the 2nd August, 1901, the engineer to the London Sanitary Protection Association was informed by the town clerk, by letter of that date, of the terms of the said resolution, and that the Council's regulations could not be relaxed, and that the old drains must be taken up and destroyed.

7. That on the 10th August, 1901, the secretary to the London Sanitary Protection Association wrote a letter to the town clerk,

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promising to take such steps as were necessary to comply with the Council's said regulations and their bye-laws. A copy of the material regulation—Regulation No. 29—is set out in paragraph 2 of the case as originally stated by me. After the receipt of the said last-mentioned letter instructions were given by the said medical officer of health to the Council's workmen to make the necessary connections of the new drains to the Council's sewer so as to enable the London Sanitary Protection Association to commence and carry on the new drainage works, and the connection was accordingly commenced on the 19th day of August, 1901, and completed on the 24th.

G. Elliott for the appellants. The point is whether the respondents have power to order the appellants when they are relaying drains, not only to relay and ventilate according to the system laid down under their regulations, but to take up old disused drains which have been effectually sealed, at whatever depth in the ground they may be. After the intimation notices under the Public Health (London) Act, 1891, the appellants placed the work in the hands of contractors. The new drains were not joined to or united with the old drains, and were fit and proper. The old drains were not works or apparatus connected with the new ones within the meaning of section 83 of the Metropolis Management Act, 1855, and the respondents had consequently no power to direct their removal. Even if the appellants did consent to take up the old drains, still that cannot enlarge the powers of the respondents under section 83, or render the appellants liable in penalties.

Danckwerts, K. C., and Courthope Munroe for the respondents. The appellants laid down a wholly new system of drainage. They were served with notice of the resolution set out in paragraph 7 of the case, and deliberately disregarded the terms of Regulation No. 29, which are extremely reasonable and proper. The reason that compliance with the terms of Regulation 29 is absolutely necessary is that in laying new drains regard must be had to any possible connection with the old ones left in the ground, lest any connection should exist between them and the old ones, which might give rise to leakages through them, or to exhalations from disused manholes. Apart from Regulation 29, the respondents have power under section 76 of the Metropolis Management Act to give directions in every case where new drains are to be laid and before they are constructed as to the manner in which they shall be laid and the course they shall take. And no new drains can be laid without their sanction. The respondents had an appeal to the London County Council under section 211 of the Metropolis Management Act, 1855, but have not availed themselves of it.

G. Elliott replied.

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LORD ALVERSTONE C.J. The re-statement of this case has removed the only doubt that existed in the mind of any member of the Court on the last occasion. As I understand it the position was this:—Here was a drainage system of a very complicated character. There were privies for both boys and girls in the middle of the yard. There were a number of drains underneath the yard, and the School Board most properly determined, there being a nuisance in connection with the old closets, and this being a very elaborate system, to remodel it, using to some extent the same manholes, and so that all the pipes shown in blue on the plan, of which there are some hundreds of feet, should be re-used for the rain and surface water. Of course it is very important that even these drains should be in a proper condition. That is all that need be said. The new drains were laid, and there were in addition to those removed many hundreds of feet of old drains that were left in the ground. A portion of them was taken up under the building, and up to eight feet from the building. Then the others, those which were not taken up, were ultimately cleansed and sealed off. The fact that they had to be dealt with in that way shows that some judgment as to what ought to be done had to be brought to bear upon the matter. In that state of things the School Board have, under section 76 of the Metropolis Management Act, 1855, to ask permission to lay the new drains connected with the sewer; and the section provides for the work being done in accordance with the directions that are given. Now—I speak for myself, because I may be going, perhaps, farther than my brothers do—I think Regulation 29 is a perfectly reasonable and proper regulation and one which, in this state of things, the authority is entitled to consider. [His Lordship read the regulation and continued:—] In my opinion, when the School Board applied to the Borough Council under section 76, it was perfectly competent for the latter to say: “But mind, if you do this you have got to obey Regulation 29.” But the appellants went a great deal further than that. They actually presented a plan with a statement that the old drains were going to be taken up, and—I do not think it is quite right to speak of it as a contractual arrangement, although I do not know why that should not be one form in which the permission may be given—it was a condition of the sanctioning of the plans that the old drains should be taken up. And when the agents of the School Board—I dare say perfectly *bonâ fide*—changed their minds, they wrote a long letter to respondents on behalf of the School Board, asking that they might not be bound to take them up, as there was no danger to health—there had been no smell nor sufficient ground for taking them up. That was considered, and then a formal resolution was passed by the respondents, that the plans submitted be

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approved, subject to the whole of the old drains proposed to be abandoned being removed.

Under the circumstances it seems to me that the one point that was made on behalf of the appellants, that this was the removal of something which had no connection with the drains, because what was left in the ground was disused and in no way connected with—not physically joined to or united with—what was put in the ground, and that that being so, there was no jurisdiction in the respondents to impose the conditions, has gone.

I am clearly of opinion that the approval of the plans obtained under section 76 might be coupled either with the observance of the regulation (which I think, for anything that has been argued before me, is perfectly reasonable) or with the express condition that if the plans were sanctioned, it was subject to some work being done in connection with the old drains. I wish to adopt, if I may be allowed to say so, the argument of Mr. Danckwerts, that the conditions as to materials that are allowed to be used, as to where the manholes are to be, and as to whether or not there should be any protection against possible leakage in the drains, are all matters which have or may have to be considered differently, according as the old drains are left in the ground or not.

I am of opinion that the view taken by the learned magistrate is quite right, and the further facts which have been stated in consequence of questions put by the Court have made the matter clear and removed the only doubt that ever existed in the mind of any member of the Court. I think the appeal should be dismissed.

LAWRANCE J. I agree.

KENNEDY J. I wish to add a few words, because I do not feel, and I have not felt, so clear about the matter as my brethren, although I certainly do not dissent from their view, and I am not prepared to say I cannot agree with it.

It is important, it seems to me, to see exactly what is the charge. Now the charge before the magistrate was that the appellants, being the owners of certain premises, did, when reconstructing the drainage thereat, make and provide the drains and connected works and apparatus at the said premises not according to the directions of the Borough Council, whereby the appellants were, pursuant to section 83 of the Metropolis Management Act, 1855, directed that the old drains should be broken up and destroyed and the material forming them removed. It appears, as I understand the re-statement of the case, that what was relied upon was Regulation No. 29.

Now, if it had rested there, I should not have been content to leave the matter where it was left by Mr. Danckwerts in his argument; but

what in substance, I think, is covered by the complaint is that there was a breach of section 83. I think, on the whole, that it does cover not merely Regulation No. 29, but also the directions which it is in the power of the authority to give under section 76. Under that section it seems to me that the local authority have power in each separate case to give directions, where drains are about to be made, for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the local authority. And although I can see considerable danger in making terms which may cause very great expense, against the imposition of which it is difficult to struggle, and in regard to matters which may not be connected with drains, I think in this case what was ordered to be done may be fairly brought within the words of section 76, which give the power to insist upon terms and conditions. Therefore I do not dissent from the judgment, but I agree with it expressly on that ground; because it seems to me that to say, quite apart from any direction in a particular case, that, in all cases where new drainage works are to be put into a place, "all old brick and other disused drains shall be broken up and destroyed and the materials forming them and all foul and sewer-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in if necessary in place of them," is rather severe if it is intended to be applied in all circumstances and without modification as an absolute regulation of the authorities. [*Danckwerts, K.C.*, stated that the regulation was applied in individual cases only, according to circumstances. Kennedy J. continued :—] If that is so, then I quite agree. I think in this particular case it is clear that whether you call it contractual or otherwise—it would be contractual as regards the engineering body who were employed by the School Board—it becomes effectual as a direction under section 76 as regards the body employing them, namely, the School Board.

Under those special terms that were made in this case, I am not prepared at all to dissent from the view which I think my Lord and my brother Lawrance think is the true one, namely, that the direction under section 76 covers that which was ordered to be done in this case, and which the School Board have not complied with.

Appeal dismissed.

Solicitor for the School Board—C. E. Mortimer.

Solicitor for the Fulham Borough Council—R. W. Prescott.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

Though the above case was decided by Kennedy J. entirely, and by Lord Alverstone C.J. partly at least, on the footing that the requirements of the borough council, with which the school board had failed to comply, were made under section 76 of the Metropolis Management Act, 1855, the Court would rather seem to have been under the impression that the borough council had

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power, derived either from section 83 of that Act or from some other enactment, to make regulations in the nature of bye-laws with reference to drains.

There is certainly no enactment other than section 83 which gives any power of this kind to metropolitan sanitary authorities, and it seems abundantly clear that section 83 gives no such power. When section 83 is looked at in conjunction with the preceding sections it seems clear that where it speaks of a drain found on inspection not to have been made or provided "according to the directions or regulations" of the sanitary authority, it is referring to requirements which the sanitary authority are enabled to make under earlier sections, and is not itself giving any power to make regulations or give directions. And further, any power in the sanitary authority to make regulations in the nature of bye-laws as to drains would be quite inconsistent with the whole scheme of the series of sections among which section 83 occurs; for the scheme of those sections is clearly to give the sanitary authority a discretion to decide in each particular case how drains should be laid and the connected apparatus provided.

The printed regulations in question in the case were moreover clearly not intended to be in the nature of bye-laws laying down hard and fast rules at all, but to be merely a code of requirements which the sanitary authority might in the exercise of their discretion apply in particular cases, and which they no doubt would uniformly apply except in so far as in any particular case it was known that peculiar circumstances rendered them unsuitable. In *Frost v. Fulham Vestry* (1900) 82 L. T. 720; 64 J. P. 629; 19 Cox C. C. 519, it was held that the discretion of the sanitary authority could legitimately be exercised in this way by means of the very set of regulations in question in the above case, though it was fully recognised that the power of the authority was discretionary. And the remarks interposed by Danckwerts, K.C., in the course of Kennedy J.'s judgment in the above case show that this was the view of the regulations taken by the borough council.

It seems, therefore, that the above case must be regarded as a decision as to the extent of the powers of the sanitary authority under section 76 of the Act of 1855 and nothing more.

As a decision upon section 76 the case is not altogether satisfactory. It hardly seems to decide that the powers of the sanitary authority under that section to give orders as to the manner, &c., in which drains shall be laid, and as to the provision of connected works and apparatus, include a power to order the removal of disused drains; but rather to proceed on the basis that that section renders it necessary for a person to obtain the permission of the sanitary authority before he lays drains, and enables the sanitary authority to impose terms as to matters going beyond what are "connected works and apparatus" as a condition of granting such permission. Indeed, Kennedy J. speaks of the words of section 76 which give the power to insist upon terms and conditions. The difficulty is that there are no such words in section 76, and that the section does not expressly make the permission of the sanitary authority to the laying of a drain necessary at all. What the section does is to require a person to notify the sanitary authority before he lays a drain and to require the sanitary authority to order how it shall be laid. So far as that section goes, the sanitary authority have no power to prohibit the laying of a drain, and unless they make an order as to how it shall be laid within a limited time (extended by section 63 of the Metropolis Management Amendment Act, 1862) after the notice given to them, the person proposing to lay it may, so far as that section is concerned, lay it how he pleases: see *Stokes v. Haydon, Loc. Govt. Chron.*, 1901, p. 962. Possibly, however, the judgment of the Court may be explained as proceeding on the footing that if the person proposing to lay the drain suggests a particular mode of laying it and in effect asks for an order to lay it in that way, and the sanitary authority consent to his request upon terms, then in some way those terms become part of the order.

It should be added that the resolution of the public health committee referred to in paragraph 5 of the supplementary case was obviously treated by the Court as the act of the Council, though there was no statement that it was ever ratified by them, and that no question was raised as to whether the requirement of the Council that the drains should be taken up was communicated to the school board within the time limited for the making of orders under section 76 of the Act of 1855, as amended by section 63 of the Act of 1862.

High Court of Justice.

CHANCERY DIVISION.

METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. ST. MARYLEBONE BOROUGH COUNCIL.

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Dec. 11.
Feb. 26.

Electric lighting—Sale of undertaking to local authority—Action for specific performance—Failure of local authority to obtain necessary sanction for raising purchase-money by loan—Promotion of Bill in Parliament to obtain borrowing powers—Extension of time for completion—Terms on which granted—Form of Order.

A metropolitan borough council obtained a special Act by which they became bound to purchase the undertaking of an electric supply company in their borough. Notice to treat was duly given, but the parties being unable to agree on the amount of the compensation to be paid, the matter was referred to arbitration. The arbitrators having disagreed, the umpire by his award, adjudged that the sum of £1,212,000 should be paid by the council to the company as compensation. As this would involve the levying of a rate of 20s. in the £1, the council applied to the London County Council for liberty to raise this sum by a loan, but this application was refused. The council then resolved to appeal to the Local Government Board against this decision. Before this appeal could be heard, an order was made on August 7, 1903, against the council for specific performance of the contract created by the Act, the notice to treat, and the award. The order fixed December 31, 1903, for the completion of the contract but gave liberty to the council to apply for an extension of time in the event of their being unable to find the necessary money. Subsequently to the order the council applied to the Local Government Board by way of appeal and also to the Board of Trade but both applications were refused. As a last resource the council proposed to promote a Bill in Parliament to obtain the necessary borrowing powers. To do this an extension of time was necessary in order to enable them to obtain the consent of the parochial electors under the Borough Funds Acts to the promotion of the Bill.

Under these circumstances the Court extended the time till February 29, 1904, upon terms, including payment by the council to the company of the bulk of the capital expenditure they had incurred in carrying on the undertaking since the date of the contract. And, the consent of the parochial electors having been obtained, and the Bill read a second time in the meantime, the Court afterwards further extended the time upon terms including a further payment by the council to the company towards capital expenditure.

MOTION by the defendants under a "liberty to apply" reserved in the judgment of the Court of July 2, 1903, that the time fixed by the Court for the completion of the purchase by defendants of the plaintiff company's undertaking might be extended.

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The following were the facts:—

The defendants, by virtue of the Electric Lighting Order Confirmation (No. 1) Act, 1901 (1 Edw. VII. c. cxxxvii.), became bound to purchase the undertaking of the plaintiff company in their district. Notice to treat pursuant to the terms of the Act was duly given, and the parties being unable to agree as to the terms of the purchase, the matter was referred to arbitration. The arbitrators disagreed and the umpire made his award on February 4, 1903, by which he adjudged that £1,212,000 should be paid to the plaintiff company as compensation. The defendants applied to the London County Council for liberty to raise this sum by loan, and on June 23, 1903, the County Council declined to give their sanction to their so doing. The defendants then resolved to appeal to the Local Government Board against the decision of the County Council. On July 2, 1903, before the appeal could be heard, the present action which had been commenced by the plaintiff company for specific performance of the contract created by the Act, the notice to treat and the award came on for hearing. (See 1 L. G. R. 673.) By the order then made which although pronounced on July 2, 1903, was dated August 7, 1903, Buckley J. declared that a binding contract was created by the Act, the notice to treat, and the award, and ordered that the same should be specifically performed. The order further directed certain inquiries as to the title of the plaintiff company to certain of the properties sold, and ordered that "the 31st day of December, 1903, be fixed for the completion of the purchase and that upon the plaintiffs executing a proper conveyance of the St. Marylebone undertaking to the defendants or to whom they should appoint, the defendants do on such 31st day of December, 1903, lodge in Court as directed in the schedule hereto the sum of £50,000"; and that the defendants should pay the balance of the purchase-money to the plaintiff company together with a sum of "£67,250, being an amount agreed between the plaintiff company and the defendants in respect of the capital expenditure of the plaintiff company on the St. Marylebone undertaking between the 31st day of December, 1901, and the 30th day of June, 1903." The order further ordered that "the defendants (in case they shall find that they will be unable to pay the aggregate purchase-money on the 31st day of December, 1903), are to be at liberty to apply for a postponement of the date for payment of the said purchase-money and for completion of the purchase." The full form of this order is set out in 1 L. G. R. (Addenda and Corrigenda), p. xi.

Subsequently to this order the defendants not only applied to the Local Government Board by way of appeal, but also inquired of the Board of Trade whether it were possible for them to obtain a licence to

meet what they thought to be the technical objection of the County Council. The Board of Trade refused to grant the licence, and on September 28, 1903, the defendants received a notice from the Assistant Secretary of the Local Government Board that the Board had no alternative but to uphold the decision of the County Council. Under these circumstances the only available remedy left to the defendants was to apply to Parliament for power to borrow the money and on October 29, 1903, a resolution was passed in favour of such an application. In order to obtain the time necessary to enable them to do this the defendants took out the present summons.

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Buckmaster, K.C., and *E. Clayton* for the motion. The defendants have done all in their power to comply with the order of August 7, 1903. They have failed to obtain the necessary consent to raising the purchase-money by a loan, and to raise it by a rate would involve the levying of a rate of 20s. in the pound, which is very undesirable. The only alternative left to the defendants is to apply to Parliament for the necessary borrowing powers. Before making the application the consent of the electors must be obtained under the Borough Funds Acts, and a poll of the electors cannot be held before February 18, 1904. But December 31 is the date fixed by the order of August 7, 1903, for the payment of the purchase-money, and an extension of time is therefore absolutely necessary. Probably an extension until the end of February will be sufficient, if liberty to apply for a further extension is given in case the defendants are able to proceed with their application to Parliament. The Bill could then be considered next Session. If power to borrow cannot be obtained from Parliament this heavy rate will have to be levied to pay this capital sum, with the result that the whole of the machinery of local government will be dislocated.

Cripps, K.C., *Astbury, K.C.*, and *Sargant* for the plaintiff company. The defendants are by reason of acts of their own under a statutory liability to purchase the undertaking on terms which have now been settled by arbitration. The plaintiff company has nothing to do with the question how the money is to be raised. The money can be raised by borrowing if the defendants and the electors do not disagree. An extension of time for raising the money is reasonable if made upon particular terms, but the right of the plaintiff company to be paid its purchase-money must be recognised. If the defendants cannot borrow the money they must raise it by a rate. If the Bill in Parliament be accepted by the electors, and it is possible to proceed with it, the plaintiff company is prepared to give the defendants some indulgence, but upon terms. If the electors refuse to agree to the Bill and no borrowing powers can be obtained, it will be the right of the plaintiff

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company to enforce the raising of the rate, and if the plaintiff company comes to the Court within six months from December 31, it can compel the defendants to make and levy a rate to raise the amount. If any extension is granted it must be made a term of the order that the right of the plaintiff company to a *mandamus* is not to be affected. The Court has no discretion to refuse to grant a *mandamus*. The defendants have now a judgment against them, and come to the Court in mercy. The plaintiff company does not object to an extension of time until February 29, 1904, but it must be on the understanding that if by that date the electors have not consented to a borrowing Bill, the plaintiff company will at once proceed to protect its own interests by obtaining a *mandamus*. [BUCKLEY J. The plaintiff company asks that the defendants shall undertake to make a rate, but at the same time it says that the plaintiff company can make them do so without any undertaking being given.] An undertaking will prevent difficulty and friction. The plaintiff company only wishes to help the defendants, but if the latter or their electors make it impossible for it to do so, they must face the consequences. Asking for reasonable conduct by the defendants is only asking them to show that they are acting *bonâ fide*. If they will not act reasonably, it must be because they want to shuffle out of their responsibility. [BUCKLEY J. By inadvertence or oversight the defendants have not foreseen the difficulties into which they are getting; but to levy such a rate as will be required will be, if not oppressive, very burdensome. The defendants have been very foolish to place themselves in such a position. If such a rate has to be levied, it will be a complete satire on municipal trading. They have agreed to buy and have incurred an enormous responsibility, and they now say that they do not know what to do.] The plaintiff company will not rescind the contract. Difficulties are thrown on the plaintiff company by reason of its being under a statutory liability to raise and expend money in keeping up an undertaking which is in reality the property of the defendants. It is submitted that the defendants ought at once to pay about £60,000 on account of capital expended since the award as a term of obtaining an extension of time.

Buckmaster, K.C., replied.

BUCKLEY J. In July, 1901, the defendants obtained an Act of Parliament which provided that the plaintiff company should sell and the defendants should purchase the St. Marylebone portion of the plaintiff company's undertaking. The terms of purchase were settled before an umpire and the purchase price was fixed at £1,212,000. At that point the difficulties of the defendants seem to have commenced. They appear to have gone with a light heart to obtain their Act which

compelled them to purchase and the plaintiff company to sell, and when the purchase price was fixed they found themselves in the difficulty which I am going to state. In order to comply with the award and pay the purchase-money they required £1,250,000, and they had not got it. They had to obtain power to borrow, and they approached the authorities and endeavoured to obtain the proper sanction to borrow the money and they failed to get it. An action was brought for specific performance of the contract constituted by the Act and the proceedings under the Act. I tried the action and gave judgment orally on July 2, but the order is drawn up and is dated August 7. It is a judgment for specific performance, and it directs certain inquiries, which I need not particularise, working out some matters of detail. It was urged before me then that the defendants were in the difficulties the nature of which I have indicated, and I was asked to fix such a time as would or might enable them to put themselves in a position to find the money that was requisite for the completion of the purchase. I fixed December 31, 1903, for that purpose, and I added that the defendants, in case they should find that they would be unable to pay the aggregate purchase-money on December 31, 1903, were to be at liberty to apply for a postponement of the date of payment of purchase-money, and for the completion of the purchase. The application before me now is an application under that liberty to apply asking for an extension of time.

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Since I gave judgment in August the defendants have, I think, to the best of their ability, sought to obtain leave to borrow the money, but they have failed.

Another machinery under which they can obtain the money is by levying a rate—getting it from the ratepayers—but the sum is so large that if the amount was to be obtained by levying a rate for the whole capital money, it would be a rate that would be, I was going to say, oppressive, but a very heavy burden on the ratepayers, and I am quite ready to believe the defendants are not prepared to face the ratepayers with such a rate as that. The plaintiff company says: “You have entered into this contract and are bound by it; how you get your money is your affair, not ours.” In that the plaintiff company is wholly right in my opinion. The defendants ought to have thought of that before, and now they are in a difficulty. It is for them to resolve the difficulty and find the money. The position is complicated by this, that an undertaking of this description is not one and complete at any moment; it is perpetually requiring additions, and the undertakers are under statutory obligations. They are not free agents; they have to keep up the undertaking and make capital expenditure. As things stand they are in the position of custodians of somebody else’s undertaking, which that somebody else will not pay for. They have to go on and do that

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which they are bound to do under the Act of Parliament, and they find themselves in a difficulty. On the other hand, the defendants say, short of making a rate which, considering its magnitude, would be a grievous matter for the ratepayers, they have really done all they can up to the present, and I think they have. They have, further, done this: they have presented a Bill which is pending at the ensuing Session of Parliament which will or will not be capable of going forward according as the parochial electors do or do not approve of that Bill at a meeting to be held hereafter. That decision of the electors will be arrived at by about the middle of February. I am asked to extend the time till February 29 to ascertain if the electors will or will not approve of that. If they do not the Bill falls to the ground, and I will not say what will happen next; the situation will become more acute. It may be that they will; then the situation will become less acute, and the purchase-money may be raised. Then I asked Mr. Cripps, who appeared for the plaintiff company, whether the plaintiff company was minded to enforce this contract or rescind it. He said, "Rescind it! Certainly not; the plaintiff company proposes to enforce it." At the same time it is competent to Parliament to do anything, and if a municipal authority have entered into such a bargain as is an oppression, it is possible that Parliament might relieve them from that contract on proper terms, and therefore it is possible, but improbable, that the sale may not be carried out. That is the situation, and under the circumstances I am asked to extend the time till February 29, and I think I ought to do so. Before that date it will be known what is going to happen.

Then comes the question upon what terms I ought to do so? The first term that the plaintiff company asks is that the defendants shall now give an undertaking that if the electors decline to approve the Bill they will forthwith levy a rate to raise the necessary amount. Now I am not minded to require that undertaking as a term. I am told, and I believe it is the case, that if the final date arrives at which this purchase-money must be paid, it will be competent for the plaintiff company to apply for a *mandamus* that the defendants do levy a rate to collect the money. Whether the Court would have any discretion in dealing with that I do not know and do not say. I think that I ought to leave the matter so that the parties shall be entitled to resort to their legal remedy by way of *mandamus*, and that the defendants should not be required to give an undertaking to do that which there would be a legal obligation upon them to do under the supposed circumstances.

Then, the second term suggested is this: As I have said, further capital expenditure is necessarily from time to time made in carrying on this undertaking, and by the order of August 7th, it is ordered that the

plaintiff company do, up to and including December 31st, 1903, proceed with reasonable diligence and in accordance with the reasonable instructions of the defendants, with the conversion of the system of supply in what is known as district "C" of the St. Marylebone area, from the high tension system to the low tension system, so that both by reason of its statutory obligation, and by reason of some part of the terms of this order, the plaintiff company was to go on spending money, and in the affidavit filed on its behalf it is said that under the circumstances it is not reasonable for the plaintiff company to raise more capital by the issue of more shares or more debenture stock, and that as the matter, it is to be hoped, is but a temporary one, what it does is to go to its bankers and borrow the necessary money at $4\frac{1}{2}$ per cent. interest. And it is said that if the time is further extended the money the plaintiff company has expended since 1901 for further capital expenditure, and the money which it is from time to time further expending in the capital expenditure costs it money; and that it is not reasonable that that should go on, and that it should be out of pocket sums spent on the undertaking which belongs to the defendants. I think there is great justification for that argument. When the judgment was drawn up on August 7th an agreement was come to between the parties that £67,250 should be the agreed amount for capital expenditure between December, 1901, and June, 1903. Then there has been further capital expenditure since that time. There has been £5,000 either made or to which the plaintiff company was committed as from and after June 30th, 1903, and there has been further capital expenditure since that date. The plaintiff company contends that it is only reasonable that there should be repaid to it, or provided for further capital expenditure which it will have to make, a substantial sum, and it suggests £60,000 as a reasonable sum to be provided at once, and the evidence is that it will require a rate of 9d. in the £. I think that is not an unreasonable term that the defendants should within such a time as is reasonable, levy a rate and pay to the plaintiff company a sum of, say, £60,000.

Then it is suggested as regards the balance of £67,250, and any further capital expenditure which the plaintiff company has to make, that it is not unreasonable that the defendants and not the plaintiff company should bear the $4\frac{1}{2}$ per cent. interest. I think that is reasonable. I think it is a reasonable term that the defendants should pay the £60,000 and interest at $4\frac{1}{2}$ per cent. on the £7,250, and upon the further capital expenditure which has been or shall be made by the plaintiff company.

The last matter is this. The order of August 7th provides that such further and other expenditure as the plaintiff company shall make up to and including December 31st, 1903, with the approval of the defendants

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together with interest on such further and other expenditure as from the respective dates of expenditure at the rate of 4 per cent. should be added to the money which is to be paid by the defendants. The plaintiff company says that that does not work in this sense, that it cannot practically go to the defendants for their approval for all the little items of capital expenditure that it has to make day by day; laying a main here and putting a connection there; numbers of small works, some large and some small; and it suggests, not unreasonably, and to some extent at its peril, that I should make it a term that the future expenditure which should be repaid, should be all reasonable and proper expenditure on capital account, that has been or may be made by the company subject to its vouching or proving such expenditure to be reasonable and proper. That is objectionable in this sense, that it leaves it to be determined in the future, whether the expenditure is reasonable or proper or not. Under that difficulty the plaintiff company will lie; but I do not regret it so much, because, if I leave it with the approval of the defendants, I am imposing upon the plaintiff company an expenditure which it is making for the benefit of somebody else, with the possibility of its being deprived of the right to repayment of the amount, because it has not obtained the approval of the defendants to it. It makes the defendants masters of the situation when the plaintiff company, through no fault of its own, is compelled to expend its own money upon that which is an undertaking of the defendants. I think that also ought to be a term. I therefore extend the time till February 29th next, upon these three terms: That within a time as to which I will hear counsel, £60,000 shall be paid by the defendants to the plaintiff company; secondly that $4\frac{1}{2}$ per cent. shall be payable upon the balance of £67,250, and upon the further and other expenditure; and upon the further term that the amount to be added to the purchase-money shall be such further and other expenditure as the plaintiff company shall make in respect of reasonable and proper expenditure on capital account, subject to its vouching such expenditure as being necessary and proper.

It was ultimately agreed by the parties that date fixed for the payment of the £60,000 should be January 31, 1904.

The order as finally settled (omitting formal parts) was as follows:—

This Court doth order that the day fixed by the said judgment (of the 7th August, 1903) for the completion of the purchase therein referred to and for the payment of the purchase-money may be extended from the 31st day of December, 1903, to the 29th day of February, 1904, on the terms hereinafter-mentioned. And it is ordered that the plaintiffs retain the profits referred to in such judgment in lieu and satisfaction of any claim for interest on the purchase-money until such extended day for completion. And it is ordered that the plaintiffs do up to and including such extended day for completion proceed in accordance with such judgment with the conversion of the system of supply therein referred to. And it is ordered that the

apportionment of rents and profits and outgoings directed by such judgment be made on such extended day for completion. And it is ordered that the further and other expenditure made by the plaintiffs up to and including the 31st day of December, 1903, included under such judgment in the aggregate purchase-money extend to expenditure made under the like conditions up to and including the said extended day for completion. And as terms of the extension of time hereby directed It is ordered as follows: First that the defendants do on or before the 31st day of January, 1904, pay the sum of £60,000 to the plaintiffs in part payment of the sum of £67,250 mentioned in the said judgment. Secondly that the defendants on the said extended day for completion pay to the plaintiffs as part of the aggregate purchase-money in addition to the further and other expenditure made with the approval of the defendants as mentioned in such judgment all such further and other expenditure as the plaintiffs shall since the 7th August, 1903, the date of the said judgment or shall hereafter have made or make as reasonable and proper expenditure on capital account properly applicable to the St. Marylebone undertaking although not made with the express approval of the defendants and thirdly that the defendants on the said extended day for completion pay to the plaintiffs as part of the aggregate purchase-money interest on the said sum of £67,250 and on the sum of £5,000 mentioned in the said judgment or on so much thereof as has been expended by the plaintiffs and on the further and other expenditure made or to be made by the plaintiffs with the approval of the defendants as mentioned in the said judgment and on the said reasonable and proper expenditure as hereinbefore-mentioned at the rate of 4½ per cent. per annum as from the 31st day of December, 1903, in the case of the said sum of £67,250 and any expenditure made prior to such date and in the case of expenditure made subsequent to such date from the date of the expenditure, the interest on the said sum of £60,000 part of the said sum of £67,250 to be calculated up to the date of payment of the said sum of £60,000 pursuant to this order. And it is ordered that all the before-mentioned interest is to be in addition to the interest at the rate of 4 per cent. per annum on any such further or other expenditure from the date of expenditure to the 31st day of December, 1903, given by such judgment but in lieu of all interest (if any) on capital expenditure given by such judgment subsequent to the 31st day of December, 1903. And it is ordered that the defendants the Mayor, Aldermen, and Councillors of the Metropolitan Borough of St. Marylebone do pay to the plaintiffs their costs of this application. Such costs to be taxed by the Taxing Master. And it is ordered that the defendants be at liberty to apply for further postponement or extension of the date for payment of the purchase-money and for completion of the purchase.

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Early in February, 1904, the consents of the electors and the Council were obtained to the promotion of a Bill in Parliament to confer upon the defendants the necessary borrowing powers, and the Bill had been presented and read a second time in the House of Commons. The defendants now applied by motion for a further extension of time to enable the Bill to be passed.

Buckmaster, K.C., and *E. Clayton* for the motion. The defendants ask that the time may be extended until 31st August, 1904, by which time in all probability the Royal Assent will be obtained to the Bill.

Cripps, K.C., *Astbury, K.C.*, and *Sargant* for the plaintiff company. The plaintiff company is willing that there should be a further extension

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for two months if the defendants pay a proper sum in respect of the expenditure on the undertaking. The plaintiff company has no desire to take up an oppressive attitude.

BUCKLEY J. At the outset I desire to say that I am sorry I cannot disconnect the ratepayers and the defendants. For the former I have great sympathy, as they have been saddled with a burden through no fault of their own. I am desirous to relieve them if it is possible. I have no sympathy with the defendants. They have entered into obligations which fall upon other persons. Judicially, however, I can only consider the defendants. The question is, as between the purchasers and the vendors, what are fair terms to impose on the purchasers on giving them an extension of time for completion. The judgment for specific performance gave them until December 31, 1903, to comply with it, and on December 11, 1903, the time was extended on the terms of their making certain payments. In pursuance of the order the defendants have taken steps to further comply with the judgment by obtaining sanction to the bringing into Parliament of a Bill to enable them to borrow the purchase-money. In the meantime the defendants have not obtained the purchase-money. What are fair terms on which a further extension of time ought to be granted? There is an undertaking on which it is necessary to make further capital expenditure. Through the default of the defendants the undertaking is left under the control of the plaintiff company; but although it is now the defendants' undertaking the plaintiff company is bound to go on with it, and to pay money in respect of it. Why is this burden to be thrown on the plaintiff company? Further moneys must be provided by the defendants, who are in default. What is a fair sum for them to pay as a term of their having a further extension of time to complete? I am going to name a sum and then appeal to the plaintiff company to take less, as I do not wish to press hardly on the ratepayers. Having regard to the evidence I find the sum to be £20,000, but I ask the plaintiff company to accept £15,000.

Cripps, K.C., stated that plaintiff company was willing to accept £15,000.

BUCKLEY J. I will extend the time until April 30, 1904, on the term that the defendants will on or before March 31, 1904, pay to the plaintiff company the sum of £15,000 in respect of expenditure on the undertaking.

Judgment accordingly.

Solicitors for the defendants—Greenwell & Co.

Solicitors for the plaintiff company—Barlow and Barlow.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

GRAY v. HACKNEY BOROUGH COUNCIL.

Feb. 19.

Officers—Metropolitan borough council—"Existing officer"—Additional work—Remuneration—Power of finance committee to remunerate for temporary assistance—London Government Act, 1899 (62 & 63 Vict. c. 14) ss. 8 (3), 30 (1).

The plaintiff who at the time of the coming into operation of the London Government Act, 1899, was accountant to the Hackney Vestry was transferred by that Act as an existing officer to the defendant council. The plaintiff did not enter into any new contract with the council, but continued to perform the duties attaching to his former office, and also, at the request, as he alleged, of the finance committee, did much additional work. He applied to the finance committee for remuneration for extra services, and the committee recommended to the council that he should be paid a sum of £50; but the council refused to adopt the recommendation.

He sued the council on a quantum meruit in respect of the extra services for a sum of £112 10s.

Held (1) that the plaintiff, not having availed himself of the option given to him under section 30 (1) of the Act to relinquish his office on the ground that the duties he was required to perform were "not analogous" or "an unreasonable addition" to his then existing duties, must be taken to have done the additional work without reference to any implied contract that he should be remunerated for so doing.

(2) that the plaintiff's claim was inadmissible by reason of the provision in section 8 (3) of the London Government Act, 1899, that a liability exceeding £50 shall not be incurred by a metropolitan borough council except upon a resolution of the council passed on an estimate submitted by the finance committee.

THIS was an action by the plaintiff claiming £112 10s. for remuneration for extra services rendered by him to the defendant council between November 9, 1900, and November 9, 1901, under the following circumstances:—

For some years prior to November 9, 1900, the plaintiff was accountant to the vestry of Hackney. On that day, under the provisions of the London Government Act, 1899 (62 & 63 Vict. c. 14), the defendant council were constituted and came into existence, and there were transferred to them the powers, duties, property, and liabilities of the vestry, and the existing officers of the vestry including the plaintiff.

Under the same Act there were also transferred to the defendant

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council all the powers, duties, property, and liabilities of the trustees of the poor of St. John, Hackney, constituted under certain local Acts of the 4th and 50th years of the reign of Geo. III.

From November 9, 1900, until November 14, 1901, the defendant council made no appointment of a borough accountant, and the plaintiff during the interval continued to discharge under the defendant council the duties which prior to that date had devolved on him as accountant of the vestry and related to the vestry only.

From November 9, 1900, until December 25, 1901, the plaintiff also discharged the duties which prior to November 9, 1900, had devolved on the accountant or other like officer of the trustees of the poor.

The particulars of the duties so undertaken were as follows :—Conduct of the poor rate audit to November 9, 1900, before the District Auditor, which took place in December, 1900; supervision of eleven rate collectors and the rating staff in the offices of the defendant council and all matters within the duties of the said trustees; preparation of the first and second general rates of the defendant council and the issue of the rates and carrying out of a complete change in the various forms and books relating to rating and the collection of rates as required by the Local Government Board under the said Act; the collection of the said general rate from railway, gas, and water companies, and on all assessments of £1,000 and upwards, and the taking over and to a large extent completing by order of the finance committee of the defendant council of the collection of an officer who, in September, 1900, was £1,000 in arrear with his work; and the work relating to adjustment of all rates between adjoining metropolitan borough councils rendered necessary by the changes in borough boundaries effected by or under the said Act.

The plaintiff applied for remuneration for the alleged extra services to the chairman of the finance committee on March 25, 1901, and on November 14, 1901, the finance committee recommended a payment of £50 to the plaintiff as remuneration for such extra services from November 9, 1900, to November 9, 1901, but the defendant council on November 21, 1901, refused to adopt the recommendation, and had since refused to pay the plaintiff any sum in respect of such alleged extra services.

The plaintiff by his statement of claim alleged that the duties undertaken by him were outside his duties as accountant to the vestry, and that their discharge involved a large amount of additional labour and trouble and a very large amount of overtime. He further alleged that these duties were undertaken by him at the verbal request of the chairman of the finance committee of the defendant council, their duly constituted statutory committee having the control of the matters above

referred to ; that the defendant council knew of the request given to the plaintiff by the chairman and committee and adopted and ratified their acts and had availed themselves of the results of the plaintiff's labour ; and that the duties were undertaken on the terms that the plaintiff should be remunerated for their discharge at a fair and reasonable rate.

The defendant council by their defence denied that they knew of the request of the chairman and the finance committee to the plaintiff, or that they ratified their acts, or that the chairman and committee acted as alleged.

Danckwerts, K.C., and *W. F. Craies* for the plaintiff. On the powers and duties of the vestry and the trustees of the poor being taken over by the defendant council, additional work was thrown upon the plaintiff, for which he is entitled to be paid a *quantum meruit*.

The plaintiff did the extra work on the invitation of the chairman of the finance committee. That committee whose duty it was, under section 8 (3) of the Act, to "control" the finance of the defendant council, had power, it is submitted, to employ an accountant to assist them in the performance of their duties, and to pay him for so doing, without obtaining the consent of the defendant council. It follows that they could employ the plaintiff, who was an "existing officer" of the council, and agree to pay him fees in addition to his regular salary.

The defendant council have accepted the work, and a promise by them to pay for it must therefore be implied in such a case. It is not necessary that there should be a contract in writing under seal : *Lawford v. Billericay Rural District Council*, 1903, 1 K.B. 772 ; 1 L. G. R. 535 ; 72 L. J. K. B. 554.

Where the amount is under £50, the finance committee have under section 8 (3) power to pay it without obtaining the consent of the council. In the present case the work was done for the committee with the knowledge of the defendant council. Inasmuch as the finance committee must be taken to have employed the plaintiff from time to time to do work which lay outside his ordinary sphere, they never at any time incurred to the plaintiff a liability exceeding £50. The consent of the defendant council to the recommendation of the finance committee was therefore not required.

T. Bowen for the defendant council. The plaintiff has made out no case for remuneration. He was an "existing officer" of the vestry under section 30 (1) of the Act. The scheme of the Act was that the person who had previously done the work should do the work of all the authorities taken over during the transitional period. The duties formerly devolving on the overseers and the trustees of the poor which the plaintiff

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undertook were "analogous" and were not "an unreasonable addition" to his duties as accountant to the vestry. If the plaintiff thought otherwise he might have relinquished his office. He did not do so, but continued in his office and thereby became an officer of the defendant council. His position was that he was doing the work of his old office augmented with new work, and hoping for an increase of salary.

Lawford v. Billericay Rural District Council, 1903, 1 K. B. 772; 1 L. G. R. 535; 72 L. J. K. B. 554, which relates to little things of daily occurrence, does not apply. The plaintiff was a permanent official and the duties of an accountant are not such as could come within that case. The plaintiff himself in his evidence repudiated the idea that there was any contract. But even if there was, the case would come within section 149 of the Metropolis Management Act, 1855, which requires such a contract to be in writing under the seal of the defendant council: *Young v. Royal Leamington Spa Corporation* (1883) 8 App. Cas. 517; 52 L. J. Q. B. 713; *Hunt v. Wimbledon Local Board* (1878) 4 C. P. D. 48; 48 L. J. C. P. 207.

Further, the finance committee are constituted under section 58 of the Act of 1855, and are subject to the limitations imposed by section 8 (2) and (3) of the Act of 1899, and the defendant council did not dispense with necessity of their approval to validate the acts of the committee, or authorise the expenditure of any money by such committee. It is a condition precedent to the plaintiff suing that he should obtain the consent of the defendant council.

Danckwerts, K.C., replied.

BUCKLEY J. In 1875 the plaintiff was in the employment of the vestry of Hackney, which he entered as a temporary clerk. In 1894 he was appointed accountant to the vestry. At that date there were three bodies in existence in Hackney, viz., the vestry, the trustees of the poor, whose function it was to make rates, and the overseers of the poor, whose function it was to collect them. From 1894 and onwards the plaintiff did in a different form the same work as during the period I am going to mention he did for the borough council. That state of things lasted until February 22, 1899. On that date a special meeting of the vestry was held, at which a resolution was passed that the accounts of the trustees of the poor should not in future be kept by the accountant of the vestry. It follows that from that date the plaintiff's sphere of activity was reduced. He was no longer accountant for the trustees.

In 1899 there was passed the London Government Act, 1899, the result of which was that as from November 9, 1900, the day on which the Act came into operation, the powers and duties of the vestry, the trustees, and the overseers were transferred to and became vested in the

defendant council. Under section 30 of the Act, the plaintiff, as an existing officer employed by the vestry, was transferred to and became an officer of the defendant council.

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The plaintiff's claim to remuneration is based on this, that when he was thus taken over his duties were confined to those to which they had been cut down by the resolution of February 22, 1899, and that other work was added outside the sphere of his previous employment, and he sues for a *quantum meruit* in respect of that additional work. What happened was this: he simply did what there was to do. He did all the classes of work which he did before 1894. His work was heavier but was the same class of work. He stated in his evidence that the chairman of the finance committee said to him that he hoped that he would go on, and that he replied he would be loyal to the defendant council, but that he hoped the defendant council would appoint a new accountant. In my judgment the conclusion to be drawn from this is that there was no new employment of the plaintiff by the defendant council, but that he was content to do extra work in the hope that he would be remunerated for so doing. That state of things continued from November, 1900, until March 25, 1901, when he wrote to the chairman of the finance committee a letter, which has not been produced, but the effect of which was that the work being very heavy he hoped that the chairman would bring the matter before the finance committee and that some payment would be made to him. In answer to that letter the chairman on March 26, 1901, wrote to the plaintiff as follows:—"I have received yours of the 25th inst., and am very sorry you are too unwell to continue your duties at the town hall. I am sorry you have written such a letter just at this time; it would have been better if you had waited until the re-organisation. I cannot read the letter to the committee, for I am sure it would do you more harm than good at the present time. If you still think, considering the state of the office work, that you must have a week's holiday, send me a letter in time for to-morrow's committee and I will read it to them." It is plain that the plaintiff knew that he was doing the extra work from a feeling of loyalty, and not because he thought he had any right to payment for it. That letter was not brought before the finance committee. Ultimately, on October 1, 1901, a meeting of the borough council was held at which a resolution was passed, that the office held by the plaintiff should be abolished, and that the council should advertise for an accountant who had had experience in municipal finance, at a salary of £300 per annum. The plaintiff relinquished his appointment. The finance committee in their report to the borough council, dated November 14, 1901, stated, with reference to the plaintiff's application for remuneration for extra services, as follows:—"When the London Government Act,

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1899, came into operation, the council at the outset did not make any appointment to the office of borough accountant, and no appointment has been made up to this date. It was, therefore, necessary that Mr. Gray should take upon himself the duties appertaining to the appointment. These have included a complete charge of all forms relating to rating matters, the issue of the council's first general rate, and the general supervision of all matters peculiar to the late trustee board." The committee accordingly recommended: "That the sum of fifty pounds (£50) be paid to Mr. C. M. Gray for extra services rendered by him to the borough council during the year ended November 9, 1901." This recommendation came before the borough council on November 21, 1901, and being put to the council was declared to be lost.

The minute or memorandum from the plaintiff, which was read to the finance committee on November 6, 1901, contains the arguments supporting his case. It commences: "The committee will no doubt recollect that the staff of the late Hackney Vestry was taken over by the borough council subject to and in accordance with the provisions of the Existing Officers' Scheme under the London Government Act, 1899, and it follows that my position as accountant to the late vestry was to continue that work in a similar capacity under the council. Had there been only one authority in the parish, this process would have been automatic, but as the borough council absorbed both the vestry and the trustees of the poor, it follows that the accountant was compelled, if only as a matter of loyalty to his employers, to take up the whole of the accountancy peculiar to both boards, and the necessity for this has been more than proved by the fact that the borough council has allowed nearly twelve months to elapse before making any appointment. That the taking of so much work on one's shoulders involved heavy additional labour and responsibility is beyond question. The committee know the general details, so I will not now enter into them. Early in 1901, it became necessary to anticipate the many changes in the various forms relating to rating matters, arising out of the dissolution of the trustee board and the making of the council's first general rate under the Act. Everything was changed, and the position was rendered more difficult from the fact that the Order of the Local Government Board defining the several forms was not issued until the 28th March, a period at which all forms for the rate from Lady-Day to Michaelmas, 1901, had been anticipated according to the knowledge and experience that had been acquired. The committee will recollect that the town clerk, who was the official really responsible for the execution of this work, became ill in February and he did not return to the office until April, with the result that as a matter of loyalty I was bound to take the whole of the business in hand, and I have reason to say that I did so successfully."

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And further on it stated : " I venture to submit that this first year of the council's labours has involved an enormous amount of extra work, which in my case means additional services, as in the capacity in which I was taken over by the council, I had no responsibility whatever for any of the duties formerly carried out by the late trustee board. But as I have already stated, loyalty compelled me to take up the work and to carry it out to the very best of my ability." Those being all the facts, I have now to consider the material provisions of the London Government Act, 1899. Under section 30 (1) : " Where the powers and duties of any authority are transferred by or under this Act to any borough council, the existing officers of that authority shall be transferred to and become the officers of that council. Any assistant overseers, rate collectors, and other officers employed in the performance of duties of overseers within a borough shall also be transferred to and become officers of the council for that borough. The council may abolish the office of any such officer whose office they may deem unnecessary ; but any officer required to perform duties such are not analogous, or which are an unreasonable addition to those which he is at present required to perform, may relinquish his office, and any officer so relinquishing his office, or whose office is abolished, shall be entitled to compensation under this Act." If the plaintiff is right in saying that the services were not " analogous " to those which he was then required to perform, or were " an unreasonable addition " to them, he ought to have availed himself of the section and to have relinquished his office. He did not, however, do so, but went on working without any contemplation that he was thereby entering into a new contract with the borough council. The only other material section is section 8 (3). The plaintiff asks me to review the exercise of a statutory jurisdiction given to the finance committee and the defendant council. Section 8 (3) provides that " every borough council shall from time to time appoint a finance committee for regulating and controlling the finance of the council ; and no order for payment of any sum, whether on account of capital or income, shall be made by a borough council except in pursuance of a resolution of the council passed on the recommendation of the finance committee ; and any costs, debt, or liability exceeding fifty pounds shall not be incurred except upon a resolution of the council passed on an estimate submitted by the finance committee" The plaintiff sought to rest his case on this : that he was employed from day to day at a *quantum meruit*, which was less than £50 a day ; in other words, that his employment was not a continuing employment, and that the remuneration was less than £50 a day, and that it was competent for the finance committee to employ him as a temporary assistant. But

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the facts do not give colour to any such construction. He was a permanent officer employed at a rate which exceeded £50.

In my judgment, it is not competent for me to review the refusal of the defendant council to adopt the recommendation of the finance committee. I think, therefore, that the action fails, and that the defendant council are entitled to judgment with costs.

Judgment accordingly.

Solicitors for the plaintiff—Stuttfield and Son.

Solicitor for the defendants—W. A. Williams.

Note.

The decision in the above case that the alleged liability of the council on which the plaintiff was suing was a "liability exceeding fifty pounds" within the meaning of section 8 (3) of the London Government Act, 1899, may be compared with the decision in *Eaton v. Basker* (1881) 7 Q. B. D. 529; 50 L. J. Q. B. 444; 44 L. T. 703; 29 W. R. 597; 45 J. P. 616, where it was held that an agreement, made, upon the occasion of an epidemic, between an urban authority and a doctor, under which the doctor was to attend the patients, who were housed in tents, at a charge of 5s. 3d. per tent per day, did not come within the provisions of section 174 (1) of the Public Health Act, 1875, requiring every contract of an urban authority, "whereof the value or amount exceeds fifty pounds" to be in writing under seal, though the doctor's charges ultimately amounted to more than £50.

High Court of Justice.

KING'S BENCH DIVISION.

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HENNEN v. LONG.

Feb. 5.

**Adulteration—Warranty—Milk—Addition of preservative by retailer
—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.**

A retailer of milk, who, after he has received milk from the whole-sale dealer under a contract containing a warranty, adds boric acid to it, cannot, upon proceedings taken against him under section 6 of the Sale of Food and Drugs Act, 1875, for selling milk deficient in fat and containing added water, set up his vendor's warranty as a defence under section 25. Having added boric acid he cannot be heard to say that the milk when he sold it was in the same condition as when he purchased it.

CASE stated by justices who, being equally divided in opinion, had dismissed an information preferred against the respondent by the appellant, an inspector of nuisances for the borough and county of Southampton, under section 6 of the Sale of Food and Drugs Act, 1875, charging the respondent with selling adulterated milk.

The facts, &c., were stated in paragraphs 3, *et seq.*, as follows:—

3. Upon the hearing of the information the following facts were admitted or proved in evidence:—

(a) Upon Wednesday, June 10th, 1903, about 8.10 a.m., the appellant purchased near No. 8 Union Road, Freemantle, in the said borough and county one pint of new milk, for which he paid twopence, from the respondent, and when the purchase was completed the appellant informed the respondent that he (the appellant) was an inspector under the Food and Drugs Act, and that he had purchased the milk for the purpose of analysis by the public analyst.

(b) The appellant then divided the milk into three parts, and sealed and fastened the same in the presence of the respondent. One part he gave to the respondent, one part he retained, and the third he took to the public analyst, whose certificate he produced to us, a copy whereof is annexed to and is intended to form part of this case. The sample of milk was marked "sample No. 102, June 10th, 1903."

(c) On July 9th, 1903, the appellant received from the respondent's solicitors a written notice that on the hearing of the said information the respondent would rely on the defence that the respondent purchased the milk in question as the same in substance

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and quality as that demanded of him by the appellant and with a written warranty to that effect, and that he had no reason to believe at the time he sold the said milk that it was otherwise, and that he sold the said milk in the same state as he purchased it, and that the person from whom the respondent received the milk was Silas Frampton, of Upper Manor Farm, Longstock, Stockbridge, Hants. Annexed to the said notice was a copy of a memorandum of agreement between the said Silas Frampton and the respondent, and also copy of two labels dated respectively June 9th. Copies of the said notice, agreement and labels are annexed to and are intended to form part of this case.

(d) The said Silas Frampton was called as a witness before us by the appellant. He deposed that he did not at any time put any boric acid preparation as a preservative or anything else into any milk sold by him to the respondent.

(e) One Hutchens, cowkeeper to Silas Frampton, was also called as a witness by the appellant, and he deposed that he milked his master's cows on the day in question, and had the milk under his care from milking until delivery at the railway station, and that nothing whatever was put into the milk.

(f) The respondent gave evidence before us. He deposed that the milk in question was received by him from Silas Frampton under the said agreement. He admitted that he had put into the milk so purchased one ounce of milk preservative to each ten gallons of milk. The respondent stated that although by the directions on the packet in which the milk preservative so used by him was contained, it appeared that the preservative should be dissolved in water before being put into the milk he had not followed the directions, but had put the same into the milk in a dry condition without dissolving the same. Respondent stated he had not discovered that the preservative left any sediment.

(g) It was proved by Henry Brierly, the borough analyst, on behalf of the appellant, that dry boric acid would dissolve in milk, but slowly, and would very likely leave a sediment, but that there was no sediment in the sample of milk in question, and which he analysed.

4. The respondent contended :—

(a) That the said agreement was a warranty, and was a complete defence under section 25 of the Sale of Food and Drugs Act, 1875.

The appellant contended :—

(a) That section 25 of the Act of 1875 required the respondent, relying on the said agreement as a warranty, to prove also that he

had no reason to believe at the time he sold it that the milk was other than of the nature, substance, and quality demanded by the appellant, and that he sold it in the same state in which he purchased it. That by the respondent's own admission the milk in question was not in the same state as when he purchased it by reason of his having added matter thereto, and that the warranty was therefore not an answer to the charge, and the respondent was not entitled to be discharged from the said prosecution. 1904.
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5. We being equally divided as to whether the warranty constituted under the circumstances a defence entitling the respondent to be discharged from the said prosecution, the information was dismissed.

6. The question for the opinion of the Court is whether upon the above statement of facts we ought to have convicted the respondent upon the above information, and what should be done in the premises.

The analyst's certificate showed a deficiency of fat, and an excess of water in the milk.

S. H. Emmanuel for the appellant. The adulteration complained of was added water and abstraction of fat. The respondent cannot defend himself by saying that he trusts to the warranty under which he purchased the milk, when he admits that he had added boric acid. Having added this boric acid after purchase he did not sell the milk in the state it was in when he purchased it. Upon the wording of section 25 it is submitted that the respondent has failed to prove what the section says he must prove before he can set up a warranty as a defence.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. I think this case must go back to be heard. In previous cases that have been before the Court I have seen that the point might some day arise as to the addition of some substance which had nothing at all to do with the adulteration. It is quite possible that that was just the point that the Act of Parliament did not mean to be raised, and that it was intended that there should not be a discussion as to whether what was added did affect the adulteration or not. But be that as it may, in this case it was attempted to say that the warranty was a defence upon the ground that the respondent had sold the milk in the same state as when he purchased it because he had only put in boric acid, which had nothing to do with the adulteration. Now it is perfectly plain that there was a case to be investigated here. The analysis shows that there was water to the extent of 5 per cent., and it seems to me, having regard to the case that was stated, there was certainly a case to be investigated with reference to how this stuff had

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been put in, and under what circumstances, so to speak, the milk got this water. Under those circumstances it is not the warranty only which affords a defence, because something has been added which can only be determined when all the case has been heard even to enable the person charged to raise the point which is attempted to be raised here, and it is evident that the real case to be tried was not the case under section 25, but was the case of the defence that the man would have had under the protective words of section 6 itself. I am therefore of opinion that for the purposes of this case the milk was not, as shown to the magistrates, sold, and could not have been found by them to have been sold, in the same state as when the appellant purchased it, and that being so they certainly ought not to have held the warranty alone to have been a defence, but ought to have heard the case on the merits and then dealt with the point which does arise as to what the actual effect of the addition was.

I am clearly of opinion that the case should go back to be heard on the ground that the warranty section did not apply, that the milk had not been sold under these circumstances in the same condition in which it had been purchased.

WILLS J. I am of the same opinion. I only want to add that to my mind the Act of Parliament is perfectly plain in section 25, and I cannot help thinking that what is really meant was: "We will not have on this question of warranty any question whether the thing added to the milk or subtracted from the milk has done any harm or not; if you rely on the warranty you must show that it was exactly what you purchased."

KENNEDY J. I think the matter is very clear, and I have some difficulty in understanding how there can be any doubt about it. Section 25 allows a defence to a prosecution under the Act if there has been proof to the satisfaction of the justices that the person who is prosecuted purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect; that he had no reason to believe at the time when he sold it that the article was otherwise; and that he sold it in the same state as when he purchased it. If a man having got an article pours acid into it, can he say when he sells it plus the acid, that it is in the same state as when he purchased it? That is really the case.

Appeal allowed.

Solicitors for the appellant—Church, Adams, and Prior, for R. R. Linthorne, Southampton.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

SCOTT v. BROWN.

1908-4

Dec. 10.
Jan. 18.

Streets—Covenant to pay a proportionate share of repairing and maintaining a road until undertaken by local authority—Standard of repair—Reconstruction—Work in excess of covenant—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

The plaintiff, in developing a building estate, granted a lease of one piece of land and conveyed another piece of land to the defendant, the property all abutting on a newly-made and incomplete road. The lease and the conveyance both contained covenants by the defendant, in similar but slightly different language, to pay a proportionate share, to be fixed by the plaintiff's surveyor, of repairing and maintaining the road until undertaken by the local authority. For three years the defendant paid small contributions in common with other frontagers, but when the plaintiff, by arrangement with the local authority, in order that the road might be taken over by them, expended a large sum on extensive works on the road, the defendant declined to pay his apportioned share of the outlay.

Held, that the defendant's covenants did not extend to the work done, which was practically a reconstruction of the road, to which the defendant was not liable to contribute; and that as the plaintiff declined to amend his claim by asking for an inquiry as to what part of the work could be called repairs, the action must be dismissed with costs.

IN this action the plaintiff, Sir S. E. Scott, Bart., claimed from the defendant, R. S. Brown, the sum of £300 5s. 7d., being an apportioned part of the expenses of repairing and maintaining a private road called Sundridge Avenue, at Bromley, in the county of Kent.

The plaintiff was tenant for life of an estate known as the Sundridge Park Estate, which in 1886 was laid out for building purposes. By an indenture of lease dated the 1st June, 1896, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff demised to the defendant all that parcel of land and house and outbuildings known as No. 30, Sundridge Avenue, together with a full right of passage for all persons, carriages, and animals to and from the house over the road known as Sundridge Avenue, and the full right of passage and running of water and soil from the said parcel of land and dwelling-house through the main sewer which had been made under the road, for a term of 21 years at the rent therein reserved without any deduction save landlord's property tax, and the defendant covenanted that he would "pay, bear, execute and observe all present

1908-4. and future taxes, rates, commuted tithe rent-charges, assessments, impositions, outgoing, works, and sanitary and other regulations imposed by competent authority on or in respect thereof (except the landlord's property tax)," and would "pay and allow a reasonable proportion of the expense of lighting, watering, and maintaining in proper repair the said road and the footway thereof and of repairing and cleansing all sewers, drains, pipes and watercourses used or to be used by the occupiers of the premises thereby demised in common with the occupiers of any other dwelling-houses or buildings already erected or to be erected on any of the said lands, such proportion to be ascertained by the surveyor for the time being of the lessor and to be recoverable from the lessee by action or distress upon the said premises in like manner as if the same were rent reserved upon lease and in arrear."

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By an indenture dated the 2nd June, 1898, and made between the plaintiff of the first part, trustees for the purposes of the Settled Land Acts of the land thereby conveyed of the second part, and the defendant of the third part, the plaintiff conveyed to the defendant a piece of land, part of the Sundridge Park Estate, situated on the west side of Sundridge Avenue, and bounded on the north by the land leased to the defendant as above mentioned, together with similar rights of passage over Sundridge Avenue and of passage of water and soil to the drains. The defendant covenanted in this conveyance (*inter alia*) that "he, his heirs and assigns shall pay and contribute a proportionate share of the expenses of repairing and maintaining the said road and the footways thereon and the main sewer thereunder and of lighting and watering the said road until undertaken by the parish or other local authority, such proportionate part to be fixed by the surveyor for the time being of the vendor."

The piece of land so conveyed was about two acres in extent, and the side abutting on Sundridge Avenue was 240 feet in length.

The road, Sundridge Avenue, was made in 1887, and had been kept in repair by the workmen on the estate, the defendant, in common with other frontagers, contributing small sums of £1 or more for three years prior to 1900. In 1900 the road was badly in need of repair, having been thrown open to public traffic and much used. In 1901 application was made to the Bromley Urban District Council to take over the road as a highway repairable by the inhabitants at large. The Council agreed to do so, provided that the road was put into a proper state of repair, and they gave instructions to their surveyor to prepare specifications of the necessary work. These specifications were sent to the surveyor of the estate, who had the work done by an outside contractor at a cost of £1,748. The Council then duly took over the road so completed as a highway repairable by the inhabitants at large. The

cost of the repairs having been paid to the contractor by the plaintiff, his surveyor apportioned the amounts payable by the several frontagers and the sums apportioned against the defendant were £165 7s. 9d. in respect of the freehold, and £134 17s. 10d. in respect of the leasehold, making a total of £300 5s. 7d. The defendant declined to pay on the ground that this money was not expended in works of repairing or maintaining the road or on any works within the meaning of the covenants contained in the two deeds, and, while denying liability, he paid £25 into Court to meet any sum which might have been expended by the plaintiff in repairing or maintaining the road, and for which the defendant might be liable. 1908-4.
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The action was heard with witnesses, and the plaintiff's surveyor deposed that he had accepted the lowest tender for the work, which was done satisfactorily and without any extras. The specification attached to the contract showed that the work to be done, which was in fact done, included

(a) a thorough cleansing of the whole of the system of surface water sewerage (at a cost of £70), and the construction of sewer manholes of the Council's pattern opposite each pair of gullies to receive the drainage therefrom (at a cost of £52);

(b) the making of the carriageway by excavating to a depth of one foot and replacing all soft material by a consolidated road of screened hard core and surface flints;

(c) the formation of tar-paved footways;

(d) the relaying of kerbstones in a bed of Portland cement concrete; and

(e) a similar laying of new granite setts for channelling.

The whole of the work was to be done to the satisfaction of both the plaintiff's surveyor and the surveyor of the Bromley Urban District Council. The plaintiff's surveyor admitted under cross-examination that the work was not wholly repair and maintenance.

Macmorran, K.C., and *R. Cunningham Glen* for the plaintiff. The defendant is liable for the apportioned part of the costs of all these works. Under both deeds it is left entirely to the plaintiff to decide what is to be the standard of repair, as it is his covenant to keep the road well lighted, watered, and maintained in proper repair. The defendant's covenant is to pay the proper proportion of the expense. All the repairs here done are repairs which under section 150 of the Public Health Act, 1875, the local authority could have required the defendant to do, according to the judgment of Bigham J. in *Moore v. Todd* (1902), 1 L. G. R. 113, which was not affected on this point by the reversing decision in the Court of Appeal, 2 L. G. R. 376.

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Bray, K.C., and *A. W. Groser*, for the defendant. The question is as to the standard of repair. The work here done was a reconstruction of the road, and that is not covered by the covenants: *Lister v. Lane*, 1893, 2 Q. B. 212; 62 L. J. Q. B. 583. In *Huggall v. McKean* (1884), 1 Cab. & E. 391, it was held that structural alterations of drains were not within a covenant by the landlord to keep the drains in good tenantable repair: see also *Moore v. Todd*, *ubi supra*. In *Leek Improvement Commissioners v. Staffordshire Justices* (1888), 20 Q. B. D. 794; 57 L. J. M. C. 102, the conversion of a macadamised road into a paved road was held not to be "maintenance" within the meaning of section 13 of the Highways and Locomotives (Amendment) Act, 1878.

Macmorran, K.C., in reply. There is here no alteration in the nature of the road, which is still macadamised, so that *Leek Improvement Commissioners v. Staffordshire Justices* does not apply. The parties must have contemplated that this road would one day be taken over by the highway authority. No objection can be raised in respect of the incidental expenses: *Walthamstow Local Board v. Staines*, 1891, 2 Ch. 606; 60 L. J. Ch. 738.

JOYCE J., after reading the two covenants above referred to, which he described as being in similar but different terms, continued as follows:—I do not think it has been seriously contended before me that that covenant empowers the surveyor not merely to apportion the amount between the several persons who are liable to contribute the amount that is to be contributed, but entitles him to fix the amount which is to be apportioned; at all events I do not so read the covenant. In my opinion, whatever might have been intended, the surveyor is only entitled to apportion such amount as is composed of the expenses mentioned in the covenant. I do not think there is any principle upon which, by having regard to another covenant in the lease or on any such suggestion as Mr. Macmorran has made to me, I can extend the meaning of the covenant beyond the actual words which I find there, and it does appear to me after reading those words more than once, as I have done, that that covenant to pay or contribute a portion of the expenses of repairing and maintaining that road does not extend to paying or contributing a proportion of the expense of an entire reconstruction of the road—of making a new road. I think the cases that have been cited to me do show this, that in considering that covenant you are entitled to have regard not only to the general condition of the road contained in the covenant but to the nature of the road as originally constructed.

What has happened is that the defendant, who is the covenantor

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and the lessee of one piece of land and the owner of another, after having been called upon for two or three years to contribute a sum of £1 or a little more every year, is suddenly called upon to contribute the two sums amounting to about £300, which are sued for in this action. It appears that the owners of the estate, the covenantees, for the purpose of inducing the local authority to take over this road, have reconstructed the whole thing, not at all according to the directions required by the Statute, but according to the conditions imposed upon them by the local authority. We have the specification and the contract for the work that was done, and it appears to me that a great deal of that work that was done was in effect new work, and the making of a new road; the gradient was new, the manholes were new, and there is a reference to new materials also. It appears to me to have been in a great measure, if not altogether, reconstruction. That in fact is admitted by the plaintiff's own surveyor because he was driven in the end to say that he "cannot say that all that was done was repair and maintenance." Practically, it was reconstruction. In that state of things there is no question about the propriety of the apportionment between the persons who pay if there is any liability to pay the total cost of these works that were done. But in my opinion this covenantor is not bound to pay an apportioned part of the sum, that is to say the £300, that is sued for in this action. That is what all the dispute is about: as to whether he is bound to pay the amount that has been apportioned by the surveyor. In my opinion he is not bound to pay that sum under these covenants.

I did at one time suggest to the plaintiff whether he had not better amend his statement of claim and ask for an inquiry as to what part of this could really be called repair. That suggestion has not been acceded to, and all I can do, therefore, is to dismiss the action with costs.

Action dismissed.

Solicitors for the plaintiff—Walfords.

Solicitors for the defendant—C. J. Smith and Hudson.

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Feb. 4, 5.

CENTRAL LONDON RAILWAY CO. v. HAMMERSMITH BOROUGH COUNCIL.

Nuisance—Metropolis—Prohibition of recurrence of nuisance—Proceedings taken without previous proceedings for abatement—Specification of works in prohibition order—Black smoke—Public Health (London) Act, 1891 (54 & 55 Vict. c 76), ss. 4, 5, 24, 130.

It is not necessary before notice is served under the Public Health (London) Act, 1891, requiring a person responsible for a nuisance, which for the time has been abated, to take steps to prevent its recurrence, that any previous proceedings should have been taken under the Act to secure the abatement of the nuisance.

On the hearing of a summons under the Act for a prohibition order in respect of a nuisance consisting in the emission of black smoke the prosecution proved the nuisance, but offered no evidence as to what was required to prevent its recurrence. After the close of the case for the prosecution the defendants, who had given evidence that the nuisance might be due to the simultaneous opening of two furnace doors, required pursuant to section 5 (5), that the order should specify the works to be executed by the defendants. They at the same time objected to the reception of any further evidence on behalf of the prosecution on the ground that their case was closed. Under these circumstances the court made an order requiring the defendants to fit apparatus to prevent the simultaneous opening of furnace doors, for example, a bar pivoted in a particular manner, and to take all other proper steps to prevent the emission of smoke.

Held, that the order was not invalid on the ground that it was made without evidence as to the nature of the necessary works.

Semle, that, careful stoking being all that was in fact necessary, the order would have been good if it had merely required the defendants to refrain from careless stoking.

CASE stated by a metropolitan police magistrate who had made a prohibition order against the appellants under section 5 (1, 2) of the Public Health (London) Act, 1891, in regard to the recurrence of a nuisance caused by the issue of black smoke :—

1. The appellants are the occupiers of an electricity generating station, which provides power for the running of the trains of the appellants, at Wood Lane, Shepherd's Bush, in the borough of Hammersmith. The respondents are the council and sanitary authority of that borough.

2. By the Public Health (London) Act, 1891—

Section 4. "(1) On receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the

sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary authority think it desirable (but not otherwise) specifying any works to be executed.

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"(2) The sanitary authority may also by the same or another notice served on such occupier, owner, or person require him to do what is necessary for preventing the recurrence of the nuisance, and, if they think it desirable, specify any works to be executed for that purpose, and may serve that notice notwithstanding that the nuisance may for the time have been abated, if the sanitary authority consider that it is likely to recur on the same premises.

Section 5. "(1) If . . . (b) the nuisance, although abated since the service of the notice, is, in the opinion of the sanitary authority, likely to recur on the same premises, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order).

"(2) A nuisance order may. be an abatement order, a prohibition order, or a closing order, or a combination of such orders . . .

"(5) An abatement order or prohibition order shall, if the person on whom the order is made so requires, or the court considers it desirable, specify the works to be executed by such person for the purpose of abating or preventing the recurrence of the nuisance."

Section 130. "The forms in the third schedule to this Act, or forms to the like effect, varied as circumstances may require, may, unless other forms are prescribed under the Summary Jurisdiction Act, 1879, be used and shall be sufficient for all purposes."

In the third schedule are Form A of notice requiring abatement of nuisance; Form B, summons; Form C, nuisance order.

3. On February 5, 1903, S. H. Brown, the sanitary inspector of the respondents, in pursuance of instructions from the respondents, served upon the appellants, at their office, 125, High Holborn, W.C., notice in a printed form such as is prescribed in the third Schedule A aforesaid, but filled up and varied in manuscript with partial alterations, as follows:—

"To the Central London Railway Company, Limited, of 125, High Holborn, London, W.C., by R. O. Graham, their secretary.

"Take notice that under the provisions of the Public Health (London) Act, 1891, the council for the metropolitan borough of

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Hammersmith, the sanitary authority for the said borough, being satisfied that at the generating station, Wood Lane, Shepherd's Bush, in the said borough, of which you are the occupiers, there existed recently, to wit, on or about the 22nd day of January, 1903, the following nuisance, namely, a chimney (not being the chimney of a private dwelling-house), known as No. 1 Shaft, sending forth black smoke in such quantities as to be a nuisance, and that although the said nuisance has since the last-mentioned day been abated, the same is likely to recur at the said premises, do hereby require you forthwith to do such things as may be necessary for preventing the recurrence of the said nuisance. If you make default in complying with the requisitions of this notice a summons will be issued requiring your attendance before a petty sessional court to answer a complaint which shall be for the purpose of preventing the recurrence of the nuisance and for recovering the costs and penalties that may be incurred thereby.

"Dated February 5, 1903."

4. On April 8, 1903, the said S. H. Brown laid six several informations at the West London Police-court and obtained six summonses against the appellants in the following form :—

"Information has been laid this day by S. H. Brown, sanitary inspector, on behalf of the metropolitan borough of Hammersmith, for that on the day of , 1903, at the generating station, Wood Lane, Shepherd's Bush, in the borough of Hammersmith, within the district aforesaid, of which you are the occupiers, there existed recently the following nuisance, namely, a chimney (not being the chimney of a private dwelling-house), known as No. 1 Shaft, sending forth black smoke in such quantities as to be a nuisance, and, although the said nuisance has since the last-mentioned day been abated or discontinued, that the same or the like nuisance is likely to recur at the said premises, you are therefore hereby summoned to appear before the court of summary jurisdiction sitting at the West London Police-court on Wednesday, the 22nd day of April, 1903, at the hour of 2 in the afternoon, to answer to the said information."

The dates on which the said nuisances were alleged to have existed in the said summonses were January 27, February 20, March 4, March 11, and March 25, 1903.

5. The said informations were by consent heard together.

6. For the appellants it was argued that the notice of February 5 was defective and invalid as not being in compliance with the provisions of the Public Health (London) Act, 1891; that under section 4 (1) and section 5 (1, b) the respondents should have served upon the appellants a notice requiring them to abate the nuisance within a time specified therein, and that the said notice of February 5 did not require the

appellants to abate the nuisance within a specified time or at all; that under section 4 (2) the notice of February 5 should have been either incorporated with or supplemental to a notice to abate the nuisance, and that under section 5 (1, b) no complaint or summary order could be made against the appellants unless and until the nuisance had been abated by them after and in consequence of a notice to abate the nuisance.

7. For the respondents it was argued that the said notice of February 5, followed the second part of form A in the third schedule to the Public Health (London) Act, 1891; that such second part of form A was intended to apply to intermittent nuisances such as the issuing of black smoke; that the notice of February 5 was a notice to abate under section 4 (1) and section 5 (1, b). And that the word "abated" in section 5 (1, b) had reference to a discontinuance of the nuisance however caused, and whether a notice to abate the same had been served or not. It was further contended by the respondents that the first part of form A was quite inapplicable to the present case as it contemplated an existing nuisance requiring to be abated at the time of serving notice in the form of the first part of form A, and further that by reason of section 130 of the said Act, the second part of form A was properly used as a notice under section 4 (1) and section 5 (1, b) in reference to such matters as intermittent black smoke nuisances under section 24 of the statute.

8. The only witnesses called on behalf of the respondents were the said S. H. Brown, the sanitary inspector, who stated that he had observed black smoke in such quantities as to be a nuisance issuing from No. 1 shaft on the dates in question, and Edward Harrison, a coal officer of the London County Council, who said that he had watched with S. H. Brown for black smoke on January 22, 1903, and no evidence was given or tendered on behalf of the respondents as to how the black smoke had been caused, nor specifying any works to be executed by the appellants for the purpose of abating or preventing the issue of black smoke.

9. Evidence was called on behalf of the appellants by their engineers that for the purpose of generating electricity to work their railway many hundreds of tons of coal per week were burnt, and that in consequence of the complaints of the respondents with regard to smoke, they had at great expense equipped and fitted the said generating stations with furnaces fired by hand, and had replaced automatic mechanical stokers by hand firing, and had converted their boilers in that behalf, and that the appellants burned nothing but the best quality of Welsh smokeless coal. There was no suggestion that the appellants' installation, machinery and equipment were not in all respects the best possible. The appellants' witnesses, who denied the sending forth of black smoke in

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such quantity as to be a nuisance, admitted that nothing had been done by them in reference to the said machinery or appliances connected with and used for the generation of electricity to remedy the nuisance or prevent its recurrence since the service of the said notice of February 5, 1903, and the emission of black smoke might have been caused by two furnace doors being open at a time.

10. After hearing the arguments and the witnesses, I overruled the objection of the appellants to the notice of February 5th. I found that on the said several dates in the summonses the said chimney sent forth black smoke in such quantities as to be a nuisance, and I held and determined that the respondents were entitled to a prohibition order under section 5 (1) and (2) of the Public Health (London) Act, 1891. Thereupon counsel for the appellants required, under section 5 (5) of the Act, that the prohibition order should specify the works to be executed by the appellants—no suggestion was made by either party as to the works necessary, and counsel for the appellants insisted that the case being closed, I was precluded in law from hearing further evidence as to the works necessary, but I adjourned the case to consider them, and on April 30, 1903, made the following order :—

“To the Central London Railway Company, &c., the owners and occupiers of the electrical generating station at Wood Lane, &c. Metropolitan Police District and Administrative County of London, to wit.

Whereas the said Central London Railway Company, being the owners and occupiers of the said electrical generating station, within the meaning of the Public Health (London) Act, 1891, have this day appeared before me, John Rose, Esq., one of the magistrates of the police courts of the Metropolis, sitting at the West London Police-court, &c., to answer the matter of a complaint made by S. H. Brown, sanitary inspector, for and on behalf of the council of the metropolitan borough of Hammersmith, aforesaid, that on March 25, 1903, at the said generating station there existed the following nuisance, namely, a chimney (not being a chimney of a private dwelling-house), known as No 1 shaft, sending forth black smoke in such quantities as to be a nuisance, and although such nuisance had since the last-mentioned day been abated or discontinued, the same or the like nuisance was likely to recur at the same premises. Now on proof here had before me, that recently, before the time of making the said complaint, to wit, on the said 25th day of March, 1903, the nuisance so complained of did exist on the said premises, but that the same has since been abated; and that the same was caused by the act, default, or sufferance of the said Central London Railway Company, yet notwithstanding such abatement, I being satisfied that it is likely that the same or a like nuisance will recur at

the said premises, do therefore prohibit the said Central London Railway Company from allowing a recurrence of the said or a like nuisance, and for that purpose I direct the said Central London Railway Company to fit up at the doors of the furnaces communicating with the said chimney apparatus to prevent the doors being opened or left open simultaneously, for example, a horizontal bar on a centre pivot between the doors, and moveable vertically in front of them, so that the doors of the one furnace must be barred and the door of another released by the act of depressing either end of the bar, or other apparatus having a like effect, and to adopt all other means which shall be necessary to prevent the emission of black smoke from the said shaft in such quantities as to be a nuisance. And I do further order the said Central London Railway Company to pay the said council the sum of ten pounds and ten shillings for costs in this behalf.

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12. The questions respectfully submitted for the opinion of the Court are :—

(1) Whether the said notice dated February 5, 1903, was and is defective and invalid for the reasons above stated or any of them, and

(2) Whether even if the said notice was valid in law, the said order made by me was and is bad, because I specified therein the works to be executed by the appellants without having heard evidence with respect to such works.

If the Court answer either of the above questions in the affirmative then the said informations are and each of them is to stand dismissed, otherwise the said prohibition order as set out in paragraph 11 is to stand; or the Court is prayed to make such order as to the Court may seem fit.

Roskill, K.C., and *T. Mathew* for the appellants. The notice of February 5 was bad, because it did not require the appellants to abate the nuisance within a specified time, and no summary order can be made against them to prevent the recurrence until the nuisance has been abated by them in consequence of a notice to abate. Section 4 (4) of the Act of 1891, which imposes the penalty, is taken from section 95 of the Public Health Act, 1875, which contemplates service of a notice to abate before complaint is made as to recurrence. Here the appellants had abated the black smoke nuisance before the issue of the summons for an order for prohibition. Therefore until a further notice had been issued it was beyond the power of the magistrate to make the order he did, because up to that time there had been no abatement in pursuance of notice. Secondly, the legislation of 1891 being founded, as it is, on sections 94–96 of the Public Health Act, 1875, the prohibition order is bad because, although it specifies works to be done, the

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magistrate has specified them without sufficient evidence: *Reg. v. Wheatley* (1885), 16 Q. B. D. 34; 55 L. J. M. C. 11.

Macmorran, K.C., Bodkin, and Bruce Williamson for the respondents. The notice was good. It followed the second part of form A in the schedule to the Act of 1891, and was applicable to the recurrence of an intermittent black smoke nuisance under section 24. The first part of form A was not followed because it contemplates an existing nuisance to be abated at the time the notice is served. It was a notice under section 4 (1) and 5 (1, b), and applies to the discontinuance of a nuisance whether a notice to abate has been served or not. As to the second point: *Millard v. Wastall*, 1898, 1 Q. B. 342; 67 L. J. Q. B. 277, is an authority under the Public Health Act, 1875, that it is unnecessary that the notice should specify the works to be done.

Roskill, K.C., in reply. If this was a case under the Public Health Act, 1875, the arguments submitted on behalf of the appellants would not apply. But the law, as regards the Metropolitan area, laid down by the Act of 1891, is different. There are two forms of punishment under the later Act, *i.e.*, a fine under section 4, and prohibition under section 5; therefore the law is altered, and *Millard v. Wastall* does not apply. The magistrate has made the order for prohibition, and the appellants are entitled to know specifically what they are required to do.

LORD ALVERSTONE C.J. I think it is better that I should confine myself to dealing with the points that have been raised and nothing more.

In this case the appellants, being summoned for sending out black smoke on several occasions, first took the technical point that because the black smoke had been abated before the first summons for abatement or for a prohibition order had been issued, therefore there had been no abatement in pursuance of duress, or threat, or notice, in the natural course of events, and that therefore the magistrate had no jurisdiction. Mr. Roskill put his point most plainly, and with every desire to appreciate the point, I venture to say that my mind is so constituted that I am absolutely unable to appreciate it. There were five other summonses, that is to say, there was proof of black smoke coming out on five days, two of them in the following month of February, and three in the following month of March. Therefore, even assuming, although I do not wish at all to be thought to say so, that there had been anything with regard to the first on January 27th, that could have no application with regard to the others, because, in any case, the abatement had been after notice. The only point that can be suggested is, that because the notice was a prohibition notice instead of an abatement notice, that made a difference to the magistrate's jurisdiction. I hope it is not

necessary to give effect to such an argument unless there is some substantial justice behind it, because, as I say, I am not able to appreciate it, and I think such a technicality ought not to be given effect to, unless there is a substantial wrong being done.

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Then came the second point, and I agree that the magistrate has rather complicated the matter by inserting directions, which I may call the directions of a mechanical engineer—for instance, a horizontal bar on a central pivot put between the doors—and the order, in my opinion, would have been better if it had been in one of two forms—either “I tell you not to be negligent in the matter of stoking furnaces, and not to do it again,” or “I direct you to put up apparatus which will prevent your being able to stoke two furnaces at the same time.” But, when we look at what happened, I think it would be wrong, and contrary to the first principles of justice, to allow such an objection to prevail. In the first place the appellants denied black smoke coming out at all, and when their witnesses were in the box, what they said was that the emission of black smoke might have been caused by two furnace doors being open at a time. We have had this kind of case in the Courts before, and we know perfectly well that one reason why the Legislature has been so stringent about black smoke is this: it has been established over and over again that it is careless stoking which brings about black smoke. Therefore one is not surprised to find, that this incident having occurred in this case, the railway company's witnesses said that it must have been owing to two doors being open at the same time. But it had occurred on a series of days, and on no less than six days spread over a period of three months. The local authority, the borough council of Hammersmith, being satisfied with their case proving the emission of black smoke, were not then and there prepared with evidence as to how it could best be remedied, and the prohibition order being about to be made, counsel for the railway company was within his rights in saying “Will you be good enough to tell us the works we are to do?” The magistrate being in a difficulty appears to have asked the appellants whether they had any evidence there, but no suggestion was made, and then when the question of adjournment for evidence was raised, this point, being fairly taken on behalf of the railway company, might have arisen. The railway company's ingenious counsel says: “You must not hear evidence at all now; the prosecution have closed their case”—which they had closed long before the request had come—“and therefore you are not entitled to hear any evidence.” All I can say is (I do not wish to say anything which goes beyond this case) that this is not the way in which a point should be raised if objection is afterwards going to be taken to the magistrate having said in his order something what he ought not to have said. I think there is not the difference in

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the case which Mr. Roskill suggests ; and I think that in *Millard v. Wastall*, 1898, 1 Q. B. 342 ; 67 L. J. Q. B. 277, it was rightly decided under the Public Health Act, 1875, that in the case of a smoke nuisance it is not necessary to specify the works, but it is enough to say : "Do not be careless again." It is argued that because section 5 (5) of the Act of 1891 requires that an abatement order or a prohibition order shall, if the person on whom the order is made so requires, specify the works to be executed, the law is differentiated from that comprised in sections 94 and 96 of the Public Health Act, 1875, under which the notice is to specify the work to be done. In my opinion, so far as this case is concerned, there is no substantial difference in the law. I quite agree that the compulsory obligation to specify is not repeated in the Act of 1891, and that under that Act the abatement order is to specify the work only if the person on whom the order is made requires it, or the court orders it to be done. That, in my opinion, does not make an abatement order or a prohibition order bad, because it is said that no works are required, but that the defendant is not to stoke carelessly again. But that does not quite cover the whole ground, because it may be said that this order is bad because it does not specify works, and it specifies works without sufficient evidence. I think if that were really what the order meant, it might be open to some objection. I think the fair reading of this order is : "I direct the railway company to fit the doors of the furnaces with apparatus to prevent the doors being open or kept open simultaneously." The point was this : the railway company had themselves said the only cause they could suggest was that two doors were open at the same time, and that stoking was going on at two furnaces at the same time. It is true the order goes on in the words beginning "for example" to specify a particular form of apparatus ; but I do not think that means that that is the only way in which it can be done ; and looking at the words of the statute as to specifying the works to be executed, and bearing in mind that magistrates are not experts, I see no reason for holding that the Act would not be properly complied with by saying : "You are to put works which will prevent two furnace doors being open at the same time," and the order goes on, "and to adopt all other means to prevent the emission of black smoke." I cannot help thinking this has been largely brought about by the railway company taking an objection which, in the ordinary conduct of litigation, I think they ought not to have taken. If they were going to raise the point that the magistrate could not make a proper order at their request without evidence, they ought not, in the same breath, to have objected that he was not entitled to hear evidence. I think the tactics were ingenious, and I think they were obviously for the purpose of preventing any order from being made.

I therefore think this appeal fails, both on the technical point and on the merits.

WILLS J. I am of the same opinion. I entirely agree that the first point taken is captious.

With regard to the second point I think myself that a magistrate in a case of this kind, if he has to specify works certainly ought under all ordinary circumstances to hear evidence, because it is absurd to suppose that he is an expert in matters of this kind, or that he is competent to specify works without knowing something about it from evidence. But in this case he is not, I think, so entirely without evidence as to prevent his exercising jurisdiction. The defendants were asked to explain how the emission of smoke took place, and they said it was owing to two furnace doors being open at the same time. I think the nature of the works required, if they are required, must be something to prevent two furnace doors being open at the same time, which is really the substance of this order; the passage beginning "for example" might have been entirely omitted, and I certainly think that this objection ought not to be listened to in the mouth of a person who has prevented the evidence being given. I cannot conceive anything more unsatisfactory or more captious and unreasonable than that, at the first moment when the question arises as to whether there shall be evidence about works or not, and when it is proposed that the evidence shall be gone into, instead of saying it is necessary to have an adjournment, or anything of that kind, the appellants should object, when the respondents' case is closed, that it is too late to hear evidence, and then come and try to upset the order because that evidence had not been given. I do not think such tactics ought to succeed.

I should like to say with regard to the case of *Millard v. Wastall*, 1898, 1 Q. B. 342; 67 L. J. Q. B. 277, that in my opinion, under section 94 of the Public Health Act, 1875, the court of summary jurisdiction is empowered to do two things, one is to make an order to abate a nuisance, and another is to order the execution of works. If the court has power to do two things it certainly has power to do one. If the second part were wholly unnecessary under the circumstances, I think the court would be quite justified in leaving that part out of the order which it otherwise would have power to make if necessary.

KENNEDY J. I entirely agree with the judgments of my Lord and my brother Wills, and I have nothing to add.

Appeal dismissed.

Solicitors for the appellants—Bircham & Co.

Solicitors for the respondents—Watson, Son, and Room.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KNUCKEY v. REDRUTH RURAL DISTRICT COUNCIL.

Mine—Abandoned pit shaft used as a public well—Well vested in local authority—Owner's liability to fence shaft for prevention of accidents—Public Health Act, 1875 (38 & 39 Vict. c. 75), s. 64—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 13, 41.

The duty of fencing the shaft of an abandoned mine cast upon the owner of the mine and every other person interested in the minerals by section 13 of the Metalliferous Mines Regulation Act, 1872, which Act by section 41 defines "mine" as including shaft, and "owner" in terms excluding a person who is only owner of the soil and is not interested in the mines, does not extend to a local authority in whom the shaft of an abandoned mine which has filled with water and become a public well is vested by section 64 of the Public Health Act, 1875.

APPEAL from the county court.

The action was brought by the appellant Knuckey to recover damages for injuries caused to a horse belonging to him which had fallen down an unprotected pit shaft.

The pit shaft in question was a shaft of an old mine which had been disused for upwards of fifty years. It had filled with water, and had been used as a well by the inhabitants of the neighbourhood for many years.

For the plaintiff it was contended that the well was vested in the defendant council under section 64 of the Public Health Act, 1875, as a public well; and that the defendants were consequently as "owners" of the shaft bound to fence it under section 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

The county court judge held that the well was vested in the defendant council under section 64 of the Public Health Act, 1875, and that it was an old pit shaft; but he held that the defendants were not by reason of the vesting of the well in them "owners" of the shaft or persons interested in the minerals so as to be under an obligation to fence the shaft under section 13 of the Metalliferous Mines Regulation Act, 1872. He accordingly gave judgment for the defendants.

The plaintiff appealed.

The material enactments are quoted verbatim in the judgment of Lord Alverstone C.J.

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Bethune (R. Cunningham Glen with him) for the appellant. The shaft, down which the horse fell, as the learned county court judge has found, is used for the gratuitous supply of water to the public. It is, therefore, as he has held, a public well which vests in the defendant council under section 64 of the Public Health Act, 1875. By section 41 of the Metalliferous Mines Regulation Act, 1872, the term "mine" in that Act includes a shaft. Therefore the defendants have, within the meaning of that Act, an abandoned mine vested in them. The vesting makes them owners of the shaft to all intents and purposes: *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128; *Taylor v. Oldham Corporation* (1876) 4 Ch. D. 395; 46 L. J. Ch. 105. The county court judge, however, in view, no doubt, of the definition of "owner" in section 41 of the Act of 1872, has held that they are not "owners" of the shaft for the purposes of that Act. In this it is submitted he was wrong. It is true that the definition of owner purports to exclude a person who is merely owner of the soil and is not interested in the mines. But the object of that definition is to determine which person is to be deemed the owner where one person is the owner of the soil and another has the sole interest in the minerals. Their statutory ownership of the shaft is quite enough to make the defendant council owners of the shaft within the Act, where there is no other person with any interest in the minerals to whom the definition can attach: *Evans v. Mostyn* (1877) 2 C. P. D. 547; 47 L. J. M. C. 25. [KENNEDY J. mentioned *Foster v. Owen* (1892) 62 L. J. M. C. 7.] The defendants are liable in damages for the breach of their statutory duty, notwithstanding the provisions of the Act under which they incur penalties: *Dublin United Tramways v. Fitzgerald*, 1903, A. C. 99; 1 L. G. R. 386; 72 L. J. P. C. 52.

Schiller for the respondents. The learned county court judge was perfectly right. Assuming this pit shaft to be a public well vested in the respondents by section 64 of the Public Health Act, 1875, yet section 13 of the Metalliferous Mines Regulation Act, 1872, points to an entirely different state of facts as regards ownership. Its object was to make the people who had won the minerals protect the shaft. But where an abandoned shaft fills with water which the public use, and therefore vests in the respondents as a well, the vesting would not enable them to prevent the owner of the minerals resuming possession or gaining the minerals from below through the shaft. The Council were, therefore, not the owners of the shaft within the contemplation of section 13. The owner is the person having the right to get the

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minerals, and is responsible for the fencing in of the shaft after abandonment. As regards the respondents, the vesting in them is only such a vesting as is necessary to enable them to perform their duties in cleaning it out; it vests no further power in them, nor does it cast further liability upon them.

Bethune, in reply, cited *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451.

LORD ALVERSTONE C.J. In this case the learned county court judge has found that this pit shaft was a public well which had become vested in respondent council by virtue of section 64 of the Public Health Act, 1875, which provides that "all existing public cisterns pumps wells reservoirs conduits aqueducts and works used for the gratuitous supply of water to the inhabitants of the district of any local authority shall vest in and be under the control of such authority" But it seems to me that this finding is by no means conclusive against the respondents in the way suggested by counsel for the appellant or indeed at all. I quite agree that the vesting of the well in the local authority under section 64, will give that authority the right to prevent its becoming a nuisance and cast upon them a duty to do that which will protect the public from danger. But it is not alleged here that the respondents, as such owners under section 64, had kept the well in a dangerous condition. That is not the question we have to decide, for it is not alleged by the appellant that owing to the negligence of the respondents a nuisance existed near the highway. What we have to consider here is whether the respondents have been guilty of a breach of the statutory duty imposed on owners of abandoned mines and workings by section 13 of the Metalliferous Mines Regulation Act, 1872. That section is as follows:—"Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents. Provided that—(1) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect" Now upon the true construction of these words it is clear that if the word "owner" stood alone it would mean the owner of the mine. But taking the whole section together it would seem that the duty of fencing an abandoned mine is cast not only upon the owner but on every person, be he owner of the freehold or not, who is

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connected with the ownership as being a person interested in the minerals underground ; and that a person in the latter category is placed under the same obligation of affording safety to the public by fencing it. Then comes the interpretation of terms in section 41, by which the term "mine" is extended to all shafts ; therefore, I agree that it is the owner of a shaft in connection with the mine who is under the obligation created by section 13. The definition of owner in section 41 is this : "The term 'owner' when used in relation to any mine means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines." This is important, for it shows clearly that in the contemplation of the statute, the owner upon whom the obligation of fencing is cast by section 13, is not the person in whom the mere legal ownership in the soil surrounding the shaft is vested, but the person who is either owner of the mine or so interested in the minerals as to come within the terms of the definition. In other words, to constitute the ownership as contemplated by section 13, the owner must be a person interested in the minerals of the mine ; and the mere possession of the land surrounding the shaft without any such interest in the minerals does not constitute such an ownership. That being so, what is the position of the respondents? They have the well. It is on private property to a certain extent. It is approached, we are told, by a lane which is not a public highway. I think, considering the language of section 64 of the Public Health Act, 1875, the learned county court judge was justified in coming to the conclusion he has come to in this case, that the well is vested in the respondents for the purposes of that section. I think they were not owners of the mine or shaft within the meaning of section 13 of the Metalliferous Mines Regulation Act, 1872. They were certainly not persons interested in the minerals, and therefore, seeing that the action against them was founded solely upon section 13 of the Metalliferous Mines Regulation Act, 1872, and there being no case of negligence against them, in the keeping of that well, apart from the statute, the learned county court judge was, I think, right in giving judgment against the appellant. The appeal must be dismissed.

WILLS J. I am entirely of the same opinion. I think the keynote of section 13 is that the liability is cast either upon the owner or the person having an interest akin to ownership in the minerals of the mine, and no one else. I think that that is accentuated by consideration of the definition of owner in section 41, which for certain purposes excludes

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persons who are not interested in the minerals of the mines. Therefore, I think, there is no pretence for saying that the respondents in this case—the local authority—are at all interested in the minerals of the mine, whatever that may mean, which either was an abandoned mine, or was said to have been an abandoned mine, but which had once been a mine containing minerals. I therefore think they are not liable, since the only case which was made against them, as I understand, at the trial was that they were liable by virtue of section 64 of the Public Health Act, 1875, and section 13 of the Metalliferous Mines Regulation Act, 1872.

KENNEDY J. I am of the same opinion. It is impossible to say that the ownership of this public well vested in the respondents, and the control of the well given them under the provisions of section 64 of the Public Health Act, 1875, constitute them owners of an abandoned mine or shaft, within the contemplation of section 13 of the Metalliferous Mines Regulation Act, 1872.

Appeal dismissed.

Solicitors for the appellant—Paige and Grylls, Redruth.

Solicitors for the respondents—Coode Kingdon & Co., for Peter, Redruth.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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/an. 12.

**THE ATTORNEY-GENERAL (on the relation of the Monmouthshire County Council) AND THE MONMOUTHSHIRE COUNTY COUNCIL
v. SCOTT.**

Highways—Locomotives—Nuisance—Interim injunction—Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 13—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6.

In an action by the Attorney-General on the relation of a local authority liable for the maintenance of a highway for an injunction to restrain the user of a locomotive on the highway in such a way as to cause a public nuisance, it is no defence, if a public nuisance has in fact been caused, to prove that there has been no contravention of the Locomotives Acts or of any bye-laws made thereunder, or to show that the local authority have failed to keep the highway in proper repair.

Section 13 of the Locomotive Act, 1861, which provides that nothing in that Act shall authorise the use of a locomotive on a highway so as to cause a nuisance is not impliedly repealed by the Locomotives Act, 1898.

APPEAL by the defendant from an order of Phillimore J. at Chambers.

The action was brought by the Attorney-General on the relation of the Monmouthshire County Council, and by the Monmouthshire County Council, claiming an injunction to restrain the defendant, his servants or agents, from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic, upon a certain highway within the county of Monmouth in such a way as, by damage to or obstruction of the highway, to cause a public nuisance.

The plaintiffs alleged that the defendant had used a traction engine to haul stone from two quarries belonging to him over the highway in question, which was a main road, so as to cause a public nuisance.

After the commencement of the action a summons was taken out at Chambers for an interim injunction in the terms of the writ.

In support of the application for an interim injunction affidavits were filed on behalf of the plaintiffs by the surveyor to the county council and other persons.

The surveyor to the county council in his affidavit deposed that the defendant commenced to haul stone from the quarries in May, 1902, and had continued to do so ever since, and in so doing passed over

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about 900 yards of the highway. That soon after the defendant commenced thus to haul stone complaints were made by the inhabitants in the neighbourhood to the county council as to the state of the highway owing to the excessive traffic thrown thereon by the defendant. That in the latter part of that year the county council re-metalled 598 yards of this portion of the highway, and put it into thorough repair; but that notwithstanding such repairs the highway had been so cut up by the extraordinary and excessive traffic conducted upon it by the defendant that it had become dangerous for ordinary vehicular traffic. That the defendant used a traction engine of the weight of about 11 tons and two laden trucks, and on an average he carried quite 160 tons a day. That the traffic was more than (in the surveyor's opinion) any ordinary metalled road could bear, and that it was impossible to keep the road in proper repair whilst such traffic was allowed to be carried on. That one cause which increased the damage done by the defendant was the shocking state of repair of the approach roads from the quarries. In passing over these roads the wheels of the traction engine and of the carts got clogged with mud, and tons of mud had thus been deposited on the highway, and this had helped to render it unfit for ordinary traffic. That numerous complaints had been made to the county council, and there was no doubt that the highway had now become, on account of the excessive traffic carried on by the defendant, not only a nuisance, but a source of danger to the public, and unless the defendant was stopped from using the highway in the manner he was now doing the highway would become impassable for ordinary vehicular traffic.

Another affidavit on behalf of the plaintiffs was filed by the Rector of Roggiatt, who deposed that the rectory opened on to the main road in question. He spoke to the repairs effected by the county council, and said that every effort had been made by them to maintain the road, and that they had put down many hundred tons of black Cornish granite, and had them rolled in, but with no lasting effect. For the last six months or more the road had been in a worse condition than at any previous time. It was nothing but a huge ditch, full of deep depressions, and even more dangerous ridges. Where large stones were laid down the traction engine threw them up into heaps until they were gradually churned into mud, when the process was repeated. He was compelled to use the road as there was no other approach to the station, an important station used by the whole neighbourhood, but he could only do so by day with great damage to his carriage, and by night with possible risk to life. The whole county side felt the grievance as intolerable, and many meetings had been held as to the course that should be adopted to put an end to this injury of their rights. Their

poorer neighbours suffered even more acutely. The larger number of them were railway employes who worked by night and slept by day.

He had no hesitation in saying, and he spoke not only for himself and for his parishioners, but for every person in the neighbourhood, that the employment of these traction engines constituted not only a public nuisance of a most serious character, but was a source of real risk to the whole community.

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The defendant filed an affidavit in reply denying generally that the road had become a nuisance or source of danger to the public using it solely from the fact that it was used for the hauling of stone from the quarries, and submitting that it had got cut up owing to failure on the part of the county council to perform its statutory duty to maintain it in a fit condition to bear the traffic of the neighbourhood that passed over it. Such re-metalling as was done was wholly insufficient, and the material used was inadequate and of a wrong character, and this being put on the road was subjected to the continuance of rains which fell during the summer of 1903 and caused the road to be in its present condition.

On his behalf Mr. H. H. Humphreys, consulting engineer, and a member of the council of the Roads Improvement Association, filed an affidavit in which he said he had gone down from London and made an inspection of the road. The opinion he had come to was that the road had not been repaired according to what he considered the most approved system. He gave no opinion as to whether in its present condition the road was a public nuisance beyond expressing a view that the alleged dangerous condition of the road was somewhat exaggerated.

The other affidavits filed on behalf of the defendant dealt merely with the way in which the road had been re-metalled.

The summons came before Phillimore J., in Chambers, who granted an interim injunction substantially in the terms of the writ, upon the usual undertaking by the county council in damages.

The defendant appealed.

R. Cunningham Glen for the appellant. The injunction ought not to have been granted. It is not alleged that the defendant was guilty of negligence, nor that the traction engine and trucks were not constructed in all respects in accordance with the requirements of the Locomotives Acts. So long as these requirements are complied with, it is just as lawful to conduct traffic on a highway by means of traction engines as by means of horses and carts.

On the affidavits nothing is shown beyond a case of extraordinary traffic, for the extra expenses of road repair occasioned by which the defendant is no doubt liable to the county council under section 23 of

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the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77).

The Locomotives Acts show that the Legislature regards the user of locomotives on highways as a legitimate method of conducting traffic. The proper course for the county council to take, if they find that heavier locomotives are using a road than it will bear, is to make bye-laws restricting the traffic on the road under section 6 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29).

The right to use a highway is not lost because its exercise involves damage to the highway: *Gas Light and Coke Co. v. St. Mary Abbots, Kensington, Vestry* (1885) 15 Q. B. D. 1; 54 L. J. Q. B. 414; *St. Mary, Newington, Vestry v. Jacobs* (1871) L. R. 7 Q. B. 47; 41 L. J. M. C. 72.

Further, it is the duty of the county council to maintain the road in question; and to maintain it in a fit condition for the traffic in the neighbourhood: *Wallington v. Hoskins* (1880) 6 Q. B. D. 206, per Field J. at p. 215; 50 L. J. M. C. 19; *Savin v. Oswestry Highway Board* (1880), 44 J. P. 766. The evidence in this case shows that the county council have not maintained the road up to the standard rendered necessary by the nature of the traffic on the road. The mischief therefore is caused by their default; they therefore do not come here with "clean hands" as it were and are not entitled to an injunction.

The Locomotives Act, 1898, now provides a complete scheme for dealing with traffic conducted by locomotives on highways, and must be taken as containing a legislative exposition of the conditions under which such traffic is not to be taken to be a nuisance, and as to that extent repealing or superseding section 13 of the Locomotive Act, 1861, which provides that nothing in that Act shall authorise the use of a locomotive on a highway so as to be a nuisance.

A. T. Lawrence, K.C., and *J. R. Atkin* for the respondents. It is not suggested that the use of a locomotive on a highway is in itself unlawful, or that it becomes unlawful merely because it necessitates increased repair to the road. But the affidavits make a clear case of nuisance. No doubt the Legislature has established machinery for the control of locomotives on highways; but there is nothing in the Acts to authorise the user of locomotives which do not contravene any statutory enactment if in fact such user causes a nuisance: *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161; *Powell v. Fall* (1880) 5 Q. B. D. 597; 49 L. J. Q. B. 428. [They were stopped.]

COLLINS M.R. This is an appeal from a decision of Phillimore J. granting an injunction in a suit brought by the Attorney-General, on the relation of the Monmouthshire County Council, and the Monmouth-

shire County Council as co-plaintiffs, against the defendant for an injunction, which is asked for on the writ in these terms:—"An injunction to restrain the defendant, his servants or agents, from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic upon the highway leading from Caldecott to Magor, situate in the parish of Llanrihangel Roggiett, in the county of Monmouth, in such a way as by damage to or obstruction of the said highway to cause a public nuisance"; and the injunction has been granted substantially in the terms of the writ. The defendant appeals, and the grounds, as far as I understand them, of the appeal are these: First, that there is no nuisance at common law. That is a matter of evidence and a question of fact, and we have affidavits before us which, if they are true, certainly to my mind show a public nuisance, that is to say, that the defendant by the use of a traction engine of very considerable weight and drawing trucks also of very considerable weight with heavy loads in them, has turned the road into a condition in which it is dangerous to life—dangerous by daylight and more dangerous at night. It is certainly dangerous as deposed to by apparently trustworthy witnesses, and the only evidence adduced on the other side with regard to that is the report of an inspector sent down from London, and really all he can say is that he thinks the accounts given by the witnesses for the relators are exaggerated. That does not touch the fact, and it is common ground in the discussion, that this road is in such a condition as to be a nuisance. Then Mr. Glen, in the second part of his argument, says that the relators themselves are responsible for its condition inasmuch as they ought to have put the road in such a condition as to stand the traffic over it which has resulted in its being in its present foundrous condition. I note in passing that that argument admits and presupposes the foundrous condition of the road, and therefore *prima facie* a nuisance. He starts the second part of his argument by admitting that the road is in such a condition as to be a nuisance, and seeks to relieve himself of the burden of the liability on the ground that it was the duty of the county council to put the road in such a condition as to stand this traffic. Now, first of all, it seems to me that the public nuisance is established on the evidence, and I see no reason whatever to doubt the evidence in the affidavits filed for the plaintiffs. Secondly, I do not agree in point of law that it is an answer to say, on the admitted state of facts, in a proceeding taken by the Attorney-General at the instance of the county council, that the county council might have put the road in repair. The condition of things is that there is a public nuisance on this highway and that the public generally, as represented by the Attorney-General, are interested in having that nuisance abated. As it

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stands it is a source of danger to individuals who in the course of their ordinary vocations have occasion to use this road. It is a nuisance to them, and it is no answer to say that if somebody else had done his duty it would not have arisen. There are provisions under which it is open to individuals to compel the authority responsible in the matter to do their duty, and it does not give *carte blanche* to any person to create a nuisance on the highway because persons have not availed themselves of those provisions and forced the authority to do their duty. It cannot be contended for a moment that a person who uses a highway not in a foundrous condition has a licence by law to use that highway in such a way as to make it foundrous and a nuisance to everybody. There is no authority for that proposition, and it is entirely opposed to common law and common sense. Then Mr. Glen relies upon the terms of the Locomotives Acts of 1861 and 1898, and he points out that in those Acts locomotives are treated as having a right to use the highways. It is perfectly true that they are so treated, but when you come to examine the particular sections you find in section 13 of the Act of 1861 this proviso: "Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance." The whole Act must be read subject to that provision. The Locomotives Acts, when they are examined, really consist of a series of enactments to mitigate the probable inconvenience of locomotives being used on highways at all. They cannot under the Acts be used at all on highways unless they conform to certain provisions which it is put in the power of the authorities to prescribe; but they may be a public nuisance even though they conform to the particular regulations for traversing the highway. That is the result of the earlier Act of 1861.

Then Mr. Glen says that somehow or other the subsequent Act of 1898 has modified the provisions of the earlier Act, and in effect repealed the provisions of section 13 of the earlier Act; but that contention is at once negatived when you look at the schedule to the later Act which sets out what is repealed. It repeals certain portions of the earlier Acts but it does not repeal section 13, and therefore that section stands. All that the later Act does is to enlarge the special powers of the authority to impose limits on locomotives by its bye-laws and otherwise. Those provisions are not in the slightest degree incompatible with the underlying obligation on any person not to create a nuisance on the highway. He cannot get his engine on to the highway at all unless he conforms with the various provisions made by the authorities entitled to make them, but when he has got his engine there he still remains liable to the underlying liability of not creating a

nuisance. That is the clear result of the plain words of the section. It has also been carried out by the authority of this Court, notably in *Powell v. Fall* (1880) 5 Q. B. D. 597; 49 L. J. Q. B. 428, which clearly drew a distinction between the liabilities for injuries done by persons acting under statutory powers and by persons who were merely using their common law rights. It distinguishes the case where injury is done to any person by reason of a locomotive travelling along a line under statutory power to travel along that line, in which case the liability of the person so using the locomotive is for negligence only, from the case of a person merely travelling along the highway with a traction engine in the exercise of his common law right, which carries with it no immunity whatever for mischief done by his engine. Now that points to the very distinction which underlies the legislation. The legislation authorising railways empowers the railway company to use locomotives for the purposes of their traffic, and it relieves them from liability unless they are negligent; while the legislation with regard to locomotives on highways expresses the fact that a locomotive is a thing which has a common law right to be on a highway but with no immunity whatever from the common law obligation.

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Therefore we have here a traction engine which in point of fact has created a nuisance on the highway, and which carries with it no immunity whatever from the liability for committing a public nuisance. It seems to me, therefore, that the learned judge was perfectly justified in granting the injunction, which after all is only an interim injunction. It leaves the whole question open of what the true rights, on a complete examination of all the facts as between the parties, are. It seems to me, therefore, that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. As was pointed out early in the argument, section 13 of the Act of 1861 is somewhat decisive of the matter, because the liability of those who use traction engines is their liability at common law. Here the traction engines were so used as to be a nuisance, and to render the highway no longer available for general use, and the liability in respect of that nuisance at common law is preserved under section 13. It has been argued that the legislation on this subject indicates some intention that trade is not to be restrained, and that it is the duty of every road authority to accommodate themselves to the requirements of each individual carrying on business in the locality. A more extraordinary proposition was never urged.

Then it was argued that section 13 of the Act of 1861 applied to existing nuisances and to those that might arise subsequently up to the passing of the Act of 1898; but that when that Act was passed section 13 was repealed, because in lieu of the old liability for nuisance

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the county council have obtained powers under that Act to make bye-laws which might possibly have all the effect of proceedings at common law as regards the protection of the rights of the public. I can see no reason whatever to adopt that construction of the Act of 1898. It would nullify the provisions of section 13 completely; and I do not think that the Legislature had any such intention. In this case the interference on the part of the Attorney-General is an interference on behalf of the public, who are those who are injured by what has been done, and complain that the defendant has rendered the road foundrous, and committed a public nuisance.

I see no answer whatever to that complaint. I therefore agree that the appeal must be dismissed.

COZENS HARDY L.J. I agree, and but for the importance of the case I should be content to remain silent, but considering the importance of the case I should like to add a few words.

If I followed Mr. Glen's argument rightly, he boldly says it is not a public nuisance at common law so to use the highway as to make it foundrous unless it is done by some wilful or deliberate act. For that proposition there is no authority. It seems to me to be wrong in principle, and, moreover, to be entirely contradicted by the language of section 13 of the Act of 1861. The words of that section are: "Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use." It seems to me, therefore, that we start with this, that there may be such a user of a highway, although not wilful or malicious, as amounts to a common law nuisance. In this case is there evidence sufficient to satisfy us on that point? Really when one examines it the evidence seems to me to be ample and more than ample. I do not wish in any way to forecast what may be the result at the trial when the witnesses are called and subjected to cross-examination; but, for the purposes of an interim injunction, protected as the interim injunction is by the undertaking to be responsible in damages, I cannot doubt for a moment that the learned judge was perfectly right in saying that there was enough to satisfy him that a public nuisance was created by reason of the user by the defendant of this heavy locomotive on this road.

Then Mr. Glen says the Locomotives Acts have really altered the position, and that they justify what has been done on this ground, that the locomotives are not in excess of the weight prescribed by the Act of Parliament, and that the number of trucks drawn was not greater than is prescribed by the Act of Parliament, and that under section 23

of the Act of 1878 the county council can recover from the defendant any expenses occasioned by any extraordinary traffic. I really fail to see how giving to the road authority a right to recover money in respect of extraordinary user, which might fall far short of a public nuisance, can in any way affect the right to bring an action or an indictment for the purpose of securing the abatement of a public nuisance, and not of putting money into the till of the ratepayers, which is the object of section 23.

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Then it is said, and this is the last point to which I need call attention, that the county council are themselves in fault; that they are bound at whatever expense to make the roads suitable for heavy traffic engines. Whether that be so or not, I desire to express no opinion. If they are liable, they are liable to be indicted for not keeping the road in good repair; but that cannot, as it seems to me, make any ground of defence to an action brought by the Attorney-General, as representing the public, complaining of the acts of the defendant which prevent members of the public generally from using this highway as they are entitled to use it.

On all these grounds, the order being guarded as it is by the undertaking, and not preventing the user of locomotives altogether, but only the user in such a way as to create a public nuisance, it seems to me that the order is perfectly right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the defendant—Hicks, Davis, and Hunt.

Solicitor for the plaintiffs—Herbert M. Davis.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

1904.

KING'S BENCH DIVISION.

Feb. 4.

KINGSLAND v. HABEN.

Bye-laws—Drains—Extension of bye-laws to drains “in” existing building—Meaning of “in”—London County Council drainage bye-laws, 1901, Nos. 5 and 21.

No. 21 of the series of bye-laws as to the construction, &c., of drains made by the London County Council under section 202 of the Metropolis Management Act, 1855, provides that the bye-laws shall apply, so far as practicable, to any person who shall construct or reconstruct a drain, &c., “in” any existing building as if the same were being constructed “in” a new building.

Held, that the word “in” in this bye-law does not mean “inside” but has the sense of “in connection with.”

CASE stated by a metropolitan police magistrate before whom the appellant had been convicted of the breach of a bye-law made by the London County Council under section 202 of the Metropolis Management Act, 1855.

1. The appellant is a builder carrying on business at 7 Benholme Road, Upper Clapton, in the county of London, and the respondent is a sanitary inspector of the metropolitan borough of Hackney.

2. The appellant was employed by the owner of the messuage and premises, No. 181 High Street, Homerton, within the borough, to carry out certain repairs to the premises, and in the course of such employment reconstructed a drain upon the said premises. The messuage and premises and drain are shown upon the plan annexed to the case, and the drain so reconstructed as aforesaid is distinguished in the said plan by the colour red. The drain commences in a water-closet constituting an outbuilding or back addition to the said messuage, passes through the back yard of the said messuage into the adjoining premises, No. 183 High Street aforesaid, where, uniting with a drain of the last-mentioned premises, it becomes a sewer within the meaning of the Metropolis Management Acts and of the bye-laws hereinafter mentioned. The said messuage and water-closet were erected before the confirmation of the said bye-laws.

3. By bye-laws under section 202 of the Metropolis Management Act, 1855, made by the London County Council on October 13, 1900, confirmed at a subsequent meeting of that Council on November 6, 1900, and approved by the Local Government Board on June 14, 1901, it is provided as follows :—

Bye-law No. 5. "Every person who shall erect a new building shall provide in every main drain or other drain of such building which may immediately communicate with any sewer, a suitable and efficient intercepting trap at a point as distant as may be practicable from such building, and as near as may be practicable to the point at which such drain may be connected with the sewer." 1904.
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"He shall, except in cases where the means of access to be provided in compliance with the preceding bye-law shall give adequate means of access to such trap, provide a separate manhole or other separate means of access to such trap for the purpose of cleansing it."

Bye-law No. 21. "These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected."

4. The appellant did not provide in the said drain a suitable and efficient or any intercepting trap, and an information was accordingly laid by the respondent against him before me that he had reconstructed the drain without providing therein an intercepting trap and a separate manhole, or other separate means of access to such trap for the purpose of cleansing it, in accordance with the said bye-laws. Apart from the provision of the said intercepting trap and manhole or other means of access thereto, the said drain was laid by the appellant in a satisfactory manner.

5. I was of opinion that the said water-closet being a building erected before the confirmation of the said bye-laws, the reconstruction of the said drain was a work in such a building within the meaning of the foregoing bye-law, No. 21, and I convicted the appellant of the offence charged, and adjudged that he should pay a penalty of 20s. and two guineas costs.

6. The question for the opinion of the Court is whether I was right in holding that the reconstruction of the said drain was a work in a building within the meaning of such bye-law as aforesaid.

Courthope Munroe for the appellant. Bye-law 5 does not apply, nor is it by the operation of bye-law 21 applied, to old buildings. All these bye-laws distinguish between the inside and the outside of a building. Bye-law 5 has no relation at all to the state of facts found in the case for it provides for something inside a building itself and nothing else; and bye-law 21 which applies bye-law 5 to old buildings does not carry the matter any further: *Metropolitan Industrial Dwellings Co. v. Long* (1903) 2 L. G. R. 233. The word "in" in the sentence

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contained in bye-law 21, "so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected," cannot be held to mean "in and outside" any building.

Avory, K.C., and Beven for the respondents were not called upon.

LORD ALVERSTONE C.J. I should be sorry if I thought we ought to be driven to construe the word "in" literally as meaning "inside, within the walls" when bye-law 5 is being applied. I am not at all sure that in one sense it would not be correct to say that these are the drains in the building, but to my mind we need not put it on that narrow ground. Bye-law No. 5 provides that a person who erects a new building is to provide in every drain of the building which may immediately communicate with any sewer a suitable and efficient intercepting trap, which is of course a most desirable thing. This, if it be applicable, is intended to be applied to old buildings by bye-law 21, and it is material to observe that bye-law 21 relates directly to the reconstruction of pipes or drains. It provides that the foregoing bye-laws shall apply to every person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of the bye-laws, as if the building was a new building. I cannot think, seeing that the pipes or drains in the majority of cases, so far as this work is concerned, are outside the actual walls that the word "in" there means "inside." I think the word "in" means "in reference to" or "in connection with," and does not mean "inside"; and certainly this is a case in which as we have to apply the bye-law we ought to apply it in, as it appears to me, the only reasonable way in which it can be applied. Therefore, I think the magistrate was perfectly right.

WILLS J. I entirely agree.

KENNEDY J. I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant—Bramall and White.

Solicitor for the respondent—W. A. Williams.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

1904.

NORTHAMPTON CORPORATION *v.* ELLEN.

Jan. 19.

Water—Water rate—Unequal water rate—Extension of borough—General rate in added area not to exceed, when added to poor rate, borough rate, and other rates, a given amount in pound—Whether water rate included in “rates” for purposes of limitation—Northampton Waterworks Act, 1861 (24 & 25 Vict. c. xlvi.), s. 59—Northampton Corporation Waterworks Act, 1884 (47 & 48 Vict. c. ccviii.), s. 36—Northampton (Extension) Order, 1900 (scheduled to 63 & 64 Vict. c. clxxxiii.), Art. XXXVI.

By a local Act of 1884 the powers and undertaking of a water-works company established by a local Act of 1861 were transferred to the plaintiff corporation.

The Waterworks Clauses Act, 1847, with immaterial exceptions, was incorporated both with the Act of 1861 and with the Act of 1884. By section 36 of the Act of 1884 the corporation were empowered to charge for the supply of water for domestic purposes to any dwelling-house “a sum not exceeding $7\frac{1}{2}$ per centum per annum” on the rateable value of the house; and under section 59 of the Act of 1861 the corporation as successors of the company had power to supply any persons with water, for any purpose for which the supply was required, for such remuneration and upon such terms and conditions as might be agreed upon under a special agreement. Neither the Act of 1861 nor the Act of 1884 contained any express provision requiring equality in the charges to water consumers.

Held (reversing the judgment of Bigham J.), that there was no obligation on the corporation in making charges under section 36 of the Act of 1884 to charge all consumers at the same rate in the pound on the rateable values of their houses.

The plaintiffs’ borough was extended by a Provisional Order of 1900, duly confirmed, which contained a provision that for a certain period the general district rate in the added area should not in any one year when added to the poor rate, the borough rate, and any other rate made by the corporation exceed a certain amount in the pound.

Held (affirming Bigham J.), that the water rate levied by the corporation was not a rate for the purpose of this limitation.

APPEAL by the plaintiffs from the judgment of Bigham J. upon a special case stated by the consent of the parties for the opinion of the Court raising the question whether the Corporation had power to differentiate between the charges made in different districts for water supplied. The case stated the following facts:—

1. The plaintiffs seek to recover from the defendant, who is a

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burgess and ratepayer of the borough of Northampton, the sum of £1 4s. 9d., being the amount of a quarterly instalment of an annual water rate for the supply of water for domestic use to his dwelling-house, situate at Kingsthorpe, a district which has formed part of the area of supply since 1861, and was incorporated with the county borough of Northampton by the Northampton (Extension) Order, 1900.

2. The following is a copy of the demand made upon the defendant by the plaintiffs:—

Water Rate Demand Note.

No. 1,400.

£ s. d.

The Northampton Corporation request payment from Mr. F. Ellen, address Queen's Park Parade, of one quarter's water rate, paying to 29th September, 1901

1 4 9

* * * * *

The above rates are now due and payable forthwith.

By order of the Corporation.

Cap. xvii., section 71 : Persons removing without giving notice to the Corporation will be liable for the rate to the next quarter day after quitting the premises.

Please bring this notice with you.

3. The said sum of £1 4s. 9d. is made up as follows:—

£ s. d.

One quarter's instalment of an annual rate of $7\frac{1}{2}$ per cent. upon a rateable value of £54... 1 0 3

One quarter's instalment of an annual rate of 18s., being an extra charge for one bath and two water-closets, each assessed at 6s. per annum ... 0 4 6

Total ... £1 4 9

Of the above items the defendant only disputes the sum of £1 os. 3d.

4. The said disputed sum of £1 os. 3d. is demanded under the following circumstances:—

5. In 1884 the plaintiffs, in pursuance of powers conferred on them by section 19 of the Northampton Waterworks Act, 1882 (hereinafter called "the Act of 1882"), purchased the undertaking of the Northampton Waterworks Company, which company was incorporated by the Northampton Waterworks Act, 1861 (hereinafter called "the Act of 1861"). The said purchase was effected by the Northampton

Corporation Waterworks Act, 1884 (hereinafter called "the Act of 1884").

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6. By section 10 of the Act of 1884, the Act of 1861 and the Act of 1882 were enacted to be read and have effect as if the plaintiffs had been named therein instead of the company, subject to certain exceptions which are not material to this case. All the said Acts are exhibited hereto, and, together with the Northampton (Extension) Order, 1900, hereinafter referred to, form the authority for the rates imposed by the plaintiffs for the supply of water within the area designated in the said Acts.

7. The plaintiffs' rate for the supply of water for domestic use is based on section 36 of the Act of 1884, which repeals section 49 of the Act of 1861 (by which rates varying with different rateable values were authorised). The said section empowers the plaintiffs to "charge for the supply of water for domestic use to any dwelling-house a sum not exceeding seven and a half per cent. per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable or if there be no such list then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate."

8. There is no section in this or in any of the aforesaid Acts which gives any specific directions or powers as to either equality or differentiation of rating.

9. Other parts of the Act of 1884 material to this case are:—

Section 20, which provides in subsection (2) as follows: "Any moneys borrowed in manner by this section authorised shall be a charge on the net revenue of the water undertaking and on the district fund and general district rate or some or one of them and such revenue fund and rate shall be deemed to be the local rate within the meaning and for the purposes of the Local Loans Act, 1875."

Section 24, which provides the order in which the plaintiffs are to apply all moneys received by them on account of revenue, and enacts that any balance remaining in any year after payment of the working and management expenses, interest on loans, and instalments to the sinking fund, shall be carried to the district fund.

Section 25, which is as follows: "If in any year the amount standing to the credit of the water account be insufficient for the payment of the charges thereon and the execution of this Act in relation to the water undertaking the deficiency shall be made up out of the general district rate by carrying an adequate sum therefrom to the credit of the water account and the Corporation from time to time in preparing the estimates of the amount required in their judgment to be raised

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by means of a general district rate for the purposes of the borough may include therein such sums (if any) as in the judgment of the Corporation are necessary to be provided in aid of the deficiency from time to time arising as aforesaid in the water account and shall collect the same as part of such general district rate."

10. The defendant's dwelling-house in respect of which the demand set out in paragraph 2 hereof is made is and has always been situate within the plaintiffs' statutory area of supply, and the plaintiffs do not contend that any special circumstances exist rendering the said dwelling-house less favourably situated than the other dwelling-houses within the said area for purposes of supply or of rating. The defendant has since the commencement of his occupation of the said dwelling-house until the 24th of June, 1901, paid a water rate of $7\frac{1}{2}$ per cent. on the net rateable value.

11. In the year 1900 the boundaries of the then borough of Northampton were extended so as to include among other areas that part of Kingsthorpe in which the defendant's said dwelling-house is situate. Such extension was effected by the Northampton (Extension) Order, 1900 (hereinafter called "the Order"), contained in the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900.

12. By Article XI. of the Order the Acts of 1861, 1882, and 1884 were made applicable to the borough of Northampton as extended by the Order.

13. Other articles of the Order material to this case are:—

Article XII. "All bye-laws and regulations and every list of tolls and table of fees and payments and scale of charges made by the Corporation which at the commencement of this Order are in force in the existing borough shall thenceforth apply to the borough until or except in so far as any such bye-laws regulations or list of tolls or table of fees and payments and scale of charges may be altered or repealed."

Article XVI. "All the property vested in the Corporation at the commencement of this Order for the benefit of the existing borough shall be held by the Corporation for the benefit of the borough and the Corporation shall hold enjoy and exercise for the benefit of the borough all the powers which at the date aforesaid are exercisable by or vested in the Corporation for the benefit of the existing borough and all liabilities which on the date aforesaid attached to the Corporation in respect of the existing borough shall from and after that date attach to them in respect of the borough."

Article XXXVI., the material parts of which are as follows: "The general district rates to be levied in the . . . added part of Kingsthorpe . . . shall not in any one year during a period of ten years

from the commencement of this Order exceed such an amount in the pound as when added to the poor rate and to the borough rate and any other rate made by the Corporation in the same year will in respect of the assessment of any hereditament included in any such rate make up. . . . In the case of the added part of Kingsthorpe a total rate of five shillings and sixpence on each pound of the rateable value of such hereditament. . . ."

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14. From the commencement of the operation of such Order up to the present time the rates levied in the added part of Kingsthorpe (other than the water rate) have continuously amounted, and now amount to 5s. 6d. in the pound.

15. In pursuance of their powers under the aforesaid Acts and Order the plaintiffs from the commencement of the said Order until the 24th of June, 1901, continued to demand water rate of $7\frac{1}{2}$ per cent. per annum from the defendant and from all other domestic consumers, both in the old borough and the added parts.

16. On and after the said 24th of June, 1901, the plaintiffs reduced the water rate from $7\frac{1}{2}$ to 5 per cent. per annum in the case of those of the said domestic consumers within the boundaries of the old borough, but retained the said rate of $7\frac{1}{2}$ per cent. in the case of the defendant and all other of the said domestic consumers in the added parts, including the added parts of Kingsthorpe.

17. This differentiation of the water rate was effected by the plaintiffs in accordance with a recommendation adopted by the Northampton Town Council on the 1st of April 1901, the material part of which adopted recommendation is as follows:—

(i.) To reduce the charge of $7\frac{1}{2}$ per cent. upon the rateable value to 5 per cent., the deficiency to be met out of the district rate. As the district rate for the purpose will only be chargeable within the old borough, it is obvious that the reduction ought to apply only to the old borough until such time as the rates on the newly added portion cease to be differential. It is estimated that this reduction will leave a sum of about £3,500 to be contributed out of district rate of the old borough.

18. The plaintiffs state that they deem it equitable to effect the said reduction on the ground that a large amount of property in the borough of Northampton which is rateable to the poor and district rates, and which benefits by the presence of an adequate public water supply for fire extinguishing and sanitary purposes, does not pay anything towards the cost of the water undertaking, because the owners and occupiers of the said property do not in respect of the same take the water supply of the plaintiffs. As a means of forcing contribution from the said owners and occupiers the plaintiffs have adopted the said reduc-

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tion, so that the said owners and occupiers within the old borough will by their contributions to the district rate fund have to make good any deficiency created by the said reduction of the water rate.

19. There are in the added parts a number of residents who do not take the plaintiffs' water supply for domestic purposes, and whose property is therefore not subject to the payment of water rate.

20. The plaintiffs contend that they are entitled to refrain from reducing the water rate in the added parts from the $7\frac{1}{2}$ per cent. now levied inasmuch as the ratepayers in the said added parts, being privileged from an increase in the district rate for a period of ten years (which period has not yet elapsed), the said ratepayers would bear no part of the extra burden that might be thrown upon the district rate of the old borough by reason of any deficiency resulting from such reduction.

21. The defendant contends, first, that the said water rate is a rate within the meaning of Article XXXVI. of the Order as set forth in paragraph 13 hereof, and that inasmuch as the poor, borough and general district rates payable by him amount together to the *maximum* sum of 5s. 6d. in the pound fixed by the said Order, the plaintiffs are not entitled to recover from him the said sum of £1 os. 3d. or any other sum in respect of water rate.

22. Secondly. The defendant contends in the alternative that, if he be chargeable with a water rate, the plaintiffs are not authorised to demand of him a higher rate than that demanded in respect of domestic consumers in the old borough taking a similar supply under similar circumstances either upon the contention of the plaintiffs set forth herein or at all. The defendant's contention is that the differentiation of the water rate as effected by the plaintiffs is contrary to the terms and intention of the Northampton (Extension) Order, 1900; that it is not authorised by the Acts of 1861, 1882, or 1884; and that such differentiation is a breach of the general law of the realm, and the defendant claims that the plaintiffs are bound to place all domestic consumers in the borough on an equality save in so far as express statutory power may authorise otherwise.

23. Thirdly. The defendant contends that the plaintiffs are not authorised to estimate for a deficiency on the water account as set forth in paragraphs 16, 17, and 18 hereof for the reason therein stated, either accompanied by the aforesaid differentiation or not so accompanied.

24. The questions for the opinion of the Court are—

1. Whether the plaintiffs are entitled to differentiate the water rate as hereinbefore set forth.

2. Whether the plaintiffs are entitled to demand a water rate of the

defendant within the period of ten years from the commencement of the Extension Order so long as the rates payable by the defendant exclusive of water rate amount to 5s. 6d. in the pound.

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3. Whether the plaintiffs are entitled to reduce the water rate for the purpose of creating a deficiency on the grounds hereinbefore stated.

If the Court answer the above questions, more particularly the first, in the affirmative, the parties herein will respectfully submit that judgment should be entered for the plaintiffs. If the Court answer the same, more particularly the first, in the negative, the parties herein will respectfully submit that judgment be entered for the defendant.

Bigham J., in deciding the first question, held that the plaintiffs had no power to differentiate the rate. In answer to the second question, he held that the water rate was not a rate to be taken into consideration in making up the total of 5s. 6d., and he answered the second question in the affirmative. He answered the third question in the negative. He accordingly gave judgment for the defendant.

The plaintiffs appealed.

C. A. Russell, K.C. (Ryland Adkins with him), for the plaintiffs.

Horace Avory, K.C. (with him Forder Lampard and Bernard Campion), for the defendant.

LORD ALVERSTONE C.J. There is no doubt about the very great importance of the point raised in this case. As I understand it, the judgment of my brother Bigham upon the main point is a simple and clear judgment that under section 36 of the Act of 1884, and the other statutory provisions that the Corporation are under, there is no power to differentiate between different persons who have to pay the water rate. That is a decision of very great importance, and is in accordance with a view which to my knowledge has been suggested from time to time during the last 20 years, but which, so far as I know, has never before received judicial sanction, at any rate in the way in which my brother Bigham has put it. Of course, there is a great deal to be said *primâ facie* for equality of charges in respect of such things as the public supply of water. But I have come to the clear conclusion that the decision of the learned judge cannot be upheld; and that the other defences sought to be raised by the defendant cannot prevail. I think it will be convenient if I state briefly what I understand the point to be, and then refer to the arguments which have been very clearly and ably urged before us. The action was brought to recover £1 4s. 9d., of which £1 os. 3d. was made up by one quarter's instalment of an annual rate at 7½ per cent. upon the rateable

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value of £54. The defendant does not question that he is liable upon the £54, that the $7\frac{1}{2}$ per cent. is properly calculated, or that that percentage is within the maximum power given to the Corporation by section 36 of the Act of 1884. But he says that if he pays $7\frac{1}{2}$ per cent. everyone else must pay $7\frac{1}{2}$ per cent., and if the Corporation do not charge everyone else $7\frac{1}{2}$ per cent. they cannot recover $7\frac{1}{2}$ per cent. from him. I do not think he goes so far as to say that the Corporation cannot recover anything against him, because the case has been argued on the basis that he would be willing to pay 5 per cent., but not $7\frac{1}{2}$ per cent.

Under those circumstances Mr. Avory says first of all—and this point I will come back to later—that the Corporation cannot, if they are simply relying upon their power to charge under such statutory powers as these, charge except at an equal rate of percentage in the case of all the persons who have not made special agreements with them, and further, he raises the point that, by virtue of the Provisional Order which added Kingsthorpe to Northampton, the total rates in Kingsthorpe—i.e., the poor rate, the borough rate, the general district rate, and any other rate—were not to exceed 5s. 6d. Now Mr. Avory has said that the effect of only charging 5 per cent. in the old borough of Northampton would be that there would be a larger charge upon the general district rate of the borough in respect of the water undertaking than there would have been if a rate of $7\frac{1}{2}$ per cent. had been charged equally upon all the water consumers in Northampton, and that therefore the effect will be that, there being a larger charge upon the general district rate, there is a greater probability of the 5s. 6d. being maintained, and the inhabitants of Kingsthorpe get less chance of the rates going below 5s. 6d. I am at present wholly unable to see how this question can be raised in this action. The defendant does not deny that the charge made upon him is *prima facie* a lawful charge, but he says that the Corporation have no right to reduce the rate upon the inhabitants of the old borough, and that the reasons stated in paragraphs 17 to 20 of the case as the justification of the Corporation for the course of action they have adopted, in reducing the water rate in the old borough to 5 per cent., are not good. It seems to me that in such a proceeding as this the defendant, unless he can make good the main proposition forming the ground upon which Bigham J. decided in his favour, is not entitled, in answer to an otherwise lawful claim for a specific sum of money, to put himself in the position of a ratepayer who is alleging that the conduct of the Corporation is *ultra vires*. I do not want to say more about this point than that I see great difficulty in the way of any single individual seeking to raise it. It may be that a ratepayer who is liable to the

general district rate has the right to bring the Corporation before some competent Court, and, either with the assistance of the Attorney-General or in some other form of proceeding, to question the right of the Corporation to reduce the water rate in the old borough with the object of equalising the total burden of the rates. But I am clearly of opinion that that question cannot be raised in order, so to speak, to cut down the right of the Corporation to make the charge which they have made in this case.

That brings me to what is the real and important point in this case, namely, whether first a company and then a corporation can differentiate between the charges they make, and whether, if, in the absence of agreement, they are proceeding to recover a water rate, the fact that they have charged less to other people than to the defendant makes the whole rate bad. The absence of an equality clause from the Waterworks Clauses Acts has been the subject of comment on many occasions, and I think the authority cited by Mr. Avory—*Hungerford Market Co. v. City Steamboat Co.* (1860) 3 E. & E. 365; 30 L. J. Q. B. 25—is a very important authority to show that it is necessary for the defendant to find, either by Act of Parliament or at common law, some obligation on the company to have uniform dealings with all the persons with whom they deal. It does not go further than that, because, as has been suggested more than once, such an obligation may be implied from the way in which the statute has been framed or from the nature of the charge which is imposed. But speaking of the old company's rights, there are a number of sections in the Act of 1861 enabling the company to make contracts of all kinds as regards the supply of water, but it is sufficient for my purpose to say that section 59—I do not refer to it as the only section—provides that “the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement.” By that section an absolute power was given to the company to make special bargains. It seems to me that, unless it can be said that because a bargain is made with one person by which he gets his water cheaper than another, therefore the charge on the latter is bad, the fact that the company could make these agreements destroys to a large extent the foundation upon which Mr. Avory's argument rests. Then in 1884 this waterworks undertaking was transferred to the Northampton Corporation. By sections 24 and 25 of the Act of 1884 the Corporation have still to keep separate waterworks accounts; and the waterworks undertaking is quite separate in their hands, subject to this, that there is the security

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of the general district rate for any deficiency which may arise in the course of carrying out the undertaking. I need not refer to the provisions as to the payment of working expenses, interest on debentures, and the providing of a sinking fund. The waterworks have become the Corporation's waterworks, and have ceased to be the company's waterworks. Now, by that transfer, have the powers of making agreements been taken away? It seems to me that section 10 of the Act of 1884 shows that all the powers of the company are transferred, and that the Corporation are just in exactly the same position as the company were in so far as their rights of dealing with customers is concerned. It has been contended that section 36 of the Act of 1884, which repeals section 49 of the Act of 1861, by empowering the Corporation to charge a sum not exceeding so much on the rateable value, imposes an equality obligation upon the Corporation, so that they must charge everyone alike. I am unable to take that view. I think the only effect of section 36 was to alter the standard of payment which existed under section 49 of the older Act. It is quite possible that one object was to fix the rateable value as the standard as distinguished from the gross annual value. But, be that as it may, it is quite impossible in my opinion to say that by implication section 36 of the Act of 1884 overrides the powers the Corporation have, by virtue of being successors to the company, to make agreements with water consumers. That being so, what is the real position of this defendant? He says that although the charge at the rate of $7\frac{1}{2}$ per cent. made upon him is authorised by section 36, the Corporation have, under some procedure which he attacks and which he objects to, made an arrangement with the water consumers of the old borough that they shall only pay at the rate of 5 per cent. In my opinion that is no defence to the claim.

I should like to say one word more so that I may not be misunderstood. It is in my opinion not correct to speak of this Corporation as rating for water. There are a great many cases in which corporations may rate for water. There are purposes for which they may include the cost of water under certain circumstances in the borough rates, and they are entitled to treat such costs as rates. But in this case the Corporation are not rating for water in the ordinary or proper sense of the term; they are charging for water at a charge which is fixed by a percentage on the rateable value. Therefore in my opinion the suggestion that the power to make these charges according to the particular circumstances of the particular case is cut down by section 36 is without foundation.

I am therefore of opinion that the judgment of Bigham J. on the point which he decided against the Corporation was wrong, and that his judgment should be reversed.

I should like to add that I entirely agree with Bigham J. in his opinion that the words "other rates made by the Corporation" in Article XXXVI. of the Provisional Order do not include water rates. It is quite clear that the rates there referred to are rates such as the general district rate, levied quite independently of the supply of a commodity to a particular customer.

COLLINS M.R. I am of the same opinion, but as we are differing from the learned judge below, I will add a few words. The question is whether the Corporation are entitled to differentiate their water rates, that is to say, whether they are entitled to charge persons in one district at one rate and persons in another district at another rate. The defendant resisted a claim for water rate against him at the rate of $7\frac{1}{2}$ per cent. on the ground that other persons in other parts of the borough were only charged at the rate of 5 per cent.; and Bigham J. upheld that view. We have to see whether the statutes under which the amount is claimed have or have not imposed any limitation upon the authority of the Corporation in imposing this charge, otherwise than by defining a *maximum*; or, in other words, whether there is any provision requiring that the charge should be made on all persons equally. We have to begin the discussion by admitting that there is no express limitation of that character. If such a limitation exists at all, it is to be collected from the words of section 36 of the Act of 1884, and those words, when they are examined, seem to me not to carry the defendant the full length he must show that they do carry him if he is to succeed in this action. The section repeals the provisions in the earlier Act fixing a number of different standards by which houses of different values were to be assessed to this charge. Then it continues: "The Corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." The section uses the words "water rate," but it does not by any other expression indicate any intention that the rate or charge shall be equal, in proportion to its value, upon every house in the borough. It does not say so. Mr. Avory contends that "any dwelling-house" must be read as though it were "all dwelling-houses." That is a gloss which I do not think he can support. The section can be read perfectly easily without substituting "all" for "any"; but even if "all" is substituted, I do not think it would carry the matter any further, because all that is imposed is a limit of $7\frac{1}{2}$ per cent. as the *maximum* sum that can be charged by the Corporation. Why is it to be imported into that that the charge is to be at an equal rate upon every person?

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The only word in the section that gives countenance to that suggestion, or upon which the argument can be founded, is that that which is charged is called a "water rate"; but how does an implication arise from that that the charge must be equal? It seems to me that as regards the basis upon which the conclusion was founded that equality is essential in the case of poor rate—which is really the foundation of this contention—the poor rate differs entirely from such a charge as the water rate. No doubt in the original enactment under which what is called the poor rate was established, there is no express provision that there is to be equality; but the very nature of the charge itself, the reason why it was imposed, the conditions attaching to it, and its very essence, all involve equality, because it is an imposition upon citizens of a duty to the community in proportion to their means, and from that duty imposed necessarily arises the implication of equality—equality in bearing burdens in proportion to their means. What is the analogy between that and the duty of a person who buys a marketable commodity? The Corporation here take the right to sell and the citizens take the right to buy a marketable commodity, and there is no analogy between their position in taking from the Corporation the water and that of a citizen who is bound according to his means to perform a public duty. One can perfectly see the force of the obligation of equality in the latter case. But the case of a person who, having a demand in his household for a certain commodity, has the right to demand a supply of that commodity from the persons who supply it is not analogous. When it is considered that that commodity is necessarily supplied at different costs to different persons in different places, there is no foundation for, and no presumption of, equality. On the contrary, in equity there would be a presumption of inequality, because persons who demand the supply of water, and are given a right to demand it, are necessarily some of them in places where it may be much more expensive to supply it than it may be in others. Therefore we do not start *prima facie* with any presumption that there ought to be equality of opportunity and equality of obligation. We clearly have to deal with this on first principles, because the sole foundation for the argument for the defendant here is the implication to be drawn from the fact that the word "rate" is used in the section, and that there is a percentage upon value imposed. Now it seems to me that that is where the case stands upon principle; but I think there is some authority upon the matter also. I think that the case of *Hungerford Market Co. v. City Steamboat Co.* (1860) 3 E. & E. 365; 30 L. J. Q. B. 25, which was a case of toll, is an instance of the application of the principles I have been attempting to set forth. There the question arose in respect of permission to

pass over certain property of the charging authority, and it was held there that there was no obligation of equality; or, in other words, that the charging authority were entitled to charge tolls at different rates to different persons for what was apparently the same privilege or the same opportunity. Why did the Court come to that conclusion? Because there were no words imposing the obligation of equality in the statute which entitled the charging authority to demand the tolls: there were no statutory words and there was no necessary implication of equality from the relations of the parties. It seems to me here that if the words which impose or give the right to impose the charge are examined, no higher implication arises from the word "rate" used here in the sense in which it is used, and in the connection in which it is used, than arose from the word "toll" in the other case. The words might be interchanged so far as any implication of equality is to be derived from the use of either one or the other in the collocation in which it is used. The charge in each case is simply a return made for some privilege used or some article supplied. It is not in any sense based upon equality of duty or equality of obligation which is really the basis upon which in the case of the poor rate the inference of equality has been drawn. For these reasons, in addition to those given by the Lord Chief Justice, I am of opinion that we must differ from the decision of Bigham J., and that this appeal must be allowed.

ROMER L.J. I have come to the same conclusion, and I need only add a few words after the judgments which have been delivered. Certainly my first impression when the case was opened was rather in favour of the view adopted by the learned judge in the Court below; but after the case has been fully argued, and the various Acts bearing upon the question before us have been examined carefully, I have come to the conclusion that there is nothing in those Acts sufficiently strong to justify this Court in holding that all dwelling-houses in the borough of Northampton must be charged with the same rate. In the first place, let me consider the Waterworks Clauses Act, 1847, which was incorporated with the special Act of 1861. Is there anything in that Act which would render it clear that whenever dwelling-houses have to pay for their water what is called a "rate," that rate must be at the same percentage upon the value in respect of all those dwelling-houses? Well, I certainly cannot find anything sufficient in the Act of 1847 to lead to that conclusion; and, as has been already pointed out by my Lords, there is no principle which would *primâ facie* make it but fair that all dwelling-houses should pay the same percentage upon their value. To supply one of two houses of the same value with water might cost very much more than to supply the other. The

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two houses, although of the same value, might not for the purposes of the consumption of water be at all of the same character. And other illustrations might be supplied. Then, there being no principle, as I have said, I cannot find any special provisions in the Act of 1847 which would support the contention of the defendant in this case. I think, in the first place, under the Act of 1847 that the definition of "water rate" in section 3 as including "any rent, reward, or payment to be made to the undertakers for a supply of water" is significant. It is true that there are in the Act certain provisions as to owners or occupiers of dwelling-houses who want water laid on to their premises paying or tendering a water rate in advance, of which it is somewhat difficult, in the absence of some obligation to charge equally, to see the exact meaning or effect, unless they mean that the maximum must be tendered where no fixed rate is imposed by the special Act. Yet I think a meaning can be given to all those sections without accepting the argument of the defendant in this case; and certainly there is nothing in the difficulties created by those sections which I think would in itself justify this Court in upholding the contention of the defendant. Passing from the Act of 1847, the next Act I have to say a word or two about is the Act of 1861. It is clear that under that Act there is nothing, having regard to its wording, which would have prevented the company from charging by agreement any householder less than it was charging other householders. Section 59 is not immaterial in this connection. That section provides that "the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." The Act therefore contemplated that by agreement the company, if it chose, might certainly charge certain householders less than others. It is noticeable also that under the Act of 1861, even as between dwelling-houses strictly so called, there was not a fixed rate, but the maximum rate that could be charged depended upon the value of the houses; and also it is not to be forgotten that in considering a question of equality as between persons who are taking water, dwelling-houses properly so called may not really constitute even a majority of the hereditaments which require a constant supply from the company. At any rate, under the Act of 1861 I think it is impossible to say that any specific provision or enactment can be pointed to as tending to support the view that under that Act the company could not, as between different dwelling-houses, charge a different rate. Then I come to the only other Act that I need say a word about, and that is the Act of 1884, and it appears to me sufficient to

say that when sections 10 and 12 of that Act are looked at, it is clear to my mind that whatever powers the company had in this respect under the Act of 1861, the Corporation have under the Act of 1884. It seems to me that the Corporation have become the owners of the undertaking, and have the same rights with regard to that undertaking as the company had, subject only to those special matters which are mentioned in section 10 of the Act of 1884. Certainly I cannot find in that Act any provision which would justify this Court in saying that the main contention of the defendant in this case is correct. With regard to the rest of the case, I desire to add nothing to what has been said by my Lords.

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Solicitors for the Corporation—Sharpe, Parker, & Co., for H. Hankinson, Northampton.

Solicitors for the defendant—Warren, Murton, and Miller, for Lamb and Stringer, Kettering.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

Feb. 3, 4.

TREASURE AND ANOTHER *v.* BERMONDSEY BOROUGH COUNCIL.

Bye-laws—Lavatories in new buildings—Provision as to trapping of waste water pipes—Waste water carried off by means other than pipe—Series of lavatory basins in one room—Construction of bye-laws—London County Council drainage bye-laws, 1901, No. 10.

No. 10 of a series of bye-laws as to drainage made by the London County Council under section 202 of the Metropolis Management Act, 1855, requires, inter alia, that a person who erects a new building shall cause every pipe in the building for carrying off waste water from every lavatory or sink (with certain exceptions) to a sewer to be constructed of certain materials, and to be trapped in a certain manner immediately beneath such lavatory or sink.

Held (assuming that each of a series of lavatory basins in a room is itself a lavatory within the bye-law, as to which quære), that the bye-law did not prohibit the carrying off of the waste water from a lavatory by means other than a pipe, and therefore that there was no infringement of the bye-law where the waste water from each of a series of lavatory basins was discharged by a short straight pipe into an open trough which in turn communicated with a pipe, properly trapped, leading to a sewer.

CASE stated by a metropolitan police magistrate before whom the appellants had been convicted of the breach of a bye-law relative to the trapping of pipes carrying off waste water from lavatories to sewers as follows:—

1. The appellants are a firm of builders and contractors, and the respondents the local authority entrusted with the duty of seeing that the drainage bye-laws made by the London County Council under section 202 of the Metropolis Management Act, 1855, are duly carried out.

2. On June 18, 1903, the appellants appeared before me to answer to a complaint by Frederick Ryall, the town clerk of the borough of Bermondsey, for that they, on or before April 25, 1903, did unlawfully erect a new building in Alexis Street without causing every pipe in such building for carrying off waste water from every lavatory to a sewer to be trapped immediately underneath such lavatory by an efficient syphon trap constructed of lead, iron, or stoneware, with adequate means for inspection and cleansing, contrary to bye-law 10 made by the London County Council under section 202.

3. It was proved or admitted that the appellants had erected certain

buildings for the School Board for London in Alexis Street in the said borough and lavatories therein for the use of children attending the school.

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4. The bye-law No. 10 was admitted, and is as follows: "A person who shall erect a new building shall cause every pipe in such building for carrying off waste water from every lavatory or sink (not being a slop sink or urinal constructed or adapted to be used for receiving any solid or liquid excremental filth) to a sewer, to be constructed of lead, iron or stoneware, and to be trapped immediately beneath such lavatory or sink by an efficient syphon trap, which shall be constructed of lead, iron or stoneware, with adequate means for inspection and cleansing, and which shall be ventilated into the external air whenever such ventilation may be necessary to preserve the seal of such trap. He shall not construct or fix in or in connection with such waste pipe, lavatory, or sink, any trap of the kind known as a bell trap, a dip trap, or a D trap." [The rest of bye-law No. 10 is quoted in paragraph 6 of the case.]

5. The construction of the said lavatories and the method of carrying off waste water from them to the sewer are sufficiently shown by the plan initialled by me which is annexed to and forms part of this case. It also shows the system required by the Council.

6. For the appellants it was contended that each basin from which after use waste water runs away through a pipe immediately underneath was not a lavatory, but that each set of basins was a lavatory: that the only "pipe" within the meaning of the bye-laws was that leading from the open trough, which was properly trapped, and that the pipe immediately beneath each basin was not a "pipe for carrying off waste water from a lavatory to a sewer." In support of the said contention it was argued that the whole of the bye-law must be read together, and that part of it, namely, the third paragraph, was not applicable to such a pipe as that immediately beneath each basin in the buildings in question. The paragraph thus referred to is as follows: "He shall cause every pipe in such building for carrying off waste water to a sewer to be taken through an external wall of such building, and to discharge in the open air over a properly trapped gully or into such a gully above the level of the water in the trap thereof, or over a channel leading to such a gully."

7. It was contended on the part of the respondents that each of the basins from which, after use, waste water runs away through a pipe immediately beneath, was a lavatory within the meaning of the bye-law, and that in order to comply with such bye-law it was necessary that each basin should be trapped, as required in the bye-law, by a syphon immediately beneath each basin; and that by the carrying of

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the water through an untrapped pipe immediately beneath each of such basins to an open trough, and carrying all such waste water from such open trough underneath through a pipe at the side, and not underneath, though such pipe was trapped, did not comply with bye-law No. 10.

I was of opinion that upon the true construction of the bye-law each basin was a lavatory, inasmuch as waste water runs away from a pipe immediately underneath each one to a sewer, and that it was necessary to cause the pipe immediately beneath each to be trapped, and I therefore convicted the appellants and fined them 40s. The question upon which the opinion of the Court is desired is whether or not the said determination was correct in point of law.

Macmorran, K.C., and *Layman* for the appellants. The facts found in this case as stated do not bring the appellants within the operation of the bye-law. The waste water from each basin in the lavatory is let off by a pipe into an open trough beneath; and the trough passes the water into a pipe, the end of which is furnished with a syphon and properly trapped, and the pipe carries it into the sewer. The short pipes at the bottom of each basin through which the water runs into the open trough are in no sense pipes which carry any waste water to the sewer. The object of the bye-law is of course to prevent any foul emanations coming up through the pipe from the sewer, and the contention is that the object is accomplished by the trapping of the pipe which carries off the water from the trough.

Avory, K.C., and *Biron* for the respondents. There can be no question as to the reasonableness of this bye-law. The pipe immediately beneath each basin is a pipe for carrying off waste water from a lavatory to a sewer. In other words, each basin is a lavatory, and the pipe beneath it must be trapped, otherwise there is no compliance with the bye-law. The open trough is the difficulty here, for that is not trapped, except between the pipe into which it discharges and the sewer. The same kind of question arose under bye-law 17 as to water-closets in *Metropolitan Industrial Dwellings Co. v. Long* (1903) 2 L. G. R. 233. Here the bye-law requires a pipe, and the appellants only furnish a trough. The word "lavatory" is used in the bye-law in the sense that each basin must have a pipe from it, and each pipe must be trapped beneath. The magistrate came to a right conclusion, and properly convicted the appellants.

LORD ALVERSTONE C.J. I am very anxious indeed to repeat what I have said more than once when giving judgment with regard to these bye-laws, that I decline to be a party to a judgment which would sup-

pose that we have expressed an opinion upon the merits of any particular sanitary, engineering, or building question. One cannot always shut one's eyes to what is common knowledge, that there have been questions raised as to the desirability of draining in a particular way, or building in a particular way, or engineering in a particular way, when it is a known and common thing. And one cannot be ignorant of the fact that there has been a very considerable controversy as to whether it is desirable to have traps which themselves may become foul below each basin, or desirable to have something which could be readily cleaned out; but I absolutely decline to express the slightest opinion as to which is the best. All I say is that there is much to be said on both sides. But I come back to the point. We have had to say on several occasions in considering these bye-laws that if a local authority who have the right to do it and the duty of exercising a discretion, do wish to indicate that the thing is to be done, they must say so in fairly plain and clear language. I do not think that in any judgment to which I have been a party I have ever—certainly I have never intentionally—construed these bye-laws unfavourably to the local authority by putting a strained construction upon them; but I have, both where I have supported them and where I have thought they could not be supported, endeavoured to point out that the language must be reasonably clear.

Let us just take this bye-law and read it without assuming the absurdity of the contention of either side. The statement in the bye-law is that "a person who shall erect a new building shall cause every pipe in such building for carrying off waste water from every lavatory or sink" to a sewer, to be constructed in a certain way, and to be trapped in a certain way. Now the class of pipe they are speaking of there is a pipe which leads from the lavatory, and for this purpose I will take that to be from a basin in a lavatory, to the sewer. If they mean by that "you must not take the water from the basin into the sewer by any other means except a pipe," they must say so; and it is not unreasonable to ask them to say so. Mr. Avory said that that was the construction he sought to put upon the bye-law, that it was prohibitive against taking the waste water away in any other method. Now, that I am not putting a false construction upon this bye-law is clear from the last paragraph of the same bye-law: "He shall cause every pipe in such building for carrying off waste water to a sewer to be taken through an external wall." Therefore it is quite clear that the County Council knew perfectly well what they were talking about; they were talking about pipes which led to the sewer from the lavatory, or, if you like, from the basin, and while I perfectly agree that the ordinary reader would take this to mean from the lavatory

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and not from each basin, yet still I think what is far more important is that even if you take it from each basin people are not told that they are not to use an open trough, but only that if they do use a pipe to the sewer it must be of a particular construction. Now in this case, I think, to say that a short end of pipe which runs into an open trough, which open trough leads into a pipe, is a pipe leading to a sewer would be simply an abuse of language. Of course it is a pipe which takes the waste water to the sewer in the same sense that the housemaid may take waste water into a sewer when she empties the basin into a slop pail and pours the contents of the slop pail down a sink. No reasonable man reading that bye-law would understand that he was told that he was not allowed to use the system of having no closed pipe at all, but an open trough which could be cleaned out every day, and of avoiding any possibility of any foul connection between the open trough and that basin by simply having a short open length of pipe, but that he must use a closed pipe with the elaborate system suggested as an alternative. I repeat that I express no opinion as to which is the best; I do not know, but all I say is that if the County Council desire to say that there must always be a pipe from each basin to a sewer trapped in a particular way, they must say so.

I am therefore clearly of opinion that the magistrate came to a wrong decision in this case, and that what was done here was not within the words of this bye-law, construing it in the most liberal way in order to carry out the views of the sanitary authority.

WILLS J. I am of the same opinion and for the same reasons.

KENNEDY J. I am of the same opinion, though I confess not quite with the same confidence, and therefore I will just add that it seems to me that the view which my Lord and my brother Wills have adopted and have expressed is the right one here, because I do think that, while it is necessary not to be hypercritical on language in matters conducted by officials and public bodies, who must be presumed to be sensible and just-minded persons, on the other hand, it is equally necessary that those who have to obey the bye-laws should be clearly told what they ought to do; and my objection to the decision of the magistrate is mainly this, that—while I confess that for myself I cannot regard as a matter of fair construction and grammatical rendering the construction that Mr. Avory put upon this bye-law as altogether an impossible one—I think before persons are brought before magistrates for the breach of a bye-law of this kind it ought to be made not merely inferentially, but absolutely clear as a matter of ordinary construction of language that they have done something which is forbidden. Here the most Mr. Avory can put upon the

construction of this bye-law is that it ought to be a matter of inference that the only connection from each of these basins to a sewer should be a pipe, and not a pipe *plus* trough. I do not think that you ought to convict a person on inference, and I do not think that it is desirable to encourage such kind of legislation by bye-law as will make it even arguably possible that the thing which has been done is not the thing which is forbidden in the bye-law.

I agree, therefore, entirely with the judgment which has been pronounced.

Appeal allowed.

Solicitor for the appellants—C. E. Mortimer.

Solicitor for the respondents—F. Ryall.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Feb. 16, 17.

KING'S BENCH DIVISION.

NOTT BOWER v. LIVERPOOL CORPORATION.

Police—Pension—Basis of calculation—Salary—Increase subject to condition that increase should not be reckoned for pension—Resignation—Suspension of pension—Authority to suspend—“Taking service in any police force”—Office remunerated out of “borough rate or fund”—City of London police—Police Act, 1890 (53 & 54 Vict. c. 45) ss. 13, 33, 39, Sched. III.

In 1901, the salary of the plaintiff, who was the head constable of Liverpool, was increased by the watch committee from £1,400 to £1,650, subject to his agreeing that the amount of the increase should not be taken into account for the purpose of pension. In March, 1902, the plaintiff retired and the watch committee granted him a pension of £933 6s. 8d., based on a salary of £1,400 a year. In the same month the plaintiff was appointed commissioner of police of the City of London at a salary of £1,250 a year. In January, 1903, the Liverpool City Council passed a resolution suspending the payment of £483 6s. 8d., part of the pension granted to the plaintiff, so long as he remained in the service of the City of London police.

Held—1. That whether the plaintiff did agree, or did not agree, in the sense either that he did not in fact or could not in law agree to the condition, the pension must be calculated on the basis that his salary remained at £1,400;

2. That the “police authority” of Liverpool under the Police Act, 1890, was the watch committee and not the city council, and that there was, therefore, no existing resolution suspending the pension within section 13 (1) of the Act;

3. That three-fourths of the expenses of the City of London police being borne by the rates, the commissionership was an office remunerated out of a borough rate or fund, within section 13 (2), and consequently that the provisions of that subsection as to reduction of pensions applied.

Query, whether the City of London police is a “police force” within section 13 (1) of the Act.

THIS was an action by Captain J. W. Nott Bower for a declaration (1) that he was, and had been, since the date of his retirement from the office of head constable of Liverpool, in March, 1902, entitled to an annual pension, payable by the defendants or their watch committee under the provisions of the Police Act, 1890 (53 & 54 Vict. c. 45); (2) that the amount of the pension was £1,100, or in the alternative £933 6s. 8d.; and (3) that such pension had never been validly or at all suspended by the defendants or their watch committee.

In January, 1873, the plaintiff was appointed sub-inspector in the

Royal Irish Constabulary, and served with that force till May, 1878. when he was appointed chief constable of Leeds. He served as chief constable of Leeds from May, 1878, till August, 1881, when he was appointed head constable of Liverpool.

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On August 22, 1898, the salary of the plaintiff being then £1,400 per annum, a resolution was passed by the watch committee, which was confirmed by the city council in September, 1898, that no further rateable deductions should be made from the plaintiff's salary under section 15 of the Police Act, 1890.

On August 15, 1901, a resolution was passed by the watch committee in the following terms: "Resolved, that it be reported to the special committee (*i.e.*, of the whole city council), pursuant to standing order No. 58, that the watch committee recommend that the salaries of the following officers be increased, namely, J. W. Nott Bower, head constable, from £1,400 per annum to £1,650 per annum, subject to the head constable agreeing that the amount of the increase shall not be taken into account for the purpose of pension. . . ."

In pursuance of this resolution the plaintiff was paid and accepted a salary of £1,650.

In March, 1902, the plaintiff applied to the watch committee to be superannuated. On March 17, 1902, he retired, and on the same day the watch committee confirmed a recommendation of their finance sub-committee in the following terms:—

"That the following constables be respectively superannuated at their own request with the allowances hereunder stated, viz. :—

Name.	Age.	Rank.	Ap- proved Service.	Annual Pay.	Amount of Allowance.
J. W. Nott Bower	52	Head constable	29 years	£1,650	£933 6s. 8d.

The above pension of £933 6s. 8d. was calculated on the basis that only £1,400, and not £1,650, was to reckon for pension, and was duly paid to the plaintiff from the date of his retirement till January, 1903.

On March 21, 1902, the plaintiff was appointed Commissioner of Police of the City of London Police at a salary of £1,250 a year.

On January 7, 1903, the Liverpool City Council passed a resolution in the following terms:—

"That it be an instruction to the finance committee to suspend payment of the sum of £483 6s. 8d., being part of the pension now paid by the council to the late head constable, so long as he remains in the service of the City of London Police."

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No such resolution was passed by the watch committee.

The defendants had since refused to pay the plaintiff his pension except subject to such deduction of £483 6s. 8d.

The plaintiff in his statement of claim alleged that, on the recommendation of April 15, 1901, being communicated to him by the watch committee, he informed them that he could not agree to accept the same, the increase being in fact not in proportion to that given to other members of the force when given on the terms of its not counting for the purpose of pension; that the matter was on several subsequent occasions discussed by the watch committee, but that no arrangement had been come to when the plaintiff retired.

At the trial before Buckley J., sitting as an additional judge of the King's Bench Division, the following questions were raised:—(a) Whether the defendants could refuse to pay the plaintiff the whole or part of his pension while he retained his position of Commissioner of Police for the City of London; and (b) whether the plaintiff was entitled to count for pension his previous service in the Royal Irish Constabulary.

The Police Act, 1890 (53 & 54 Vict. c. 45), provides as follows:—

Section 13. (1) Where a constable in receipt of a pension under this Act from a police authority takes service in any police force, his pension may be suspended by that police authority in whole or in part so long as he remains in that service.

(2) If a constable in receipt of a pension under this Act is appointed to an office remunerated out of money provided by Parliament, or out of a county or borough rate or fund, he shall not, while holding that office, receive more of the pension than together with the remuneration of that office is equal to one and a half times the remuneration of the office in respect of which the pension was awarded.

Section 33. In this Act, unless the context otherwise requires,—the expression “police area” means one of the areas set forth in the first column of the Third Schedule to this Act; and the expressions “police authority,” “chief officer of police,” and “police fund,” mean, as respects each police area, the authority, officer, and fund respectively mentioned opposite to that area in the second, third, and fourth columns of that schedule; and the expression “police force” means a force maintained by one of the police authorities mentioned in the said schedule . . .

Section 39. This Act shall not apply to the City of London Police.

THIRD SCHEDULE. POLICE AREAS AND AUTHORITIES.

Police Area.	Police Authority.	Chief Officer of Police.	Police Fund.
*	*	*	*
A borough.	The watch committee.	The chief or head constable.	The borough fund or borough rate or any fund or rate applicable under any local Act for the expenses of the police force.
“	“	“	“

Sir R. T. Reid, K.C., Bray, K.C., and Rowlatt for the plaintiff.

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Firstly, the plaintiff is entitled under the Police Act, 1890, to a pension, and for this purpose to count his period of service in the Royal Irish Constabulary. [*Cripps, K.C.* We admit that.] Assuming, therefore, that he is entitled to a pension, the pension ought to be calculated according to the amount of his annual pay at the date of his retirement, viz., £1,650, and not £1,400: Act of 1890, Sched. I., Part III., Gen. Rules. No. 11.

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The plaintiff could not agree to waive his right to an accrued pension. A pension cannot be assigned. [BUCKLEY J. There can be no question of the assignment of a pension until it is granted. But cannot a person agree that he will not take a pension?] The rules contained in Sched. I., according to which pensions are granted, are statutory, and it would be against public policy to allow policemen to contract themselves out of them.

Secondly, the plaintiff, by becoming Commissioner of the City of London Police, has not taken service in a police force within the meaning of section 13 (1) of the Police Act, 1890. Section 39 of the Act expressly excludes the City of London from its operation. Under the City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), the Commissioner occupies an exceptional position in regard to the men under his control: he appoints them: section 9. The City of London Police are not a "police force" within the definition contained in section 33 and Sched. III. of the Act of 1890, for a "police force" is defined in relation to a "police area," and none of the police areas mentioned in the schedule are applicable to the City of London, which is an administrative area *sui generis*. [On this point they also referred to the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38).]

Thirdly, there is no valid resolution suspending the plaintiff's pension. The "police authority" of Liverpool empowered by section 13 (1) of the Act of 1890 to suspend, is, as appears from Sched. III. to the Act, the watch committee, and not the city council, and the watch committee have not suspended the plaintiff's pension.

Cripps, K.C., and A. J. Ashton for the defendants. The plaintiff has taken service in a police force. The City of London Police are excluded from the provisions of the Police Act, 1890, only because they have a scheme of superannuation established under the Act of 1839. Section 39 of the Act of 1890 does not mean that the Commissioner is to occupy an exceptional position as regards his pension. The City of London is a town not being a borough, and maintaining a separate police force under a local Act. If the City were not a "town" within section 33, there would be no point in its exclusion from the general scope of the Act by section 39.

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As to the amount of the pension, assuming that the terms of the recommendation of August 15, 1901, were such that the plaintiff either did not or could not in law accept them, the result would be that the defendants voted him a salary of £1,650 provided that he did and could agree to them. The resolution was therefore either *ultra vires* or *intra vires*. If it was *ultra vires*, then the salary was £1,400. If it was *intra vires*, and the plaintiff did not accept the terms, then the salary would still be £1,400.

As regards the resolution passed by the city council, we cannot now maintain the point that it had the effect of suspending the plaintiff's pension.

Sir R. T. Reid, K.C., in reply. Upon that admission the plaintiff is entitled to judgment for the amount claimed, subject only to the question whether the pension is to be calculated on £1,650 or £1,400. On that point it is submitted that the increase of salary was made subject to an invalid condition, and that such increase was therefore payable without regard to the condition.

Upon the question whether the plaintiff has taken service in a police force within the meaning of section 13 (1) of the Act of 1890, the Court is asked to abstain from giving a decision, on the ground that such decision is not material to the present case, and also on the ground that if it should be against the plaintiff, the Court of Appeal might refuse to deal with it on an appeal, as being unnecessary to their decision on the main issue.

BUCKLEY J. I do not know that this is correctly described as a litigation between these parties: it is not, as I understand, a hostile litigation at all. There is a certain Act of Parliament which, like many other Acts of Parliament, is a little difficult to construe, and the parties have come here, I understand, simply to ascertain, as far as I am able to determine them, what their rights are.

The first point which was suggested was this: Had Captain Nott Bower, on March 21, 1902, served for 25 years? That is covered by an admission which Mr. Cripps has made that service in the Irish Constabulary, in which the plaintiff served from January, 1873, to May, 1878, is to be taken into account, and therefore he has served the number of years which entitle him under the Police Act of 1890 to a pension.

Starting with that, the next question, I think, conveniently to be determined is, what is the amount upon which his pension is to be calculated under the Police Act, 1890? That falls to be decided upon a resolution of April 15, 1901. At that date, Captain Nott Bower's salary as head constable of Liverpool being £1,400 a year,

the watch committee passed this resolution:—"Captain J. W. Nott Bower, head constable, from £1,400 per annum to £1,650 per annum, subject to the head constable agreeing that the amount of the increase shall not be taken into account for the purpose of pension." 1904.
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Now, there might have been, if it were material, a question of fact and a question of law to be determined as regards that: first, whether the head constable did agree as was there stated, and secondly, supposing that he did, whether in law he could agree; but it seems to me immaterial to decide either of those points. It may be taken in either way—that he did agree or that he did not agree—and that he did not agree either because he was not willing to or because he could not. I will first take it that he did agree. If he did agree that the £250 was not to be taken into account for the purpose of pension, I must take the salary to be £1,400 a year for the present purpose. If, on the other hand, he did not agree, and could not agree, then the resolution was to increase his salary to £1,650 upon a condition which was not complied with. His salary remained £1,400, and did not become £1,650, because the terms of the resolution which would have led to its increase were not complied with. For the next year, or something like that, the salary of £1,650 was paid, but of course that does not matter. At the end of that time, supposing he had been put to bring his action to recover his salary had he continued in the service of the corporation of Liverpool, and it had not been paid, it seems to me impossible that he could have sued for more than £1,400. If he had sued for the £1,650, he would have had to come to the Court alleging that his salary had been raised on a condition which had never been complied with, which is equivalent to saying that it never had been raised. It seems to me to result from that that the effect of the resolution of 1901 was that there was no increase of his salary from £1,400 to £1,650. The result is that the amount upon which his pension is to be calculated is, I think, £1,400, and the proper figure for that is £933 6s. 8d.

That being so, the next question is whether under section 13 (1) of the Police Act, 1890, the resolution of January 7, 1903, operated to suspend payment of £483 6s. 8d., part of his pension. Now section 13 (1) of the Act of 1890 provides, supposing it applies to him, that "his pension may be suspended by the police authority"—that is, the police authority from whom he is entitled to receive and is receiving a pension—and that the suspension may be in whole or in part. When I turn to Schedule III. to the Act, I find that the police authority as regards Liverpool is the watch committee. Now the watch committee have never passed any resolution at all suspending his pension. What

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happened was that the city council purported to pass the resolution of January 7, 1903. Mr. Cripps, for the corporation of Liverpool, has not seen his way to argue that that was a resolution under the Act of 1890 at all, because the proper authority never passed it. There was therefore no resolution of suspension.

Then as a matter of figures, the next thing which comes in is this, that under section 13 (2), which operates by force of the statute, "if a constable in receipt of a pension under this Act is appointed to an office remunerated out of money provided by Parliament, or out of a county or borough rate or fund, he shall not, while holding that office, receive more of the pension than together with the remuneration of that office is equal to one and a half times the remuneration of the office in respect of which the pension was awarded." Captain Nott Bower is now the Commissioner of the City Police. His salary and the other expenses of the City Police are borne as to three-quarters by the rates. I think he is appointed to an office remunerated out of a borough rate or fund. Therefore he falls within that subsection. Then I have to see what is the "one and a half times the remuneration of the office in respect of which the pension was awarded." By what I have decided before, that is £1,400 plus £700, namely, £2,100. His salary in the City is £1,250 a year. Then he must not receive more for the pension than what together with £1,250 is equal to £2,100; that is £850. It seems to me upon that he is entitled only to receive £850 out of the £933 6s. 8d.

A further point has been argued before me, and that is this, whether under section 13 (1) he is a person who has taken service in a police force. So far as I am concerned, I should have been perfectly ready to decide that point also, but the matter stands in this way, inasmuch as I hold that, supposing that it applies to him, no proper resolution has been passed by the watch committee, the authority to exercise the powers under that subsection, the question does not arise whether he is a person falling within section 13 (1) or not. You may make the assumption that he is, but the authority has not passed the resolution, so that the question does not arise. I myself, as I say, for the assistance of the parties would have decided it if they had wished me to do so, but Sir Robert Reid asked me not to do so, for this reason—that if he went to the Court of Appeal they might say, and it seems to me they might say, that it was unnecessary for them to determine that point, inasmuch as the watch committee never having passed a resolution the question did not arise. I do not know whether the Court of Appeal would take that objection or not, but it is quite possible they might, and if so they would not determine the point on appeal. It is not a question which necessarily arises for me to determine, and

I think I ought not to determine it without the assent of both sides.
I therefore leave that point undecided.

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Judgment for the plaintiff.

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Solicitors for the plaintiff—Freshfields.

Solicitors for the defendants—F. Venn & Co., for E. R. Pickmere,
Town Clerk, Liverpool.

Note.

On the question whether it is competent to an officer of a police force to contract that part of his annual pay shall not be so treated for the purpose of computing his pension, reference may be made to *Upperton v. White Ridley*, 1903, A. C. 281; 1 L. G. R. 659; 72 L. J. K. B. 535; 88 L. T. 642; 67 J. P. 349, and particularly to the speech of Lord Davey in that case.

It may be pointed out in connection with the wide meaning attached by Buckley J. to the expression "borough rate or fund" in section 13 of the Police Act, 1890, that the attention of the learned judge appears not to have been directed to the definition of "borough" in section 15 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

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KING'S BENCH DIVISION.

Mar. 1.

DUNN v. HOLT.

Streets — Nuisances — Obstruction — Reasonable user for business purpose — Wilful obstruction — Evidence — Metropolitan Police Act, 1839 (2 & 3 Viet. c. 47) s. 54 (6).

The appellant was convicted by a magistrate under section 54 (6) of the Metropolitan Police Act, 1839, of causing wilful obstruction in a street by means of a truck, containing apparatus worked by a petrol motor for cleansing houses by what is called the vacuum process, which he caused to stand in the street for some hours while in use for cleaning a house. The truck was of such dimensions and so placed as to leave ample room for vehicles to pass, and there was no evidence that any passenger was prevented from passing along the street or incommoded. The magistrate found that the business purpose and time selected were reasonable, that neither the time nor space occupied was excessive, but that the system of house cleaning in question was not necessary to the ordinary comfort of life, and was still in an experimental stage and could not be regarded as an incident of every-day life, and that the noise and collection of sight-seers might be productive of discomfort to occupants of houses and to people using the street.

Held, upon a case stated setting out the above facts and findings, there was no evidence of wilful obstruction, and that the conviction could not be supported.

CASE stated by a metropolitan police magistrate before whom the appellant, William Dunn, had been convicted upon an information laid by the respondent Holt, under section 54 (6) of the Metropolitan Police Act, 1839, charging the appellant with wilfully causing an obstruction in Trebovir Road, within the district of the West London Police Court, by means of a truck which the appellant caused at about 10.30 a.m. to be placed on the carriage-way opposite the house.

At the hearing the following facts were proved :—

The truck in question contained an apparatus for removing dust from and cleaning houses and their contents.

This apparatus consisted of a motor driven by petrol, which, by creating a vacuum, caused the dust and dirt to pass from the house through india-rubber tubes into a receptacle on the truck.

The tubes were passed from the truck over the pavement for foot passengers, but in such manner and at such a height as not to interfere with any persons using the pavement or carriage-way.

The noise made by the working of the motor was considerable, and

not unlikely to frighten horses and prevent persons driving there from passing near.

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The appellant was in the employment of the British Vacuum Cleaner Company (Limited), the owners of the truck and apparatus, who were employed by the occupier of the house to remove the dust and dirt and clean the house. The truck and apparatus remained opposite the house from 10.30 a.m. till 5.30 p.m. which was not longer than necessary to remove the dust and dirt into the receptacle and clean the house.

The process went on continuously, and the truck with the apparatus and receptacle containing the dust was driven away.

The carriage-way was 30 feet wide, the pavement was 10 feet wide, and the length of the truck, which stood lengthwise beside the pavement, was 6 feet and its breadth 2 feet 8 inches.

Sufficient carriage-way was left to enable vehicles to pass, and there was no evidence that anyone was actually prevented from passing along the street or that any individual was incommoded.

Between June 1 and July 2, 1903, 721 houses in London had been cleaned in this way by the company.

It appeared to the magistrate that the acts of the appellant amounted to a wilful obstruction within section 54 (6) of the Act, unless they could be justified as a reasonable temporary appropriation of part of the roadway for a reasonable purpose of business, unaccompanied by any unreasonableness in the time chosen, substantial excess in the time and space occupied, or other elements converting the operations into a common law nuisance. The magistrate held that the business purpose and the time selected were reasonable, that neither the time nor the space occupied was excessive, but that the system was not necessary to the ordinary comfort of life, and was still in the experimental stage, and could not be regarded as an incident of every-day life, and that the noise and collection of sightseers might be productive of discomfort to occupants of houses, and to people using the streets, which could scarcely be dismissed as trivial.

On the whole the magistrate came to the conclusion that the appellant had not made out any legal justification for his appropriation of the roadway, and he accordingly convicted him.

Section 54 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), provides as follows :—

Every person shall be liable to a penalty not more than forty shillings who, within the limits of the metropolitan police district, shall, in any thoroughfare or public place, commit any of the following offences; (that is to say,) . . .

(6) Every person who shall cause any cart, public carriage, sledge, truck, or barrow, with or without horses, to stand longer than may be necessary for loading or

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unloading, or for taking up or setting down passengers, except hackney carriages standing for hire in any place not forbidden by law, or who by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal, shall wilfully interrupt any public crossing, or wilfully cause any obstruction in any thoroughfare.

Danckwerts, K.C., H. E. Vaughan Williams, and D. H. Crompton for the appellant. The learned magistrate was wrong on several grounds in holding that any wilful obstruction had been caused in a thoroughfare within the terms of section 54 (6). The gathering of the dust and dirt from the house and putting it into the truck was all one operation. Again the carriage-way was 30 feet in width and the truck only 2 feet 8 inches. There is no finding of fact in the case that an obstruction existed or that anyone was obstructed. Before there can be obstruction within the section such material obstruction must be found as would amount to an obstruction or nuisance at common law. Neither has the learned magistrate found that any unreasonable use of the truck and apparatus had been made: *Original Hartlepool Collieries v. Gibb* (1877) 5 Ch. D. 713; 46 L. J. Ch. 311. [At this point they were stopped.]

Macmorran, K.C., and Gill for the respondent. The British Vacuum Cleaner Company are upon the facts found in the case appropriating the highway or public thoroughfare for their trade. No one has a right to make an unreasonable use of a highway for the purposes of his trade, and if such a use amount to a public nuisance it will be restrained by injunction: *A.-G. v. Brighton and Hove Co-operative Supply Association*, 1900, 1 Ch. 276; 69 L. J. Ch. 204. The claim on the part of the company must be that they have a right to apply this apparatus to every house in the street at once. If there be an obstruction at all it is no answer to say that people can avoid it by going round or deviating from the ordinary thoroughfare, for part of the highway is nevertheless obstructed: see judgment of A. L. Smith J. in *Horner v. Cadman* (1886) 55 L. J. M. C. 110. The judgment of Lindley M.R. in *A.-G. v. Brighton and Hove Co-operative Supply Association* is also much in point. It is admitted that the obstruction must be something more than a mere technical obstruction as in *Chelsea Vestry v. Stoddard* (1879) 43 J. P. 782; but here there was in fact an obstruction to the thoroughfare for some seven hours caused by the use of it by the company for the purposes of their trade.

LORD ALVERSTONE C.J. Every case of this kind, when a person is summoned for wilfully causing an obstruction to a thoroughfare, must depend upon its particular facts, and I have not the least intention of expressing any opinion that people have a right of appropriating a

street for the purpose of carrying on their business, or that this company or anybody else have any right to put their machinery in the street anywhere, or that it may not be a wilful obstruction. All I say is that the magistrate seems to me to have stated facts to show that there was no evidence of an offence under this Statute. He first finds that no one was in fact obstructed; he then gives the width of the street, which shows that some 2 feet 8 or 2 feet 10 inches out of a width of 30 feet were obstructed for some hours in the day. He finds that the business purpose was in itself reasonable, that is, it was reasonable to have the house cleaned at that time; that the time selected for the operation was reasonable; and that neither the time nor space occupied by it was excessive. On the other hand he finds that the system of carpet cleaning involved was in no sense necessary to the ordinary comfort or exigency of life; that it is still in the experimental stage, and cannot be regarded as an incident of every-day life; and that the noise of the machinery used, and the collection of sightseers attracted by the working of it, are or may be productive of discomfort or inconvenience to occupants of houses and people using the streets.

It seems to me that all these things might be very material indeed if he was dealing with a case where in fact he was able to say there had been wilful obstruction, or that the passengers or the road had been wilfully obstructed; but it seems to me, having found as he has that it was a reasonable use and that there was no obstruction in fact, that to nullify the effect of those findings by saying it was experimental or had not become part of the ordinary comfort and exigency of life, is applying a test which ought not to be applied.

I think that in this case there was no evidence of a wilful obstruction of the highway. I desire to repeat that I do not want anything I say to suggest or indicate that the company have the right of carrying on their business in every highway, or to appropriate any part of the highway independently of the inconvenience caused to other people. I think in this case there was no evidence on which we can properly find that there was wilful obstruction of the highway under subsection 6 of section 54 of the Metropolitan Police Act, 1839, and I think the appeal should be allowed.

WILLS J. I agree.

KENNEDY J. I am of the same opinion. It appears to me that it must in each case be a question of degree, and, therefore, in this case in order that we may reverse the decision—as I concur with my Lord and Mr. Justice Wills in thinking we should—let us see whether there was anything to show such circumstances as would justify the magistrate in finding as he did. I think from the very fair and full

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way that the case is stated, we have the means of seeing that there was nothing which ought to have led to this conviction on the facts. The learned magistrate has given us some reasons which do not, I confess, seem to be applicable. I do not think the noise of the machinery used so as to possibly cause discomfort and a nuisance to the occupants of neighbouring houses is an obstruction of a highway, or is an element of the obstruction of a highway. Of course, if it causes a crowd it would be otherwise. So in the same way, I do not think it is very relevant to consider that the system of carpet cleaning involved is not necessary to the ordinary comfort or exigency of life. If that is to be considered, it is prohibitive of every new invention of the same kind, if there could be any justification to bring machinery there to clean carpets. It must be a matter of degree to justify a conviction for wilful obstruction of a highway, and when it is said by Mr. Macmorran in his argument that a trader has not got a right to use the streets for part of his trade, in a degree we all know, living as we have to live in a city and making reasonable allowance for reasonable conduct, that there are people who in selling things do pass their trucks, I should think, down every street in London, certainly in the west of London, and if they do not stop too long I do not think they should be condemned because, while a customer comes to them, they are using the street for their trade. This is a big machine and a novel one, and might be a nuisance if used differently to the way in which the magistrate has stated it has been used on this occasion in this place.

*Appeal allowed.**Solicitor for the appellant—Hasties.**Solicitors for the respondent—Wontner and Sons.**Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.*

High Court of Justice.

KING'S BENCH DIVISION.

1904.

ALTON URBAN DISTRICT COUNCIL v. SPICER.

Mar. 1.

Rates—General district rates—Assessment on higher or lower scale—Sporting rights—Rating Act, 1874 (37 & 38 Vict. c. 54), ss. 2, 6—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (1, b).

Sporting rights which are severed from the occupation of land and are let are assessable on the full rateable value to general district rates.

CASE stated by justices on the hearing of a complaint for the recovery from the respondent, Mr. J. H. Spicer, of the sum of £5 7s. 4d., which was assessed, in a general district rate made by the respondent council, on the respondent as the lessee of sporting rights over certain land belonging to a Mr. J. G. Wood.

At the hearing of the said complaint it was proved :—

1. That the respondent rented and had for many years rented the shooting over certain lands, being arable, meadow, or pasture ground and woodlands, situate in the parish of Alton, within the jurisdiction of the Alton Urban District Council, which jurisdiction is co-extensive with the parish of Alton. The parish of Alton contains a large amount of arable, meadow, or pasture ground and woodland, besides the town of Alton proper.

2. That the said general district rate was properly made on March 26, 1903, and was good on the face of it, at 1s. 11d. in the £ on the rateable value of £55, and that the said rate, amounting to £5 7s. 4d., has been duly demanded from the said J. H. Spicer, but that the said J. H. Spicer has never been in the habit of paying more than one-fourth of the general district rate.

3. The said J. H. Spicer accordingly declined to pay the above-mentioned sum of £5 7s. 4d., but made a legal tender of the sum of £1 6s. 10d., which tender was refused by the collector of the urban district council, in accordance with instructions received by him.

4. In the month of March, 1895, the Alton Local Board, the predecessors of the urban district council, had entered a complaint for the recovery from the said J. H. Spicer of £5 12s. for the general district rate, and that the court of summary jurisdiction on March 12, 1895, directed that the said J. H. Spicer was agreeably with section 211, subsection (1, b) of the Public Health Act, 1875, only liable to the assessment in respect of the rights of sporting over the arable, meadow, or pasture ground and woodlands, in proportion of one-fourth part only

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of the net annual value thereof, and this decision has never been questioned or appealed against.

5. It was contended on behalf of the appellants that we, the said justices, in the above circumstances had no jurisdiction in the matter, and that the rate having on the face of it been properly made our duties were purely ministerial and that we were consequently obliged to make an order on the respondent for payment by him of the full amount claimed on behalf of the appellants.

6. Our attention was called to section 256 of the Public Health Act, 1875, and to the following words in that section: "If no sufficient cause for non-payment is shown, the court may make an order," &c., and also to a case, *Reg. v. Barclay* (1881) 46 J. P. 167 [affirmed 8 Q. B. D. 486; 51 L. J. M. C. 47], and to the judgment of Cave J., wherein he decided that upon a proceeding before justices to enforce payment of a general district rate it is competent for the justices to hear objections to the mode of assessment, inasmuch as it affects their right to enforce the rate.

7. We accordingly decided that we had jurisdiction to adjudicate and overruled the objection taken by the appellants.

8. After hearing the solicitors for the appellants and the respondents, respectively, we decided that the sporting rate on the arable, meadow, or pasture ground and woodland was properly assessable only in the proportion of one-fourth part of the net annual value thereof, and we accordingly, as a legal tender had been made of this one-fourth, refused to make any order upon the said complaint.

9. The question upon which the decision of the Court is desired is whether we, the said justices, upon the above statement of facts came to a correct decision—

- (a) as to our jurisdiction;
- (b) in point of law;
- (c) if not, what should be done in the premises.

Foots, K.C., and Emmanuel for the appellants. The question is whether shooting rights over land, where the rights are let to a shooting tenant who is not in the occupation of the land, are liable to be assessed on their full value to general district rate, or whether they are only assessable on one-fourth of their full value. Sporting rights so let are made rateable as an incorporeal hereditament by the sections 3 and 6 (2) of the Rating Act, 1874, and do not fall within the provisions of section 211 (1, b) of the Public Health Act, 1875. Section 211 (1, b) is as follows:—The occupier of "any land used as arable meadow or pasture ground only, or as woodlands" shall be assessed in respect of the same in the proportion of one-fourth part only of

the rateable value. It is submitted, therefore, that they are rateable in full.

[They cited *Eyton v. Mold Overseers* (1880) 6 Q. B. D. 13; 50 L. J. M. C. 39.]

M. M. Macnaghten for the respondent. Agricultural land being exempted from the assessment in full and liable only to one-fourth, it would naturally be thought that the same principle would apply to sporting rights and that they would be entitled to a like reduction. Here the respondent is the occupier of the land and nothing else as arable, meadow, or pasture ground. He cannot be said to be the occupier of anything else, for unless he occupies the land by going on it he cannot shoot. He may not have the general occupation of the land, but he has such an occupation as enables him to exercise his sporting right, and in respect of that occupation he is as much entitled to exemption as if he were the owner or farming occupier. The respondent is something more than a licensee; he has a *profit à prendre*.

LORD ALVERSTONE C.J. In my opinion we must allow this appeal, although I confess there is a certain amount of attraction in Mr. Macnaghten's argument for the respondent that the shooting right could not possibly be exercised by him unless he went on the land, and that therefore he was possessed of an occupation which entitled him to a reduction; still I cannot say I think the argument goes the length of showing that anyone entitled to mere sporting rights is the occupier of the land in the ordinary sense of the word occupation. When we look at the statutes, however, the matter is pretty clear. Prior to the Rating Act, 1874, shooting rights, as such, were not rateable, but the fact that shooting rights existed over land was allowed to be shown so as to give the land an enhanced value. By section 3 (2) of that Act the Poor Rate Acts were extended "to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land," in like manner as if they were mentioned in the Act of Elizabeth. From this it is plainly seen that a new rateable hereditament was created which was in itself entirely independent of and apart from the ordinary accepted meaning of occupation of land. Then follows section 6 (2) of the same Act of 1874, which provides that "where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof." Mr. Macnaghten was, therefore, unable to contend that the lessee of sporting rights could not be rated, but what he had to contend was that the respondent was the occupier of "land used as arable meadow or pasture ground only, or as woodlands" within the meaning

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of section 211 of the Public Health Act, 1875, because the respondent had to go on to such lands when he exercised his rights of shooting over them, and that he could not exercise those rights without going on the lands. In my opinion the answer to this argument is that the respondent was not the occupier of "land used as arable meadow or pasture ground only, or as woodlands," and therefore within the exemption of section 211 (1, b) of the Public Health Act, 1875; but the occupier of a special class of hereditament newly created and made rateable by the Rating Act, 1874. I am accordingly of opinion that the justices were wrong in the determination they arrived at, and that the respondent is liable for the full amount of the rate.

WILLS J. I am of the same opinion. The Rating Act, 1874, for the first time made sporting rights rateable as distinct from the occupation of the land; and the person who hires these rights and becomes the sporting tenant is not the occupier of the land itself but of the right of sporting over it. This is not the kind of occupation contemplated by section 211 (1, b) of the Public Health Act, 1875, which allows certain reductions to be made to the occupiers of a particular class of land in the matter of rating.

KENNEDY J. I agree.

Appeal allowed.

Solicitors for the appellant—Church, Adams, and Prior, for C. and W. Trimmer, Alton.

Solicitors for the respondents—Cunliffes and Davenport, for Bailey and White, Winchester.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

The provisions of the Public Health Acts for the differential rating of different classes of property, and the similar provisions of the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), and other statutes, give rise to very difficult questions in connection with the rating of sporting rights.

It is to be observed that the above decision applies only where the right of sporting is severed from the occupation of the land, and falls within the operation of either subsection (2) or subsection (3) of section 6 of the Rating Act, 1874 (37 & 38 Vict. c. 54), so that the right of sporting is rateable as an entirely independent hereditament. The most usual cases in which sporting rights are rateable in this way are where the landlord lets the land to one person and the sporting rights to another, and where he retains the land in his own hands and lets the sporting rights: as to the latter of these cases, see *Kenrick v. Guilsfield Overseers* (1879) 5 C. P. D. 41; 49 L. J. M. C. 27; 41 L. T. 624; 28 W. R. 372; 41 J. P. 202.

A much more difficult case is where the sporting rights are severed from the occupation of the land and are not let, but the owner of the sporting rights receives rent for the land, *e.g.*, where the landlord lets the land but retains the sporting rights in his own hands. In this case subsection (1) of section 6 of the Rating Act, 1874, applies. That subsection provides that in the case mentioned the sporting right "shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed," and goes on to provide for the deduction of the proportion of the rate referable to the sporting right from the rent in certain cases. The natural view

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of these provisions, apart from any alteration effected by subsequent legislation, seems to be that the sporting rights must not be treated as in any way a separate hereditament from the land over which they exist, and that consequently if the land over which they exist is rateable to a differential rate on the lower scale, the sporting rights will also be virtually rated on the lower scale. As regards rates to which the Agricultural Rates Act, 1896, applies (among which the poor rate is the most important), however, the Local Government Board have expressed the opinion that the provisions of section 6 (1) of the Rating Act, 1874, above referred to, "must now be read together with section 5 (a) of the Agricultural Rates Act, 1896, which requires that in every valuation list the value of agricultural land shall be stated separately from that of any building or other hereditament;" and that "the latter enactment renders it necessary that where, in cases of the class referred to, the rateable value of any agricultural land would, under the Rating Act, 1874, be increased by reason of its being estimated as if the rights of sporting were not severed, the amount of such increase should now be entered in the valuation list as the rateable value of the right of sporting separately from the value of the land over which they are exercised": see "Decisions of the Local Government Board, 1902-3" (Knight & Co.), p. 1. The result, if the Board are right, is that sporting rights over agricultural land are, in substance, rateable on the higher scale, at all events to rates to which the Agricultural Rates Act, 1896, applies, in this case as well as in the cases above considered. Even if this is so it does not seem necessarily to follow that the result is the same as regards a general district rate, or a rate for special expenses of a rural district council, levied under the Public Health Acts. The opinion of the Local Government Board is based on the view that section 5 (a) of the Agricultural Rates Act, 1896, must be taken to have amended section 6 (1) of the Rating Act, 1874. But even if this is so as regards rates to which the Act of 1896 applies, it is difficult to suppose that the amendment can have affected rates to which that Act does not apply. And it can hardly be contended that the Public Health Act, 1875, effected an amendment of section 6 (1) of the Rating Act, 1874, similar to that which the Local Government Board think has been effected by section 5 (a) of the Agricultural Rates Act, 1896, particularly as the rating provisions of the Act of 1875 were mere re-enactments of previously existing provisions.

Another case is where the sporting rights are not severed from the occupation of the land; in other words, where the occupier of the land, whether he is owner or tenant, himself enjoys the sporting rights. In this case the Rating Act, 1874, does not apply to the sporting rights at all. But, under the general law, the sporting rights are to be taken into account in valuing the land so that the rights are indirectly rateable: *Reg. v. Williams* (1854) 23 L. T. (O. S.) 76, and see *Reg. v. Battle Union* (1866) L. R. 2 Q. B. 8; 36 L. J. M. C. 1; 15 L. T. 180; 15 W. R. 57; 8 B. & S. 12. In this case it seems clear that, as in theory the sporting rights are not rateable as a separate hereditament in any sense, their value must for all purposes be treated as part of the value of the land over which they exist, so that if that land is rateable to a differential rate on the lower scale, the sporting rights are virtually rateable on the lower scale. And the Local Government Board take this view: see "Decisions of the Local Government Board, 1902-3" (Knight & Co.), p. 140. The fact that sporting rights may in this case indubitably enjoy the partial exception accorded to agricultural land is not without its bearing on the question of the rating of sporting rights in the difficult cases where section 6 (1) of the Rating Act, 1874, applies.

Though the above case proceeded on the assumption that on proceedings for the recovery of general district rate the justices can entertain an objection that the property rated has been assessed on the wrong scale, and at least one other case has proceeded on a similar assumption (*Hampton Urban District Council v. Southwark and Vauxhall Water Co.*, 1900, A. C. 3; 69 L. J. Q. B. 72; 81 L. T. 547; 48 W. R. 209; 64 J. P. 260), it could be argued with some force that the objection is matter for appeal against the rate only, and is not available by way of defence on proceedings for the recovery of the rate. And even if the objection is available by way of defence to proceedings for the recovery of general district rate, it does not follow that a similar objection would be available by way of defence to proceedings for the recovery of the poor rate.

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CHANCERY DIVISION.

In re ALLEN AND DRISCOLL'S CONTRACT.

Streets—Private street works—Charge on premises—Time when charge commences—Sale of leaseholds—Outgoings until completion—Payment as between vendor and purchaser—Public Health Act, 1875 (38 & 39 Viet. c. 55), ss. 150, 257.

The charge upon premises given by section 257 of the Public Health Act, 1875, for expenses incurred by the local authority in executing private street works under section 150 of the Act, first arises on the completion of the works and not upon the local authority entering into an agreement with a contractor for their execution.

When, therefore, as between vendor and purchaser, outgoing in respect of premises to which such a charge attaches are payable by the vendor up to a given date and by the purchaser after that date, the expenses are payable by the purchaser if the works are not completed till after that date, though at that date an agreement for their execution has been entered into by the local authority and the works are in progress.

THIS was a vendor and purchaser summons taken out by the purchasers of certain leasehold houses situate in Rusthall Avenue, Acton, for the determination of the question whether the expenses incurred by the local authority in making up the roadway in front of the premises were to be borne by the vendors or the purchasers.

On February 10, 1903, the Urban District Council of Acton, who were the local authority, served on the vendors a notice under section 150 of the Public Health Act, 1875, to pave and make up the roadway. The vendors did not comply with the notice, and accordingly the local authority undertook the works, and on July 7, 1903, they entered into an agreement with a contractor for their execution.

Shortly after the local authority entered into this agreement, an order was made, on July 22, 1903, in an action of *Allen v. Driscoll*, in which the vendors were the plaintiffs and the purchasers the defendants, whereby it was ordered "that the defendants, Timothy Driscoll and Emma, his wife, do pay to the plaintiffs, on or before the 29th September next, the sum of £4,440 in settlement of the purchase-money and interest due in respect of eleven leasehold houses in the statement of claim mentioned, the plaintiffs by their counsel undertaking to make a good title to the said leaseholds, and to assign the same to the defendants or as they shall direct, the defendants by their counsel undertaking to accept the leasehold houses so assigned

in their present condition, and the plaintiffs are to receive the rents and pay the outgoings in respect thereof up to the said 29th September next, and these terms are to be in satisfaction of all claims by any of the parties in this action and in the action in the King's Bench Division."

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The whole of the works were not completed until after September 29, 1903, the date fixed by the order of July 22, 1903, for the completion of the purchase.

Section 257 of the Public Health Act, 1875, provides as follows:—

Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred . . .

W. H. Cosens Hardy for the purchasers. The notices under section 150 of the Public Health Act, 1875, not having been complied with, the local authority became entitled to do the work themselves. The works were only partially completed on September 29, 1903. The local authority became liable on July 7, 1903, the date when they entered into the agreement with the contractor for the execution of the works, and the expenses thereupon became a charge on the premises under section 257 of the Act as from that date, which the vendors are bound to satisfy: *Tottenham Local Board v. Rowell* (1880) 15 Ch. D. 378; 50 L. J. Ch. 99; *West Ham Corporation v. Grant* (1888) 40 Ch. D. 331; 58 L. J. Ch. 121; *In re Bettsworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749.

The charge comes into existence independently of its being capable of being recovered by the personal remedy, and at an earlier date. It arose either at the date of the contract with the contractor or at the date when some money became payable under the contract. *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401, and *Surtees v. Woodhouse*, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, do not apply, as in both cases the works had been completed before the date which was material as between vendor and purchaser.

Norton, K.C., and *Ashton Cross* for the vendors. The expenses became a charge only on the completion of the works, and as the same were not completed until after September 29, 1903, they must be borne by the purchaser. *Stock v. Meakin*, *supra*, is precisely in point. See also *In re Waterhouse's Contract* (1900) 44 Sol. Jour. 645.

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[BYRNE J. referred to *Newcastle-upon-Tyne Corporation v. Houseman* (1898) 63 J. P. 85.] The expenses cannot be recovered before service of the notice of apportionment, and until completion there is no charge.

W. H. Cozens Hardy in reply. The personal remedy against the owner comes into operation after the completion, but the charge at an earlier date: see the observations of Brett L.J. in *Tottenham Local Board v. Rowell*, 15 Ch. D., at p. 393. In that case the decision was upon an earlier Act, but the words were similar.

BYRNE J. In this case a vendor and purchaser summons has been taken out for the determination really of a question which resolves itself into this,—whether or not the expenses referred to in section 257 of the Public Health Act, 1875, are a charge upon the premises prior to the completion of the works in respect of which notice has been given. I think Mr. Cozens Hardy has shown that this precise point has never been directly decided—that is to say, that there is no authority in which it has in terms been held that the period may not be an earlier date than the completion of the works.

I will first state how the question arises. [His Lordship stated the facts and continued:—] Now the crucial date is the date fixed for completion of the purchase. The question is whether the expenses were incurred within the meaning of section 257 before the date fixed for that completion. So the case does resolve itself into the simple question of the meaning of the section.

In *Tottenham Local Board v. Rowell* (1880) 15 Ch. D. 378, at p. 392; 50 L. J. Ch. 99, Brett L.J. refers to the section in these terms: "The condition upon which the charge is made to arise is nothing but this, 'Where the local board have incurred expenses for the repayment whereof the owner is made liable.' Directly, therefore, the local board have incurred such expenses, the section must be read as if immediately after that there came these words, 'Such expenses shall be a charge on the premises'—therefore directly from the moment the expenses which are named in that section have been incurred, such expenses are a charge on the premises, that is, the charge is imposed then and there by the statute." Then a little further on he adds: "Therefore it seems to me that upon the reading of that section this is a charge the moment the expenses are incurred, and it is a charge which exists, although other remedies exist at the same moment that that commences, or other remedies may by different processes be made to arise either as against the owner, who is in the first place the person liable, or as against other persons." That leaves the question still open as to whether or not the date of completion

is the actual time when the charge first arises, or whether the expenses may be said to have been incurred within the meaning of the section before the date of such completion. In the case of *West Ham Corporation v. Grant* (1888) 40 Ch. D. 331; 58 L. J. Ch. 121, Kay J. had, it is true, to deal with a different Act, and the question there was not the same as arises in the present case. But in dealing with section 257 he says: "I need not pause to say what 'expenses incurred' may possibly mean, or whether the term implies actual payment of the expenses or not, because, at the least, it means money which the authority may have paid or become liable to pay. I do not mean to give that as a definition, but it must mean that at the least." It is obvious that the learned judge did not there determine the question whether the period when the expenses were considered to have been incurred was the date of completion or some earlier date. Then in *In re Bettesworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749, North J., after referring to the case of *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305, 307; 48 L. J. M. C. 119, and to what was there said by Cockburn C.J., says: "Therefore it comes to this, that the expenses are charged from the time of the completion of the work. That seems to me the construction of the section. And in that view I am fortified by the opinion of the judges who decided the case of *Tottenham Local Board v. Rowell* (*supra*), when they had that case before them on the construction of a section in an earlier Act, which does not appear in this respect distinguishable from the Public Health Act, 1875. It is quite true that the owner cannot be compelled to pay till the total costs have been made out and apportioned between the owners, and notice has been served, and he has had three months to dispute the apportionment, and at the end of the three months he has had written demand served upon him. The Act says payment may be recovered from the person who is owner at the time when the works were completed, and he is the person charged under the Act." And further on in the same judgment the learned judge says: "It seems to me that the expenses were a charge which came into existence, at all events, as early as the 26th of June, 1886," that being the vital date in the particular case before him. But he leaves it open to argument whether it may come into existence at an earlier period.

I come now to the later cases in which the matter has been dealt with, but here again, the question did not arise as it does here. In *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401, which was a case between vendor and purchaser, the headnote to the report in the Law Reports is as follows:—"The amount of the apportioned expenses of private street works executed by a local authority under the Private Street Works

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Act, 1892, becomes a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, and not merely as from the date of the final apportionment. If, therefore, the premises are sold by the owner free from encumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises." Here again it is quite true that it was not necessary to decide as against an earlier date that the date for completion of the work was the date from which the charge took effect. But notwithstanding that, I cannot doubt but that the Court determined that it was the date, and I do not see that I ought to put another interpretation on the words, because Vaughan Williams L.J., in delivering the judgment of the Court of Appeal, said: "The charge under the Public Health Act, 1875, however, is a charge which can only arise on the failure of the owner of the land to comply with the notice of the urban authority, and the execution by the urban authority of the works by reason of that default of the landowner, and is, moreover, a charge taking effect from the date of the completion of the works." Then after referring to the case of *In re Bettesworth and Richer (supra)*, he adds: "It was held in *In re Bettesworth and Richer (supra)* that the expenses become a charge upon the completion of the works"—not putting in any qualifying words like "at least" or anything of the kind. Speaking of the last-mentioned case, he says: "This decision turned entirely on the words of sections 150 and 257 (of the Public Health Act), which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by section 150."

Again, in *Surtees v. Woodhouse*, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, which was the last case referred to in argument, I take one of the judgments of the Court of Appeal. I agree that here, again, the question was not the question that I have to determine. Speaking of *Stock v. Meakin (supra)*, Stirling L.J., in the course of his considered judgment, says: "The nature of the outgoing in question was considered by the Court of Appeal in the case of *Stock v. Meakin (supra)*, and it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of the final apportionment. It was not expressly decided in that case whether or not the amount is 'charged on the owner in respect of the premises'

as from the same date." I do not think there are any other passages in that judgment which I need read. 1904.

In the result it appears to me that the construction I ought to put upon section 257 is that the expenses incurred by the local authority under that section first become a charge upon the premises on the completion of the works. I think that meets the present case. *In re Allen and Driscoll's Contract.*

Solicitor for the purchasers—T. Blanco White.

Solicitors for the vendor—Taylor, Willcocks, and Lemon.

High Court of Justice.

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CHANCERY DIVISION.

COLWELL v. ST. PANCRAS BOROUGH COUNCIL.

Nuisance—Vibration—Noise—Injury to Fabric—Electric generating station—Dust destructor—Temporary nuisance—Injunction—Suspension.

A local authority in London, under a Provisional Order containing a clause that the undertakers should not be exonerated from any action for nuisance, began in 1903 to use new electric generating machinery in addition to plant which had been in use since 1894. The owners and occupiers of dwelling-houses and shops near the works complained of nuisance by noise and vibration arising from the works and smell and dust from a dust destructor in an adjoining yard, and after receiving a letter from the defendants stating that the works were not completed, but that when they were there would be no cause of complaint, commenced proceedings.

Held, that the works of the defendants by vibration and otherwise had caused a nuisance in law materially interfering with the comfort of the plaintiffs so as to justify their action, and that the defendants, although a public authority, were not entitled to carry on the works at all unless or until they could do so without occasioning a nuisance to the neighbouring owners of property.

Broder v. Saillard (1876) 2 Ch. D. 692; 45 L. J. Ch. 414, and Bamford v. Turnley (1862) 3 B. & S. 62; 31 L. J. Q. B. 286, applied.

Harrison v. Southwark and Vauxhall Water Co., 1891, 2 Ch. 409; 60 L. J. Ch. 630, distinguished.

The operation of the injunction granted was suspended for six months on terms.

THIS was a witness action, in which the plaintiffs were the lessees and occupiers of the houses Nos. 108 to 116 (even numbers), Great College Street, St. Pancras, in the county of London, carrying on the businesses of builder, butcher, hairdresser, dressmaker, and clothiers respectively, beneath the residential portion of the premises. The unexpired terms of the leases varied in length, and a sixth plaintiff, named Stone, was joined as having reserved the last few days of the lease which he enjoyed on granting a sub-lease of one of the houses. The defendants, the St. Pancras Borough Council, had purchased the freehold interest in all the premises. The houses were three storeys in height, and had been built many years.

Upon ground distant from fifty feet to a hundred feet from the houses the defendants had an electric generating station, the older

part of which was built in 1894, since which date they had supplied electricity to a large number of houses and a great length of streets. In 1902 the defendants contemplated the erection of new works and the increase of their electrical plant and machinery, and in May, 1902, the plaintiffs and some of their neighbours addressed the following letter to the defendants:—

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"We the undersigned owners, leaseholders and occupiers of premises in Great College Street, adjoining your King's Road electrical works, beg to call your attention to the very great nuisance arising from the vibration and noises of the electrical machinery, which is very detrimental to the health of the occupiers, and also causes serious damage to the said properties. Hearing that you intend to extend the works, and to lay down more plant with powerful machinery much nearer the said properties, we must protest against any increase of work or works likely to add to the aforesaid nuisance and shall be compelled to take such action to protect ourselves in the matter as may become necessary."

The defendants, however, having obtained a Provisional Order under the Electric Lighting Acts, 1882 and 1888, which contained a clause to the effect that nothing in the Order should exonerate them as undertakers from any action or proceedings for nuisance in the event of any nuisance being caused or permitted by them, merely acknowledged this letter, and proceeded with their works, which, including two engines of 750-horse power each, were completed in May, 1903. The plaintiffs, having complained of the annoyance caused by the old works, endured what they alleged to be an increased nuisance until August, 1903, when they again complained that it was increasing. The defendants' resident engineer thereupon wrote as follows on August 19:—

"I much regret to hear that the vibration from the above station is causing you any inconvenience. I may say that I have just started up some new machinery that should give no vibration and am endeavouring as far as possible to keep this running and obviate any cause there may be for complaint."

The alleged nuisance was not abated in spite of repeated assurances of intended improvement by the defendants, who by their town clerk wrote on November 23, 1903, that the works "are not completed but are still in the contractors' hands, and until certain additional portions of some of the engines now at work there have been supplied, the installation works must be regarded as still in progress. These additional portions of machinery cannot be supplied before the end of the year, but your clients will find when the engines are completed that they will not have cause of complaint." The plaintiffs thereupon

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instituted this action for an injunction to restrain the defendants from causing nuisance to the plaintiffs and damaging the value of their interests in the houses by vibration and noise from the electric generating station, and by dust and noisome or offensive fumes and smells from their buildings and works used in connection with refuse, and also from interfering with the use and enjoyment of the houses above mentioned by such vibration, noise, and dust, and by noisome fumes or smells.

It appeared from the evidence that the alleged nuisance from smell and dust arose from a yard and building on the further side of the generating station from the plaintiffs' houses, in which respectively the defendants collected and destroyed refuse and its products. Special complaint was made of the smell and dust alleged to come from the hot clinkers from the destructor furnaces deposited in the yard and cooled with water from a hose. During the hearing of the trial, however, the defendants promised to the satisfaction of the plaintiffs to remedy this source of complaint.

With regard to the nuisance from the electric generating station, evidence was given by the inmates of the plaintiffs' houses of constant shaking of articles like ornaments on a piano, knobs on a bedstead, clothing and curtains, and a door, between the hours of 6 a.m. and midnight (most of the defendants' engines having ceased to be run throughout the night a few weeks before the action was commenced). Evidence was also given of throbbing, screaming, and grinding noises attributable to the machinery. Several of the inmates of the houses had suffered in health from the nuisance, chiefly from the vibration, which prevented sleep and caused nervous trouble.

The defence was that the plaintiffs had made no complaint of the works, which had existed in operation since 1894, and that the complaints now made against the works as a whole were exaggerated, and that the new engines were at present defective in balance, but in some weeks' time would be found to work smoothly. Professor Dalby, Professor of Mechanical Engineering and Applied Mathematics at the Finsbury Technical College, exhibited a model of a three-crank engine, and deposed that by balancing the machinery a perfect cure for vibration was possible.

Hughes, K.C., and E. Beaumont for the plaintiffs. The nuisance to the plaintiffs was, and continues to be, such as to call for an injunction and damages. The fact that the locality where these operations are carried on is one generally employed for such purposes will not exempt the defendants from liability for damages in respect of injury to neighbouring property: *St. Helens Smelting Co. v. Tipping* (1865)

11 H. L. C. 642; 35 L. J. Q. B. 66; and the right to commit an annoyance cannot be supported by user unless during the period of user the noise or vibration has amounted to an actionable nuisance: *Sturges v. Bridgman* (1879) 11 Ch. D. 852; 48 L. J. Ch. 785.

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Bousfield, K.C., and *Younger, K.C.* (*Marten* with them), for the defendants. As a local authority engaged in the discharge of a statutory duty, the defendants have been obliged to erect this machinery, and if in so doing they happen to have erected something which is temporarily a nuisance, but can be remedied in a few weeks, they will not be liable to an action for damages: *Sutton v. Clarke* (1815) 6 Taunt. 29. In their selection and erection of the machinery the defendants used every care; they chose engines of a kind which in other places have proved unobjectionable; and the absolute balancing of them, which is in itself quite a recent discovery, is a question of a very short time, although here there has appeared an unexpected local condition in the vicinity of the River Fleet or some other quality of the soil which baffled the defendants at first. Even when the engines in operation were such that a penny could be balanced on them, the defendants admit that they did cause some vibration prior to January 8 (a month before the trial), but there has been no complaint since except as to one room. The defendants have used all reasonable care, and, if an injunction is to be granted, are entitled to have that injunction suspended for a few months, as was done in *Shelfer v. City of London Electric Lighting Co.*, 1895, 2 Ch. 388; 64 L. J. Ch. 736. But the plaintiffs here are not entitled to an injunction, because, if people live in a town, they must submit to the consequences of operations of trade which are for the benefit of the inhabitants and the public at large: per Lord Westbury in *St. Helens Smelting Co. v. Tipping* (*ubi sup.*).

Hughes, K.C., in reply. This is not a temporary nuisance, nor a nuisance confined to the construction or execution of the defendants' works, but a nuisance which cannot be justified as a common and ordinary user of the land: *Bamford v. Turnley* (1862) 3 B. & S. 62, 83; 31 L. J. Q. B. 286. The defendants are not protected by being a local authority; but for this purpose are in the same position as a commercial corporation. In *Shelfer v. City of London Electric Lighting Co.*, 1895, 1 Ch. 287; 64 L. J. Ch. 216, Lord Halsbury C., in the Court of Appeal, swept away the contention that the nuisance was authorised, and even imposed on the undertakers as a duty by the Provisional Order which the defendants there also had obtained: see *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, 1899, 2 Ch. 217; 68 L. J. Ch. 457.

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The plaintiffs are entitled to an injunction restraining the defendants from so using their generating station as to cause a nuisance to the occupants of the houses or so as to injure the fabric thereof.

JOYCE J. This action was instituted on the 30th of November, 1903, and it was virtually admitted before me—for in truth it could not be denied—that by reason of the vibration caused by the defendants' works at various times and from time to time between the months of May and December in that year, the plaintiffs had a right to complain of the annoyance to which they had been subjected, or rather a right to complain unless it was merely a temporary annoyance; and that it was such an annoyance as that if continued the defendants could not deny the nuisance in law. That, as I say, was virtually admitted, but, at all events, if necessary I decide on the facts that that is so. In other words, it appears to me that by the vibration caused by the defendants' works and machinery so much annoyance has been occasioned to the plaintiffs as to justify the action, unless the defendants can show that they are excused by reason of its being, as they allege, a temporary nuisance, or by reason of something in the nature of the annoyances bringing them within the class of such annoyances as are referred to in the judgment of Lord Justice (then Mr. Justice) Vaughan Williams, in the case of *Harrison v. Southwark and Vauxhall Water Co.*, 1891, 2 Ch. 409; 60 L. J. Ch. 630. I am of opinion that the amount of the annoyance caused has occasioned material interference with the comfort of the plaintiffs. As Sir George Jessel M.R. said in *Broder v. Saillard* (1876) 2 Ch. D. 692, 701; 45 L. J. Ch. 414: "The law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise"—and of course if he causes such vibration—"as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it." I am of opinion that there has been such annoyance in this case.

But it was suggested, rather mildly I think, that the defendants were entitled to be excused by reason of the passage I have referred to in the judgment of Lord Justice Vaughan Williams. Were the annoyances occasioned within the principle of that statement of the law? In my opinion they were not. The principle is stated, and no doubt correctly worked out and stated, by Lord Justice Bramwell in *Bamford v. Turnley* (1862) 3 B. & S. 62; 31 L. J. Q. B. 286, and the same judgment deals satisfactorily, to my mind, with the question whether a defendant is entitled to be excused on the mere ground that the annoyance which he occasions is temporary. In this particular

case the annoyance caused has not been a mere temporary and occasional personal interference, but in my opinion is such as is calculated to work material injury to the property of the plaintiffs, and beyond all question, if that be a ground of action (which I do not think it is), most seriously to depreciate the value of the plaintiffs' property.

I am not aware that it has ever been suggested that nuisance by vibration, actual physical shaking of the plaintiff's house or property, is within the principle referred to by Lord Justice Vaughan Williams, and dealt with by Lord Justice Bramwell. In this particular case there is a clause in the Order which authorises the works which says: "Nothing in this Order shall exonerate the undertakers from any indictment action or other proceeding for nuisance in the event of any nuisance being occasioned by them." What it really comes to is this: that, notwithstanding that Order, it is suggested that for months, it may be for years, after the first erection or construction of the works the defendants are entitled to make the neighbourhood uninhabitable, or to cause serious nuisance to the neighbours until such time has arrived when they have contrived or managed in some way or other to carry on their works without creating a nuisance. What is to happen in such a case, or in this case, if they never succeed in doing that, no one has told me; but, however, that proposition or suggestion was not laid down very positively, and it is to me entirely novel and strange, and one to which I certainly for one am quite unable to accede. I would rather say that after the construction of their works, if not before, the owners of those works, particularly under an Order such as this, are not entitled to carry them on at all unless or until they can do so without occasioning a nuisance to the neighbouring owners of property.

As to the old machinery, it appears it is not stopped altogether, but runs occasionally during the night. At all events, it has not been going long enough for the defendants to acquire a right as against any of these plaintiffs to work that machinery so as to occasion a nuisance, although it is quite clear they would not have been able to get an injunction on an interlocutory application; but at the hearing delay is nothing except for this, unless it be long enough—twenty years or something of that kind—to create a right in the defendants.

I think that there must be an injunction, not distinguishing in any way between the old machinery and the new. The injunction will be to restrain the defendants from carrying on these works in such a way as to cause by vibration, noise or otherwise, a nuisance or injury to the plaintiffs during the plaintiffs' leases, and there must be an inquiry as to damages.

The case as to nuisance from the cinders from the furnaces was

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settled in the course of the hearing, the defendants having promised to remedy that. With regard to any possible annoyance from the destructor, I will only say that this order will be without prejudice to any question of annoyance or nuisance caused thereby after March 31 next.

Younger, K.C. There is no evidence to show that one of the plaintiffs, Stone, landlord of one of the occupiers, with a three days' interest at the expiration of an existing lease of about 40 years, can maintain this action. In *Shelfer v. City of London Electric Lighting Co.*, 1895, 1 Ch. 287, 312; 64 L. J. Ch. 216, the reversioners and the tenants were dealt with separately. The defendants are a public body, and have to protect the public purse.

Hughes, K.C. Stone pays the ground-rent under his original lease, and he may have to re-enter if the tenant fails to pay the house rent. I ask for an injunction on behalf of Stone in respect of vibration only.

JOYCE J. Then I find as a fact that this is calculated to injure the reversion, and to cause an injury to the fabric. But I am willing to suspend the operation of the injunction for a period of six months, the defendants undertaking to shut down the engines after May 1 next from 11 p.m. to 7 a.m.

*Injunction granted, with an inquiry as to damages;
but operation of injunction suspended for six
months on terms.*

Solicitors for the plaintiffs—Beaumont and Son.

Solicitors for the defendants—Cunliffes and Davenport.

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COURT OF APPEAL.

1904.

HARROGATE CORPORATION v. DICKINSON.

Jan. 22.

Bye-laws—Buildings—Local Act—Deposit of plans—Plans null and void if work not commenced within three years—Repeal of bye-laws subject to saving for work commenced or of which plans have been approved—Plan for several houses held null and void as to houses not commenced within three years—Harrogate Corporation Act, 1893 (56 & 57 Vict. c. cclx.), s. 27.

Where the bye-laws of an urban authority require every person intending to erect a new building to deposit plans of every floor of the building, a plan comprising a number of proposed houses constitutes a separate and independent plan of each house for the purposes of a provision in a local Act enacting that the deposit of a plan of any building shall be null and void if the work specified in such plan is not commenced within a certain period.

Consequently, after the expiry of the period named in the Act, the deposit of the plan, as regards houses not already commenced, becomes ineffective, and a fresh deposit is required before the erection of such houses; and, if new bye-laws are made rescinding the previous bye-laws subject to a saving for work already commenced, or of which plans have been approved, such houses must be erected in accordance with the new bye-laws.

Decision of Wright J., reported 1 L. G. R. 275, affirmed.

APPEAL by the defendant from a judgment of Wright J. on a special case stated pursuant to Order XXXIV., rule 1.

The case in the Court below is reported in 1 L. G. R. 275, where the special case is set out substantially in full. For the purposes of this report the following statement of the facts will suffice:—

Section 27 of the Harrogate Corporation Act, 1893 (56 & 57 Vict. c. ccix.), which was passed on August 24, 1893, provides that: "The deposit with the corporation of any plan of any street or building shall be null and void if the execution of the work specified in such plan be not commenced within the following periods (that is to say):—As to plans deposited after the passing of this Act within three years from the date of such deposit; and as to plans deposited before the passing of this Act within three years from the passing of this Act: And at the expiration of those respective periods fresh notice and deposits shall unless the corporation otherwise determine be requisite."

After the passing of the Act, on October 1, 1894, the defendant, pursuant to the bye-laws then in force in the borough, deposited with the plaintiffs two plans showing 11 dwelling-houses—Nos. 1, 2, and 3

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in one street, and Nos. 4 to 11 in another street—and two stables and coach-houses detached from one another and situate behind dwelling-houses Nos. 1, 2, and 3, which houses and coach-house and stables the defendant proposed to erect on land in the borough belonging to him.

The plans were approved by the plaintiffs on October 8, 1894.

By June, 1899, dwelling-houses Nos. 1 to 5 and one stable and coach-house had been completed, and the foundations for dwelling-house No. 6 had been partly excavated. One wall of No. 5 was intended to form the party wall between Nos. 5 and 6, and in building this wall some preparation had been made for the fire-places and chimneys of No. 6.

Nothing was done towards the erection of any of the other buildings until January, 1902.

The bye-laws which were in force when the Harrogate Corporation Act, 1893, was passed, and which remained in force until they were rescinded as is mentioned below, contained a provision prohibiting the occupation of a new house until it had been certified as fit for habitation.

Certificates were granted pursuant to this bye-law in respect of house No. 1 on May 6, 1898, in respect of Nos. 2 and 3 on June 10, 1898, and in respect of Nos. 4 and 5 on June 6, 1899.

On November 7, 1901, a new set of bye-laws came into force in the borough whereby the set theretofore in force were rescinded as from that date "except as regards any work commenced before that date or of any work not so commenced but of which plans shall either have been approved by the council before such date or have been sent to the surveyor of the council one month at least before such date, and shall not have been disapproved by the council."

On January 3, 1902, the defendant commenced to build the second stable and coach-house shown on the plans in accordance therewith, and in accordance with the bye-laws in force at the time when the plans were deposited, but in various respects not in accordance with the subsequent bye-laws.

A series of questions for the opinion of the Court were contained in the special case, which are set out fully in the report of the case in the Court below. In substance the question was whether the defendant was entitled to build the second stable and coach-house and the remaining dwelling-houses shown on the plans in accordance with the bye-laws in force when the plans were deposited, or whether he was bound to build, if at all, in accordance with the new bye-laws, after depositing fresh plans.

Wright J. gave judgment for the plaintiff corporation.

The defendant appealed.

Colefax for the appellant. The appellant is clearly entitled to proceed with his building scheme under the old bye-laws by reason of the saving in the rescinding clause of the new bye-laws for work of which plans had been approved, unless section 27 of the local Act has nullified the effect of the deposit of the plan. That section provides that a plan of "any street or building" is to be null and void if the work specified in the plan is not commenced within a period of three years. It is submitted that the defendant's plans constituted a single whole for the purposes of this provision, and that as he built some houses under the plan within the three years, he had commenced the work specified in the plan, and that his plan remains effective in spite of the section. Secondly, section 27 only requires a fresh plan to be deposited "unless the corporation otherwise determine." By granting certificates in respect of houses Nos. 4 and 5, which were commenced after the expiration of the three years, the corporation have in effect determined that no fresh deposit of plans is necessary, and they cannot now be heard to say that the original deposit has been nullified. Thirdly, it is submitted that the defendant is protected by the saving in the new bye-laws for "work commenced." Even the deposit of plans has been held in the Palatine Court of Lancaster to be the commencement of work within a saving of this kind: *Withington Urban District Council v. Moore* (1896) 60 J. P. 408. [He referred to *White v. Sunderland Corporation* (1903) 1 L. G. R. 483.]

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Danckwerts, K.C., and *W. Mackenzie* for the respondents were not called upon.

LORD ALVERSTONE C.J. I have very grave doubts whether the question in this case is not a question of fact. I certainly see no grounds on which we could reverse the findings of the learned judge on the question of fact if that were so, but, inasmuch as we have more power in a case of this kind than we have in magistrates' cases which come before the Divisional Court, I should like just to say how the case strikes me. It is perfectly true that the plan may for some purposes be called one plan, and I can well imagine cases arising where there might be a right to go on founded on what had been done with regard to buildings shown on a plan. In this particular case—and in each case one must look at the facts—the plan showed three houses in a side street, eight houses in a front street, and two coach-houses detached from one another with fence walls between, behind Nos. 1, 2, and 3, in the side street. The defendant built 1, 2, and 3, and obtained the necessary certificates for these houses. He then built 4 and 5 and one of the coach-houses, and then—it must be taken for the purposes of this case—did nothing more until after the new bye-laws had come into

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force. Under these circumstances Wright J. has held, having regard to the words in the saving clause of the new bye-laws, "of which plans shall either have been approved by the council before such date," that the defendant's plan was not a plan of one building which had been commenced, but one plan of several buildings, and that therefore for the purposes of the bye-laws it was not protected, because section 27 of the Harrogate Act required that after three years there should be a fresh deposit. I think it would be going too far to say that for all time the defendant has the right to go on with the whole of the work shown on his plan, whatever might be required under new bye-laws, because he had commenced to do part of the work or had built and completed some of the houses shown on that plan.

I think that all the grounds taken by Wright J. are correct, and that the defendant was not entitled to go on under the old bye-laws in consequence of what he had done in regard to the houses he had built. I think the appeal should be dismissed.

COLLINS M.R. I am of the same opinion.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for the plaintiffs—Sharpe, Parker, & Co., for J. Turner Taylor, town clerk, Harrogate.

Solicitors for the defendant—Ullithorne, Currie, and Jennings, for Francis Barber, Harrogate.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

STOCKDALE v. ASCHERBERG.

1904.

Feb. 8.

Landlord and tenant—Tenant's covenant to pay rates, &c.—Outgoings—Tenancy for three years at £55 a year—Abatement of nuisance—Reconstruction of drains.

A tenant of a house for the term of three years, and thenceforth from year to year, at a rent of £55 a year, agreed to pay all "taxes rates assessments and outgoings."

Held, that he was liable to repay to his landlord expenses amounting to £83 10s. incurred in repairs to and reconstruction of drains in pursuance of a notice under the Public Health Act, 1875.

Decision of Wright J., reported 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, affirmed.

APPEAL from the judgment of Wright J. given in an action by a landlord against tenant to recover money paid by the landlord, the plaintiff in the action, to the use and for the benefit of the tenant, the defendant in the action.

The action was brought to recover £83 10s. under the following circumstances:—

By an agreement in writing dated the 25th of March, 1902, the plaintiff let to the defendant a house for a term of three years from that date, and then from year to year until one of the parties should give to the other six calendar months' notice in writing, at a yearly rent of £55. By the agreement the defendant agreed to "pay all taxes rates assessments and outgoings of every description, for the time being payable in respect of the premises as they became due (landlord's property tax only excepted)." The defendant also agreed to keep and leave the premises (including the fixtures) in as good condition as they were in at the date of the agreement (reasonable wear and tear excepted), and to "keep the gutters, stack-pipes, water-closets, and cisterns clean, and to keep in repair all sash lines and internal pipes and taps."

On the 4th of September, 1902, a notice was served on the "owner or occupier" by the Willesden Urban District Council under the Public Health Act, 1875, requiring him to abate a nuisance upon the premises, and for that purpose to take up and relay the drains of the house.

Upon the receipt of the notice of the urban district council the plaintiff communicated with the defendant who repudiated liability, and the plaintiff then proceeded to comply with the notice, and executed

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the works at an expense of £83 10s. He brought this action to recover that amount from the defendant under the contract.

Wright J. gave judgment for the amount claimed.

The defendant appealed.

Foa for the appellant. It must be admitted that the word "outgoings" is capable of including expenses of the character of those incurred in the present case, and that if the covenant now in question were contained in a lease for a long term the tenant would be liable. *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, however, establishes the proposition that a covenant of this character must be confined to matters which can reasonably be supposed to have been contemplated by the parties. Therefore all the surrounding circumstances, including the length of the term, the amount of the rent, and the amount of the expenses, must be taken into account, as also the other covenants in the lease. In *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305, Farwell J. held that an agreement to pay "outgoings" in a lease of a cottage from year to year at a rent of £20 did not include expenses of the character of those now in question amounting to upwards of £50. That case was distinguished by Wright J. in the present case. In *Re Warriner*; *Brayshaw v. Ninnis*, 1903, 2 Ch. 367; 1 L. G. R. 765; 72 L. J. Ch. 701, Swinfen Eady J. followed the decision of Wright J. in the present case. Lastly, in *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31, where the tenant had held over after the expiration of a three years' agreement, Wright J. followed *Valpy v. St. Leonard's Wharf Co.* The recent cases thus recognise that there is a distinction, as regards the meaning of covenants of this character, between the case of a tenancy from year to year and a tenancy for a longer period. It is submitted that the line should rather be drawn between a three years' agreement and a lease for a longer term. For a very long time a distinction, drawing its origin, no doubt, from the Statute of Frauds, has existed between three years' agreements and leases for longer terms. In three years' agreements it is most unusual for the tenant to agree to repair, except to the limited extent that the tenant has agreed to repair in the present case. And the absence of a wide repairing covenant is very strong to show that it is not intended that the tenant should bear the expense of such works as the reconstruction of drains.

In all the older cases where the tenant has been held liable for expenses of this kind the term was longer than three years except in *Batchelor v. Bigger* (1889) 60 L. T. 416. There, no doubt, Kay J. expressed the view that it was difficult to put different constructions on the same covenant according as it occurred in a lease for three years or

in a longer lease ; but he said that the length of the term was a matter to be considered. Moreover the expenses for which the tenant was there held liable were expenses of private street works, and expenses of that kind must be in the contemplation of the parties, as it can be seen that the street has not been made up. Expenditure on the reconstruction of drains may be wholly unexpected. The expression in the present agreement referring to the payment of outgoings "as they become due" shows that the outgoings contemplated were outgoings of a recurring character.

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Hohler for the plaintiff was not called on.

COLLINS M.R. Although one naturally has very great sympathy with a tenant for three years who complains of having been mulcted in a sum amounting to about one and a half times his annual rent for improvements which he did not, in fact, anticipate, and which have had to be executed by his landlord in compliance with notice from the local authority, still the question we have to determine is whether or not he is bound by his contract to accept this liability.

It has now been clearly established by authority—in fact, Mr. Foa did not dispute it—that the word "outgoings" does cover the class of expenditure which was in this case imposed upon the owner by the notice of the local authority. The notice required the owner to alter the system of drainage and bring it up to a modern standard. No doubt that was a very drastic notice, but it was a notice which might quite possibly be given having regard to the condition of the premises. The defendant took premises which, in point of fact, were in a very inefficient condition so far as drainage was concerned ; and it is impossible, in these days, to regard it as so clearly outside the reasonable contemplation of the parties that the authority, whose duty it is to see that houses are kept up to a modern standard of sanitary efficiency, should give such a notice, that it must be unreasonable to suppose that they undertook their several responsibilities in view of such a contingency. It is impossible to say that. It is an every-day matter that the sanitary authority interfere to insist upon more or less radical changes according to the exigencies of the particular case in the matter of sanitary arrangements ; and if, in view of that possibility, two persons—landlord and tenant—come to an agreement in perfectly unambiguous terms, whereby the tenant accepts the obligation of paying all outgoings in respect of the premises, it seems to me we cannot escape from the plain meaning of the agreement without straining the language altogether and introducing an element which it is impossible to limit or to analyse as controlling the clear agreement of the parties.

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For these reasons, in my opinion this appeal fails.

ROMER L.J. I agree.

MATHEW L.J. I am of the same opinion. I think the judgment of Wright J. was perfectly correct in this case and ought to be upheld for the reasons given by the Master of the Rolls.

Appeal dismissed.

Solicitors for the plaintiff—Sharpe, Parker, & Co., for H. Fielding, Canterbury.

Solicitors for the defendant—Potter and Heath.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

LEWIS v. DURHAM UNION.

1904.

Feb. 5.

Poor Rate—Exemptions—Property occupied for Crown purposes—Occupation partly for Crown purposes and partly for other purposes—Premises of volunteer corps—Premises let for profit—Occupation—Caretaker—Music and dancing licences in name of caretaker.

The user for profit for purposes other than Crown purposes (such as concerts and balls) is sufficient to deprive a volunteer drill hall of the exemption from poor rates to which the premises would otherwise be entitled as being occupied for the purposes of the Crown.

The circumstance that music and dancing licences are granted in respect of such premises in the name of the caretaker, a servant of the commanding officer of the volunteer battalion at weekly wages, does not render the caretaker liable to be rated, for the occupation of the servant is that of his master.

CASE stated by consent and by order of Bucknill J. pursuant to section 11 of the Quarter Sessions Act, 1849, after notice of appeal to quarter sessions against a poor rate, as follows :—

The question to be raised in this case concerns the rateability of certain premises situate in the parish of St. Giles, in the city of Durham, and being numbered 40, 41, and 42, in the street of Gilesgate, used as a store house, drill hall, sergeant instructor's residence, officers' and non-commissioned officers' quarters. The whole of the property is in the occupation of the officer commanding the 4th Volunteer Battalion of the Durham Light Infantry, the appellant being only a caretaker, whom the overseers of the poor for the said parish entered as the occupier in the rate book. The appellant is a servant, and is paid a weekly wage for attending to the said premises, and does not reside on the said premises.

The whole of the property is freehold, and is vested in the commanding officer for the time being of the 4th Volunteer Battalion Durham Light Infantry, which consists of about 1,000 officers and men. It is subject to a mortgage of £6,000 granted to the Public Works Loan Board under the authority of the Secretary of State for War.

The buildings in question consist of two floors and a basement with a large drill hall between the front and back portions thereof extending to the roof.

The primary purpose of the premises is that of a drill hall and store-house for rifles, clothing, and other arms, and property, such as camp equipment, of the battalion.

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The premises have been duly certified as a storehouse by the authorities under section 26 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65).

The owners have a music licence from the Durham City justices, and a dramatic licence from the Durham County justices, in respect of so much of the said premises as are used for music or theatrical purposes, and these licences are in the name of the appellant. Certain portions of the premises are occasionally let for lectures, trade exhibitions, concerts, balls, dramatic and other performances; such letting is subservient, however, to the use of the said premises for military purposes. The portions so let come into competition with other buildings in the city of Durham which are let in the same way. Those buildings are rated according to their annual value.

The respondents have rated such portions of the said premises as are let for the above purposes on a gross estimated rental of £60, and a rateable value of £30. The portions of the premises used exclusively for volunteer or military purposes are not rated.

The appellant contends that the whole of the premises are exempt from rateability under section 26 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65), and that they are also exempt as being in the occupation of the Crown for the purposes of the Crown. That the premises were erected and are primarily used for purposes of the Crown, and the letting being only a secondary or subsidiary use thereof when not required for the purposes of the Crown, and that the premises are not liable to be rated for any amount whatever.

He also contends that as the profits obtained from the letting of the hall are appropriated to the repayment of the £6,000 borrowed from the Public Works Loans Board, there is no beneficial occupation of the premises to render them liable to be rated, and, further, that the person so rated is not the occupier, nor in any way beneficially interested in the premises.

The respondents on the other hand contend that to entitle the premises to be exempt from rateability under the section above referred to, they must be occupied exclusively as a storehouse, or for some purpose reasonably incident thereto, and must be occupied merely for public purposes; that such portions of premises as are let are not so occupied; and that the exemption therefore does not extend to these portions. They further contend that when so let they are not used for the purposes of the Crown; that the appellant is the licensee of the premises and responsible for their proper management when used under the licences, and that he is therefore properly rateable in respect thereof, and that to the extent of the sums received for the letting there is a beneficial occupation which renders him

liable to be rated irrespective of the purposes for which these sums are applied.

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W. C. Ryde for the appellant. In the first place the whole of these premises are exempt because held by the Crown; and in the second place the wrong person has been rated in respect of them, because the appellant is only a caretaker.

The primary purpose of the buildings is that of a drill hall and store-house for arms. Though a music licence is granted in respect of them, they are none the less occupied for Crown purposes; for all the profit derived from the licence goes to pay off the debt on the building and to relieve the Crown. If the Crown be owner and the subject occupier the property is rateable; but if the Crown be the occupier of property of the subject it is exempt: *Hornsey Urban District Council v. Hennell*, 1902, 2 K. B. 73; 71 L. J. K. B. 479; *Jones v. Mersey Docks* (1864) 11 H. L. C. 443, at p. 463; 35 L. J. M. C. 1; *Smith v. Birmingham Overseers* (1857) 7 E. & B. 483; s.c. nom. *Reg. v. Smith*, 26 L. J. M. C. 105. Here the occupation is of the Crown, and the fact that money is made under the licence does not do away with the exemption. The principle laid down in *Coomber v. Berkshire Justices* (1883) 9 Q. B. D. 17; 9 App. Cas. 61; 51 L. J. Q. B. 297; 53 L. J. Q. B. 239, is applicable; and the recent case of *Pearson v. Holborn Union*, 1893, 1 Q. B. 389; 62 L. J. M. C. 77, is precisely in point. *Reg. v. Ponsonby* (1842) 3 Q. B. 14; 11 L. J. M. C. 65, is distinguishable, as it relates to apartments in Hampton Court Palace occupied by permission of the Crown.

Upon the second point the appellant is clearly entitled to succeed. He is caretaker of the premises at weekly wages, and a mere servant of the commanding officer. His occupation is, therefore, the occupation of his master, who can alone be rated: *Rex v. Tynemouth Inhabitants* (1810) 12 East. 46.

Simey for the respondents. Upon the second point, as to the appellant being a servant, and therefore not rateable, it must be remembered that he is the holder of the music and dancing licences granted under the Public Health Acts Amendment Act, 1890. The appellant as holder of these licences is in a position of responsibility, and something more than a mere caretaker, and he is properly rateable.

Upon the main point: These premises are not exclusively used for Crown purposes. *Pro tanto* they are not occupied by the Crown, since portions are at times let at a profit. In *Pearson v. Holborn Union*, 1893, 1 Q. B. 389; 62 L. J. M. C. 77, there was no profit made at all. It cannot be material what the colonel intended to do with the profits, and there is no reason why he should devote them to paying off the

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mortgage debt. The paying off of the debt does not change the occupation into that of the Crown exclusively. In *Rayner v. Drewitt* (1900) 82 L. T. 718, the colonel was the owner of a drill hall let for concerts and entertainments, and was held liable to pay district rates. That case in effect concludes this one. *Reg. v. Fuller* (1855) 8 E. & B. 365 n, is to the same effect. It is the user of the premises, and not the occupation, which renders them not in the exclusive occupation of the Crown: *Hornsey Urban District Council v. Hennell*, 1902, 2 K. B. 73; 71 L. J. K. B. 479. In the present case the Crown have but a *quasi* exclusive occupation of these premises, and there exists a beneficial occupation or user of part which is rateable: *Lancashire Justices v. Cheetham Overseers* (1867) L. R. 3 Q. B. 14; 37 L. J. M. C. 12. Ryde replied.

LORD ALVERSTONE C.J. Mr. Ryde has by his argument for the appellant most ingeniously endeavoured to adopt a test and reject a test, both of which are inconsistent with the authorities as they stand. As to occupation by the Crown for Crown purposes, I was, for the moment, somewhat pressed by the argument that premises occupied for Crown purposes were not rateable, although occasionally used for purposes which were not those of the Crown. However, I have come to the conclusion that I was right when I made use of the word "user" and not "occupation" in *Hornsey Urban District Council v. Hennell*, 1902, 2 K. B. 73; 71 L. J. K. B. 479. We must distinguish here between Crown property and property occupied by other persons but used for Crown purposes. The appellant's contention is that there is a distinction to be drawn between a user or licence to use and an occupation of the premises, and that the mere use, although for profit, of premises exempt as premises used for Crown purposes, does not do away with the exemption.

The question therefore comes to this: Is a user for profit for purposes other than Crown purposes sufficient to deprive these premises—the drill hall, and so on—of the exemption to which on the cases cited they are otherwise entitled? In *Pearson v. Holborn Union*, 1893, 1 Q. B. 389; 62 L. J. M. C. 77, the premises were occupied by a volunteer corps, and were therefore occupied by servants of the Crown for the purposes of the Crown, and exempt. In that case the exemption was not limited to stores within the meaning of section 26 of the Volunteer Act, 1863, because independently of that section they were exempt by general law as being occupied by the Crown for the purposes of the Crown, upon the general principle that volunteers are servants of the Crown. In *Pearson v. Holborn Union*, however, no profit was made by the occupier for purposes other than the purposes of the volunteer

corps. In *Greig v. Edinburgh University* (1868) L. R. 1 H. L. Sc. 348, Lord Cairns, at p. 350, dealing with the general principle regulating the decision of questions of this kind, said: "Any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown is not rateable to the relief of the poor." In *Lancashire Justices v. Cheetham Overseers* (1867) L. R. 3 Q. B. 14; 37 L. J. M. C. 12, as to which it has been said that it may be open to question whether the decision was right, the Court held that the justices were rateable to the poor rate in respect of £600 per annum, being the extent to which they had a beneficial occupation of assize courts. In *Worcestershire County Council v. Worcester Union*, 1897, 1 Q. B. 480; 66 L. J. Q. B. 323, where it was held that the exemption from rateability to the relief of the poor, of property in the occupation of persons using it for the service of the Crown, applies only where the property is exclusively used for such service, Lord Esher M.R. adopted what was said by Lord Cairns in *Greig v. University of Edinburgh*, and decided that as the premises in the case then before him in the Court of Appeal were not used exclusively for the service of the Crown they did not come within the exemption, and were therefore rateable. In *Rayner v. Drewitt* (1900) 82 L. T. 718, a volunteer drill hall which, besides being used for the purposes of the battalion, was let for concerts and other entertainments was assessed in the valuation list, and district rates were levied in respect of it, and it was held that the justices were bound to issue process for the recovery of such rates as the premises were not exempt as being solely used for the purposes of the Crown. Upon the authorities, therefore, it appears to me impossible to say that a user amounting to an occupation is necessary in order that the exemption may be got rid of.

Applying that principle to the present case, I am of opinion that the respondents, the rating authority, are right in contending as they do that such portions of the premises as were let for lectures, trade exhibitions, concerts, balls, dramatic and other performances are not occupied in such a manner as to fall within the exemption, and that the premises when so let are not used for the purposes of the Crown; and that they were right in rating such portions of the premises as were let for those purposes. The argument that since the colonel applies the profits received from letting a portion of the buildings in the repayment of the loan of £6,000 granted by the Public Works Loan Commissioners, therefore the whole of the premises must be taken to be used for Crown purposes is, in my opinion, fallacious. I think, therefore, that upon the main point, that is, in the rating of the premises in the way they have done, the rating authority were right.

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On the other point as to the rating of the appellant Lewis they were wrong, for he is not the occupier of the premises, but a caretaker, and not the person to be rated at all. We are obliged to give effect to this objection, because it is a well-established proposition that the occupation by the servant is the occupation of the master, and I see no reason for departing from it in the present case. The appeal must, therefore, be allowed, but, since the first point argued was the main one, there will be no costs on either side.

WILLS J. I am of the same opinion. The exemption exists only when the whole occupation enures to the Crown. When the occupation of such buildings as these enures to another purpose, to that extent, *pro tanto*, it is rateable. Here the money gained by the letting portions of the buildings for purposes of entertainment does not go straight to the Exchequer, but to another authority from which the loan was borrowed and which has to be paid off.

KENNEDY J. I am of the same opinion. The case is substantially governed by *Worcester County Council v. Worcester Union*, 1897, 1 Q. B. 480; 66 L. J. Q. B. 323.

Appeal allowed.

Solicitors for the appellant—Crossman, Pritchard, Crossman, and Block, for W. H. Oliver, Durham.

Solicitors for the respondents—George Reader & Co., for W. Lisle, Durham.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

MILLARD *v.* BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL.

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Feb. 29.

Streets—Private street works—Recovery of expenses—Change of ownership before demand—Public Health Act, 1875 (38 & 39 Viet. c. 55), ss. 150, 257.

Expenses of private street works executed under section 150 of the Public Health Act, 1875, are not recoverable from a person who, though he was owner of premises abutting on the street when the work was completed, has ceased to be owner of the premises before the expenses are demanded.

So held, on the authority of *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, but with reluctance.

CASE stated by justices for the West Riding of Yorkshire who had, upon complaint preferred by the respondent district council against the appellant, found that the respondents were entitled to recover from the appellant the sum of £45 11s. 7d. and interest, in respect of expenses incurred by the respondents in executing private street works to a street called Carr Hill, under section 150 of the Public Health Act, 1875, and made an order directing payment thereof accordingly.

The facts, so far as they were material to the only point dealt with in the High Court, were set out as follows, in paragraph 5 of the case:—

(a) That Carr Hill mentioned in the information was a street not being a highway repairable by the inhabitants at large situate within the urban district of Balby-with-Hexthorpe, and that on and before June 8, 1899, such street was not sewered, levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the respondents.

(b) That before June 8, 1899, the respondents, in compliance with the provisions of the Public Health Act, 1875, s. 150, caused plans and sections of the structural works intended to be executed under the said section, and an estimate of the probable cost thereof, to be prepared under the direction of their surveyor, such plans, sections, and estimates being prepared in accordance with the provisions of the said section, and being deposited for inspection as thereby required; and that on June 8, 1899, the appellant was the owner of certain premises fronting, adjoining, and abutting on such parts of the said street called Carr

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Hill as required to be sewered, levelled, paved, metalled, flagged, channelled, and made good; and that on June 8, 1899, the respondents served upon all the owners (including the appellant) of premises fronting, adjoining, or abutting on such parts of the said street called Carr Hill as required to be sewered, levelled, paved, metalled, flagged, channelled, and made good, notices requiring such owners to sewer, level, pave, metal, flag, channel, and make good such parts of the street called Carr Hill as aforesaid, such notices being in the form prescribed by the Public Health Act, 1875.

(c) That such notices were not complied with by the persons to whom such notices were addressed, and that after the expiration of one calendar month from the date of such notices, the respondents executed the works mentioned or referred to therein (except as stated in paragraph 6 (c) hereof), and that such works were completed on December 4, 1901.

(d) That in course of the execution of the works mentioned or referred to in the said notices, the respondents incurred certain expenses and that such expenses were apportioned by the surveyor of the respondents upon the owners in default (being the persons who were on December 4, 1901, the date of the completion of the said works, the owners of premises fronting, adjoining, or abutting on such parts of the street called Carr Hill as required to be sewered, levelled, paved, metalled, flagged, channelled, and made good) according to the frontage of their respective premises.

(e) That on December 4, 1901, the appellant was the owner of certain premises fronting, adjoining, or abutting on such parts of the street called Carr Hill as required to be sewered, levelled, paved, metalled, flagged, channelled, and made good as aforesaid, and that the surveyor of the respondents duly apportioned upon the appellant and his said premises the sum of £45 11s. 7d. as the proportion due from the appellant in respect of his said premises of the expenses incurred by the respondents in the execution of the said works.

(f) That a formal notice in writing of such apportionment dated November 18, 1902, was on November 24, 1902, personally served by the respondents upon the appellant in accordance with the provisions of the Public Health Act, 1875, s. 257, and the appellant did not within three months from the service on him of such notice of apportionment, by written notice dispute the same.

(g) That on May 20, 1903, a formal demand in writing for payment of the said sum of £45 11s. 7d. was personally served by the respondents upon the appellant in accordance with the provisions of the Public Health Act, 1875, s. 257, and that such notice contained a claim for interest at the rate of £5 per cent. upon the said sum

of £45 11s. 7d. from the date of service of such notice until payment of the said sum.

(k) That the appellant had not paid the said sum of £45 11s. 7d. and interest on any part thereof before July 25, 1903.

(j) That on March 20, 1902, the appellant entered into a contract for the sale of his premises in Carr Hill, and that on April 25, 1902, the said premises were duly conveyed by the appellant to John Smith, Tadcastle Brewery Company, Limited.

It was contended on the part of the appellant that by law the appellant was required to be the owner of the said premises both in December, 1901, when the work was found by us to have been completed, and on May 20, 1903, the day of the date of the said demand, and that as we had found as a fact that the appellant was not such owner on May 20, 1903, the said complaint should have been dismissed on that ground.

It was contended on the part of the respondents that the appellant was on his own admission the owner of the premises the subject of these proceedings on June 8, 1899, and from that date up to and including March 20, 1902, and that it was not contended that appellant was the owner on May 20, 1903; that the appellant was not required by law to be the owner of the premises both at the date of the completion of the works and at the date of demand, but that by virtue of the Public Health Act, 1875, s. 257, the apportioned expenses with interest were summarily recoverable from the person who was the owner of the premises at the time the works were completed for which such expenses had been incurred, and that as the appellant had been proved to be the owner at the time the works were completed he was liable to pay such expenses notwithstanding the fact that the appellant was not the owner thereof at the date of service of demand therefor. In support of this contention the following case was cited on behalf of the respondents: *In re Bettesworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749.

The justices held that the appellant was liable to pay to the respondents the sum of £45 11s. 7d., the amount apportioned in respect of his property in Carr Hill, together with 7s. 3d. for interest thereon and £2 11s., the costs of the proceedings, and they accordingly made an order for payment thereof by the appellant by instalments of £5 per month.

Israel Davis for the appellant. The justices were wrong. It was held in *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, that in order that an owner should be personally liable for expenses under sections 150 and 257 of the

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Public Health Act, 1875, he must be owner both when the works are completed and when the demand is made. It is true that on this view there is no one personally liable where there is a change in ownership between the two dates. But the charge on the premises remains, and the result is in accordance with the policy of the Act, which is to throw the expenses upon the property. *In re Bettesworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749, on which the justices seem to have founded their decision, was a case between vendor and purchaser, and turned upon the existence of the charge on the premises. It does not touch the present point at all. [He also cited *Tottenham Local Board v. Rowell* (1876) 1 Ex. D. 514; 46 L. J. Ex. 432; *West v. Downman* (1880) 14 Ch. D. 111].

Macmorran, K.C., and *Scholefield* for the respondents. The words of section 257 expressly make the expenses recoverable summarily from the person who is the owner of the premises when the works were completed. It is true that in *Reg. v. Swindon New Town Local Board* Cockburn C.J. used language implying that the expenses were not recoverable summarily unless the defendant continued to be owner when the demand was made; but this opinion was merely *obiter*. The decision was that the expenses were not recoverable from a person who had ceased to be owner before the works were completed. The charge on the premises, as has been repeatedly held, exists as from the completion of the works though it is not enforceable until after the apportionment: *Re Bettesworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749; *Hornsey Local Board v. Monarch Investment Building Society* (1889) 24 Q. B. D. 1; 59 L. J. Q. B. 105; *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401; *Surtees v. Woodhouse*, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302. Just as there is an inchoate liability as regards the charge upon the completion of the work, so, it is submitted, there is an inchoate personal liability from that date which a subsequent change of ownership cannot defeat.

Israel Davis in reply. Nothing has been said to shake the authority of *Reg. v. Swindon New Town Local Board*. To disregard that decision would work hardship, as the sale of property takes place upon the faith of it.

LORD ALVERSTONE C.J. Speaking for myself I have no hesitation in saying that if the matter were *res integra* I should have very great difficulty in coming to the conclusion expressed by the judgment of the Court of Queen's Bench in *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119. It seems to me that if section 257 of the Public Health Act, 1875, is looked at, the person who is to pay is clearly defined; but I have always held, and still

maintain the view strongly, that where there has been a clearly expressed opinion or decision, which is under ordinary circumstances binding on this Court, unless we can see that the judgment has proceeded on a mistake of fact, or that the particular point has not been raised, so that the opinion was clearly *obiter*, we ought not to draw fine distinctions. It is very important, because, as Mr. Davis has pointed out, persons will act on such decisions, and ought to act on such decisions, and they may influence such persons' conduct to a considerable extent; and this is one of the matters which, no doubt, would be pretty well known by persons dealing with local government.

Looking at the *Swindon* case, I must say it is quite impossible to hold it was a mere *obiter dictum*, or not a matter of judgment. The point had been raised, and three times over in his judgment Cockburn C.J. refers to it. At p. 307 he says: "We have the words, 'owner in default,' that is to say, the person who as owner is required to do the work, and is in default by reason of not having done it; but it must be a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him." Then at p. 308 he says that section 257 treats owners upon whom notice was originally served, "and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses." Again later, on the same page, he speaks of the owner liable under section 150, adding, "but if in the meantime he has ceased to be owner he cannot be said to be the owner in default at the time the money is demanded." Under those circumstances I think that if this decision is to be questioned and varied by rejecting that part of the judgment which refers to the time when the money is demanded, as distinguished from the time when the work is completed, as stated in section 257, it must be done by the Court of Appeal. I myself should not have arrived at the same conclusion; but I think we are bound by *Reg. v. Swindon New Town Local Board*, and ought to follow it. Therefore this appeal will be allowed.

WILLS J. I am of the same opinion, and I certainly entertain very strongly the view my Lord has expressed, that where there is a decision which seems to cover the point, it is better to adhere to it, and to leave the correction to be made by the Court of Appeal, rather than to refine it away because we think it is not correct, especially where the judgment is an old one, and where many rights have been created in reliance on the judgment as it stands. Also, if I may take the liberty of saying so, I entirely agree that I should not have come myself, after the full discussion we have heard, and after considering the sections, to the same conclusion, because it does appear to me that the words of section 257

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are abundantly plain, and that they impose a liability or inchoate liability upon the person who happens to be owner at the time the work is completed.

KENNEDY J. I entirely agree with my Lord's judgment. I share with him the feeling as to what the position of this Court should be, and for my part I question the correctness of the decision in the *Swindon* case.

Appeal allowed. Leave to appeal.

Solicitors for the appellant—Halse, Trustram, & Co., for A. Muir Wilson, Sheffield.

Solicitors for the respondents—Speechly, Mumford, and Craig.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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JACKSON v. WIMBLEDON URBAN DISTRICT COUNCIL.

Mar. 3.

Sewers — Drains — "Single private drain" — Pipe draining several houses belonging to one owner and discharging into single private drain taking also drainage of houses belonging to another owner — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 41 — Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.

Section 19 of the Public Health Acts Amendment Act, 1890, which, under certain circumstances, enables a local authority to cause a "single private drain," by which two or more houses belonging to different owners are connected with a public sewer, to be repaired at the expense of the owners, and defines "drain" as including, for the purposes of that section, a drain used for the drainage of more than one building, does not apply to a drain pipe laid in private property and receiving the drainage of several houses belonging to the same owner which discharges into a pipe which receives also the drainage of houses belonging to other owners, and which is itself a single private drain to which the section applies.

CASE stated by justices of Surrey.

The appellant appeared before us on August 19, 1903, in obedience to a summons by the respondents dated August 8, 1903, for that he, the said appellant, did on April 29, 1903, or on some day or days within six months then last past, make default in payment of the sum of £35 1s. due and owing from the appellant to the respondents, being the amount of expenses incurred by the respondents in the execution of certain works in relaying the main drain at the rear of Nos. 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, and 73, Hartfield Crescent, Wimbledon, and also did make default in payment of £13 7s. 5d., being a proportion of the expenses incurred by the respondents in the execution of certain works in relaying a single private drain connecting the said house, No. 73, Hartfield Crescent, and a certain other house, to wit, No. 75, Hartfield Crescent, belonging to a different owner, with a certain public sewer.

On the north side of Hartfield Crescent, in the respondents' district, are sixteen houses, numbered with odd numbers from 51 to 81, both inclusive. The appellant is the owner of twelve of the said houses, namely, the houses numbered 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, and 73. A Mr. Holliday is the owner of the house, No. 75, and a Mrs. Eysoldt is the owner of the three houses, Nos. 77, 79, and 81. At the rear of the said sixteen houses runs a main or common drain

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which is connected with the public sewer in Hartfield Crescent by a branch drain which runs between the house numbered 73 and the house numbered 75 at about right angles to the road under a narrow piece of land between the two houses, which is unbuilt upon. Each of the sixteen houses connects with the main drain or common drain by means of branch drains which convey the sewage from each of the houses to the main or common drain and thence through the branch drain into the public sewer in the Hartfield Crescent. The plan hereto annexed was put in evidence at the hearing before us. [A sketch of this plan is given on the opposite page.]

The main or common drain D to C and the branch drain B to A on the said plan are constructed wholly upon private property.

Part III. of the Public Health Acts Amendment Act, 1890, which includes section 19 of the Act, has been adopted in the respondents' district.

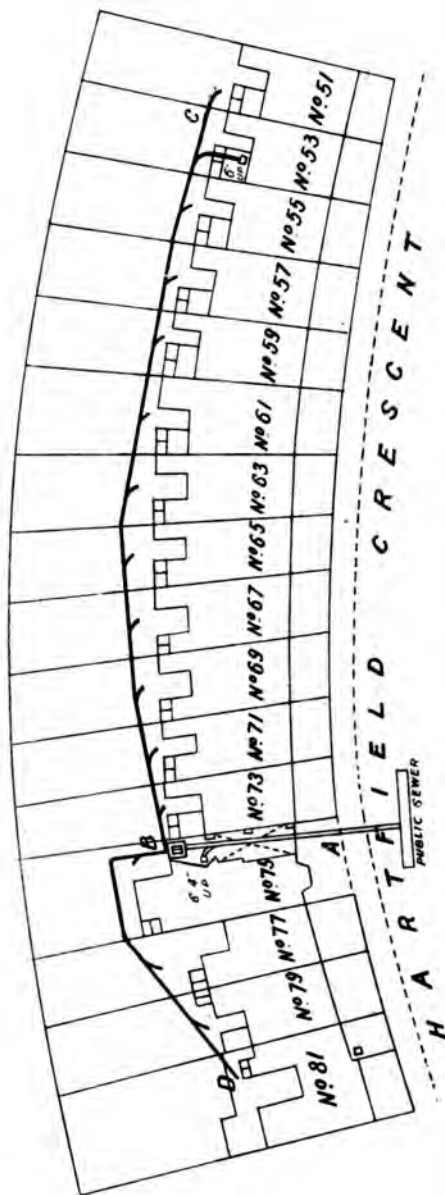
On November 26, 1902, a written application was made by certain persons to the respondents acting as the local authority under the Public Health Act, 1875, stating that the drains on or belonging to the premises Nos. 77 to 85 (odd numbers), inclusive, Hartfield Crescent, as aforesaid, were a nuisance and injurious to health, and requesting the respondents in pursuance of the provisions of the said Act to empower their surveyor or inspector of nuisances to enter the said premises with or without assistants and cause the ground to be opened and examined after due notice to the occupiers of such premises. Acting in pursuance of section 41 of the said Act, the respondents as such local authority as aforesaid did on December 10, 1902, by writing empower their inspector of nuisances, after twenty-four hours' written notice to the occupiers of the said premises, and such other premises as might by him be found necessary, to enter such premises with or without assistants and cause the said ground to be opened and examine such drains. In pursuance of such authority the inspector of nuisances did open up the said drains, namely, the drains at the rear of Nos. 77 to 85, inclusive (odd numbers), Hartfield Crescent, after giving twenty-four hours' due notice to the occupiers of such premises, and upon examination found that it was necessary for the drains at the rear of Nos. 75 and 51 to 73 (odd numbers), inclusive, Hartfield Crescent, to be also opened and examined. Being empowered by the respondents to open up such other drains, the said inspector after due notice as aforesaid to the occupiers of Nos. 75 and 51 to 73 (odd numbers), inclusive, Hartfield Crescent, did enter such premises and open up such drains. The whole of the said main or common drain appeared to be in a bad condition and to require alteration and amendment, and the inspector

PLAN REFERRED TO.

Jackson Appellant
Wimbleton Urban
District Council Respondents

SPECIAL CASE.

A - B Shows Joint Drain from Houses
 of Three Owners. { Mrs Eysoldt. (77-81)
 Mr C.D. Holliday. (75)
 Mr D. Jackson. (51-73)
 B - C. " Mr Jackson's.
 B - D. " Main Drain from Houses of Mr Holliday & Mrs Eysoldt
 D - C. " Full length of Main Drain



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duly represented such facts to the respondents. The respondents, acting upon such representation, forthwith caused notice in writing to be given to the owners or occupiers of the said sixteen houses requiring them forthwith or within a reasonable time therein specified to do the necessary works. The owners of the premises 75, 77, 79, and 81, Hartfield Crescent, duly executed the works required by the respondents to their satisfaction so far as such works affected the main or common drain at the rear of their said premises, but made default in executing the works required to the branch drain between the points A and B on the plan hereunto annexed. The appellant, as the owner of the houses Nos. 51 to 73 (odd numbers), inclusive, Hartfield Crescent, did not comply with such notice, but made default in executing the works so required to be done to the branch drains between A and B and the main or common drain between the points marked B and C, and the respondents duly executed such works and their surveyor duly made an apportionment of the expenses of such works by apportioning the expense of the branch drain A and B amongst the owners of the said sixteen houses, namely, upon the appellant in respect of his ownership of the houses Nos. 51 to 73 (odd numbers), inclusive, upon Mr. C. D. Holliday in respect of his ownership of the house No. 75, and upon Mrs. Eysoldt in respect of her ownership of the houses Nos. 77, 79, and 81, and also apportioned the cost of the works executed to the main or common drain, at the rear of 51 to 73 (odd numbers), inclusive, upon the appellant. The appellant did not within the required statutory period of three months dispute such apportionment, and the same has now become binding and conclusive. Formal demand was duly made by the respondents, acting as the local authority, on the appellant for payment of the sum of £35 1s., being the amount apportioned in respect of the works executed to the main or common drain at the rear of 51 to 73 (odd numbers), inclusive, Hartfield Crescent, shown as between the point marked B and C on the plan, and the sum of £13 7s. 5d. as his proportion of the expenses of the works executed to the branch drain shown as between the points A and B in the plan.

The appellant made default in complying with such demand and the respondents on August 8, 1903, duly laid their complaint before the justices as aforesaid.

There was no dispute between the parties as to the amounts claimed by the respondents, and for the purpose of this case these must be taken to be agreed.

[The case then set out section 41 of the Public Health Act, 1875, and so much of section 4 of that Act as defines "drain" and "sewer," and section 19 of the Public Health Acts Amendment Act, 1890.]

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The question for our decision was whether, having regard to all the facts before us, the drain B to C used for the drainage of the houses Nos. 51 to 73 (odd numbers), inclusive, all of which houses belong to the appellant, was a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890? At the hearing before us it was admitted on behalf of the appellant that the branch drain A to B shown on the plan was a "single private drain" within the meaning of section 19 of the Act of 1890, but it was contended on his behalf that the drain B to C was a sewer within the meaning of section 4 of the Public Health Act, 1875, and not a single private drain connecting two or more houses belonging to different owners with a public sewer within the meaning of section 19 of the Act of 1890.

The following cases were cited to us in support of the above contentions: *Travis v. Uttley*, 1894, 1 Q. B. 233; 63 L. J. M. C. 48; *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217; *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245; *Holland v. Lazarus* (1897) 66 L. J. Q. B. 285.

On behalf of the respondents it was contended that it is necessary to have regard to the entire system of drainage discharging into the public sewer at the point marked A on the plan, and that such system of drainage comprehends the drainage of the whole of the sixteen houses, Nos. 51 to 81 (odd numbers), inclusive, Hartfield Crescent, and which houses belong to different owners, and forms, in fact, one entire drain connecting the whole of the sixteen houses with the public sewer; that therefore the main or common drain, D to C, and the branch drain, B to A, are capable of being dealt with under section 19 of the Public Health Acts Amendment Act, 1890, as a single private drain within the meaning of that section. *Seal v. Merthyr Tydfil Urban District Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37, was cited to us on behalf of the respondents.

We decided in favour of the contention of the respondents. The question respectfully submitted for the opinion of the Court is whether the said decision was right. If the Court should be of opinion in the affirmative then the judgment is to stand; but if in the negative the judgment, so far as regards the claim for £35 rs., is to be set aside, or such other order is to be made as the Court shall think fit.

Sylvain Mayer for the appellant. The drain B to C carries away the drainage of twelve houses, and is, therefore, beyond all question a "sewer" within the definition in section 4 of the Public Health Act, 1875. The respondents will contend that it is a single private drain within section 19 of the Public Health Acts Amendment Act, 1890; but that

section applies only where the drain connects two or more houses belonging to different owners with a public sewer. Here all the houses which the drain B to C serves belong to the same owner, and therefore the section does not apply. [He cited *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; *Travis v. Uttley*, 1894, 1 Q. B. 233; 63 L. J. M. C. 48; and *Reg. v. Hastings Corporation*, 1897, 1 Q. B. 46; 66 L. J. Q. B. 80.]

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Macmorran, K.C., and *Geo. Humphreys* for the respondents. The conduit in question is a "drain" within section 19 of the Act of 1890. Subsection (3) of that section provides that "drain" shall, for the purposes of that section, include a drain used for more than one building, and the definition in section 4 of the Act of 1875 does not prevent the words of the section of the later Act from receiving their natural interpretation: *Bradford v. Eastbourne Corporation*. If the appellant is right the result is that a public sewer, B to C, runs into the private drain A to B, which would be an absurdity. *Seal v. Merthyr Tydfil Urban District Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37, is in point, but carries the case no further than *Bradford v. Eastbourne Corporation*. *Reg. v. Hastings Corporation* is inapplicable. A, B, C, or A, B, D, whichever way they are taken, are private drains within section 19. They all of them connect and form a single private drain, however far they may go back.

Sylvain Mayer replied.

LORD ALVERSTONE C.J. I hope that the day will arrive when no question can arise as to what is a sewer and what is a drain. Really the difficulty of dealing with these questions is such, as the Courts have found, that one does hope that something may be done in the way of a declaratory Act or an amending Act to put these questions beyond the range of discussion. The difficulty probably arises, and the difficulty in legislation probably arose, from the fact that modern provisions as to sanitation and repairs of drains have to be applied to old methods of drainage.

The main proposition for which Mr. Macmorran contends is this: Once get section 19 of the Act of 1890 to apply, and you are entitled to go back to the end of all the drains or sewers—I will call them drains so as not to appear to beg the question—that connect with the private drain, and to bring them all within the purview of section 41 of the Act of 1875. I think, stated in that way, the proposition goes too far. I have had a great deal of trouble in this case by reason of the fact that it is admitted that the pipe from A to B is a single private drain within section 19, and therefore in respect to that part of it, at any rate, proceedings could be taken under section 41. But I think that the main

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contention of Mr. Macmorran goes too far. It does not follow that you can be entitled to go to the end of every pipe and say that they are all of them private drains because they happen to connect. One can put a number of cases, although I do not know that very much light is thrown by trying to put cases; but it does seem to me, to take one case, that if that were so, a person through whose land there went a sewer, the obligation of repairing which sewer really had fallen upon the local authority, might be deprived of those rights by the action of third persons without his consent at all. Therefore I think that that proposition is too wide.

Under these circumstances, what is the real question we have to decide? From c to B it is admitted would be a sewer within the meaning of the Public Health Act, 1875, if it had discharged into a sewer at the point B, or if it had been connected by a pipe which was not a single private drain running from the point B to the sewer. At first I was inclined to think that it was difficult to contend that a sewer could communicate with a single private drain, but, after the consideration this case has undergone and the argument that has been addressed to us, I think that that view of mine was not well founded and went too far. The scheme—as far as one can see there is a scheme of legislation—originally provided that where there was a drain which drained more than two houses, or more than two buildings within the definition, it became a sewer because it was not a drain. I can well imagine that there may be structures, as in this case, dealing with a long row of houses, as to which it could not be denied that they would be sewers. The structures do, in fact, empty on both sides in this case into that which for this purpose must be taken as being a single private drain.

I do not think that the admission that it is a single private drain ought to be construed as being an admission that the whole of it is a single private drain, because, whatever may have been the reasons for the admission, or however it came to be made, the point was distinctly raised that from c to B was a sewer. Does section 19 of the Act of 1890, which enables the local authority to apply section 41 of the Act of 1875, involve the proposition that, because there is a single private drain, the connections with that must be part of the single private drain, and must be so regarded? As I have already pointed out, that might involve the loss of rights and the change of obligations which undoubtedly existed prior to the Act of 1890; and it would require clear and distinct words in order to bring about that result. The words of section 19 are: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain." I am fully conscious of the difficulty of understanding what was meant by "a single private drain," having regard to the fact that if a drain does

drain two houses it would become a sewer by virtue of the Act of 1875. But, at the same time, the Legislature, I think, certainly did not mean to sweep away the distinction between a drain and a sewer for all purposes in that particular case, nor does Mr. Macmorran contend that. He says that for some purposes the distinction will remain. At any rate, it seems to me that the purview of the section is to confine the operation of section 41 to that which is a single private drain; and I point out that in the case which has been of great assistance to us, and which certainly discussed the matter more carefully than any other case that I know—I mean the case of *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571—it was not contended, nor was it any part of the decision, that the obligations and the rights extended to more than what was a single private drain in fact. It was not any part of that decision to decide that that which was connected with a single private drain must of necessity have been a single private drain itself or part of it. I cannot help thinking that the language of the most careful judgment (if he will permit me to say so) of my brother Wills rather excludes the idea that the matter was in way considered by the Court beyond the particular question as to what was the meaning of a "single private drain" under section 19 of the Act of 1890.

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Therefore I think that we are entitled, notwithstanding the admission, to say that that which was a sewer may still remain a sewer, and the fact that it connects with a single private drain does not make any difference. It would have been a sewer had it connected with the main sewer by means of that which was itself a sewer or by a continuation of its own pipe, and I do not think the fact that it does happen to pour out into a single private drain between the points A and B and thereby get to the sewer, makes any difference for the purpose of deciding what is the character of the pipe which runs from C to B.

In this case, Mr. Macmorran says that you find a private drain, you find the different owners, and therefore a case under section 19 arises. I think that is perfectly true so far as the portion of the pipe or conduit is concerned which is found to be a single private drain into which the other drains or sewers connect; but I see no reason why a sewer should not connect with the single private drain and then with another sewer.

For these reasons, which I admit are difficult to express clearly, having regard to the difficulty of the subject, I have come to the conclusion that the magistrates were wrong in coming to the conclusion that the portion of the drain or conduit between C and B was a drain within the meaning of the Public Health Acts and not a sewer; and that this appeal ought to be allowed.

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WILLS J. I have come to the same conclusion, though with considerable difficulty, because it seems to me that to reconcile section 19 of the Act of 1890 with the general legislation on this subject is a work of extreme difficulty. The Court, of which I was a member, attempted to do it in the *Eastbourne* case, and I think, so far as the *Eastbourne* case was concerned, the attempt was not altogether unsuccessful. But now it comes to be applied to a different set of circumstances, and that brings me to a fresh difficulty and one as to which the considerations of policy appear to me to be pretty evenly balanced, so there is very great difficulty in saying that there is any particular reason why one should incline to one construction rather than another for reasons of public convenience or general policy.

What appears to me to be the determining factor really is that when you come to look at section 19, and suppose that it does apply to what has happened in this case, the facts which are disclosed in this case would seem to *prima facie* bring us to say that this was a case in which under certain circumstances at all events, section 19 might apply, because there are two or more houses which belong to different owners—namely, those on the right-hand side and those on the left-hand side of the passage way through which A to B is carried. They are connected with the public sewer by that single private drain, A B, and then one has got to see, when that is granted, what the consequences are, those being the facts. The consequences are that application may be made under section 41 of the principal Act, and when you turn to section 41, I think it is very clear that the drain in respect of which complaint is to be made, and the drain in respect of which the local authority has the power of calling upon the owner to do the work, and to do it themselves if the owner does not do it, is the same drain in each case. If that is so, then, inasmuch as the obstruction did not lie between A and B, section 41 would not apply. There seems to be some sort of intelligent groundwork for such a view in this consideration: that if the obstruction does arise between A and B, generally speaking, it is almost impossible to say which of the various effluents which meet in A and B is the one that does the mischief, and therefore it is reasonable enough that the expense of putting things right should be shared amongst all the people who use A and B. That, of course, does not apply when you are dealing with B to C, because from B to C the other houses which are necessary to bring in the operation of section 19 of the Act of 1890 do not come in at all, and because, excepting for the purposes of section 19, from B to C is undoubtedly a sewer.

I do not say that these reasons are satisfactory. I very much doubt whether completely satisfactory reasons could be given for any decision

in any way upon any question almost of those which have come under my notice under this section 19 ; but I think upon the whole, for the reasons which I have mentioned, that the decision which my Lord has announced is the correct one.

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KENNEDY J. I think so, too. I quite agree that it is very difficult to come to any satisfactory solution of the difficulties which are presented on one side or the other in connection with this case ; but it seems to me that the least difficult is the one which my Lord has presented.

I will only add just this. The section which is invoked by the respondents here is section 19 of the Public Health Acts Amendment Act, 1890. To what does that relate ? To put it shortly, it relates to the rights or duties of repairing and bearing expense connected with a single private drain which connects two or more houses belonging to different owners with a sewer. Does any portion of B to C—and this is what we have got to deal with—fulfil that condition ? Clearly not ; B to C is a complete length which would be a sewer and repairable by the public authority for the whole distance, because it is a length of conveyance of sewage—to avoid the words “drain” and “sewer”—not from different owners, but from the same owner. Does A to B satisfy it ? I think myself it does, and no question arises as to A to B. Then from B to A you have got the different owners, you have got them connected by what certainly may be described as a single private drain. Does the fact, then, that A to B may be a single private drain, and does collect from houses owned by different persons, carry with it, so to speak, the right to treat as a single private drain within the section, a track, I will call it, or a range of drainage which clearly does satisfy it, and the connection of which at B is one of the elements, but one which by itself would be insufficient to make A B a single private drain ? A B only becomes a single private drain because of the connection with different houses which is involved in the connection of B, not only with B C, but with B D.

It seems to me that that which is the most simple, because the most natural, explanation of the words, is also one which on the whole least conflicts with the considerations that arise from the fact that this is an amending Act, and has to be read with the provisions of the earlier legislation which undoubtedly did protect the private owner in respect of these things.

Appeal allowed. Leave to appeal.

Solicitors for the appellant—W. W. Young and Ward.

Solicitor for the respondents—R. H. S. Butterworth.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

See *Thompson v. Eccles Corporation*, post, p. 556, from which it would appear that the assumption or admission that the conduit from A to B was a single private drain within the meaning of section 19 of the Act of 1890 was mistaken.

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Mar. 29.

KING'S BENCH DIVISION.

THOMPSON *v.* ECCLES CORPORATION.

Sewers—Drains—“Single private drain”—Pipe in private ground draining houses “belonging to different owners”—Structural alteration of pipe—Public Health Act, 1875 (38 & 39 Vict., c. 55), ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict., c. 59), s. 19.

Section 19 of the Public Health Acts Amendment Act, 1890, which provides that “where two or more houses belonging to different owners are connected with a public sewer by a single private drain,” proceedings may be taken under section 41 of the Public Health Act, 1875, and which defines drain as including, for the purposes of the section, a drain used for the drainage of more than one building, applies only in cases where, apart from the section, the conduit is “private” in the sense of not being a sewer vested in and repairable by the local authority, e.g., where the conduit is a sewer made for “profit” within the meaning of section 13 of the Act of 1875.

Hill v. Hair, 1895, 1 Q. B. 906; 64 L. J. M. C. 164, approved and followed.

Bradford v. Eastbourne Corporation, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, not followed.

Section 19, however, is not confined to cases where no two of the houses drained by the “private drain” belong to the same owner, for the expression “belonging to different owners” means not all belonging to the same owner.

The power of the local authority under section 41 of the Public Health Act, 1875, to require the necessary works to be done where, on such examination as is mentioned in the section, the drain appears to be in bad order or condition, or to require alteration or amendment, extends to requiring a structural alteration of the drain necessary to abate a nuisance.

Southwold Corporation v. Crowdy (1903), 1 L. G. R. 899, approved.

CASE stated by justices as follows:—

1. This is a case stated by us, the undersigned, two of His Majesty's justices of the peace in and for the borough of Eccles, being a court of summary jurisdiction sitting in a petty sessional court-house under the Summary Jurisdiction Acts, 1857 and 1879, on the application in writing of the appellant who was dissatisfied with our determination as being erroneous in point of law as hereinafter stated.

2. At the court of summary jurisdiction sitting at the court-house, Eccles, being a petty sessional court-house, a complaint was preferred by the mayor, aldermen, and burgesses of the borough of Eccles

(hereinafter called the respondents) under section 41 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and section 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), against Thomas Thompson (hereinafter called the appellant), for that on March 16, 1903, a notice was served upon him requiring him to abate a certain nuisance in or on certain premises situate at 428, Liverpool Road, in the district of the said respondents, and that he had made default in complying with the requisitions thereof within the time therein specified, that is to say, within fourteen days from the service thereof to take up the existing defective yard and cellar drains and gullies and tops and in lieu thereof provide and lay down efficient drains constructed of glazed and socketted stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of six inches all round the pipes, and to provide efficient wash-out gullies with lifted tops, which complaint was heard by us on September 28 and October 19, 1903, when we, the said court of summary jurisdiction, adjudged that—

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The cellar drain complained of by the corporation (the respondents) was used by two or more houses belonging to different owners, and declared that such drain was a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, and made an order for the defendant (the appellant) to abate the nuisance and to do any works necessary for that purpose within twenty-eight days.

3. And whereas the appellant being aggrieved and dissatisfied with our determination as being erroneous in point of law has, pursuant to section 2 of 20 & 21 Vict. c. 43, and section 33 of 42 & 43 Vict. c. 49, and the Summary Jurisdiction Rules, 1886, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid for the opinion of the Court, and has duly entered into a recognisance as required by the said statutes in that behalf:

4. Now, therefore, we, the said justices, in compliance with the said application, do hereby state and sign the following case:—

5. Upon the hearing of the complaint the following facts were proved before us.

6. The appellant is the owner of a block of seven houses numbered 426 to 438, Liverpool Road, in the borough of Eccles, of which the house No. 428, the subject of the complaint, is one.

7. The said houses were built in the year 1875, and in accordance with plans deposited with the then sanitary authority, the Barton, Eccles, Winton, and Monton Local Board (predecessors of the respondents), and approved by them on March 4, 1875.

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8. Adjacent to the block of seven houses, and only separated therefrom by a private passage giving access to the backs of the houses (but on the same side of Liverpool Road aforesaid), are twelve houses belonging to one owner, Edward Johnson, and divided into two blocks of six houses each by a private passage giving access to the backs of the said houses.

9. On March 6, 1903, complaint was made to the respondents that a certain drain or sewer belonging to No. 428, Liverpool Road, was a nuisance and injurious to health. On examination the said drain or sewer was found to be in bad condition and to require alteration or amendment, and the respondents thereupon served upon the appellant the notice of March 16, 1903, a copy of which is hereto annexed. The works specified therein were necessary for the purpose of abating the said nuisance.

10. The said notice was not complied with.

11. The said drain or sewer was part of a nine-inch drain or sewer running through and under the cellars of the seven houses belonging to the appellant and receiving the drainage of each house before falling into the respondents' main sewer in Hampson Street (a street running off Liverpool Road).

12. The said nine-inch drain or sewer was a continuation of and receiving the drainage from a six-inch drain or sewer passing through and under the cellars of the two blocks of houses belonging to Edward Johnson and receiving the drainage from each of the said twelve houses before reaching the nine-inch drain or sewer, as shown upon the plan hereto annexed. [A sketch of the plan referred to will be found on the opposite page.] The whole of the six-inch and the nine-inch drain or sewer was laid through private property until it reached the public sewer in Hampson Street aforesaid.

13. It was admitted by the respondents that the notice required the appellant to make structural alterations in the said drain or sewer.

14. On the part of the appellant it was contended that as the drain of the said house received the drainage of more than one building not within the same curtilage belonging to the same owner it became a sewer under the provisions of sections 4 and 13 of the Public Health Act, 1875, as it conveyed the drainage of three separate blocks of dwelling-houses containing six in each in two blocks owned by one owner, Edward Johnson, and the other block containing seven dwelling-houses owned by the appellant, another owner, and was vested in the local authority, and it was the duty of the local authority to repair, cleanse, and keep it so as not to be a nuisance or injurious to health, and that the said drain was not a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890.

HAMPSON STREET

MR THOMSON'S PROPERTY	438	436	434	432	430	428	426
	PASSAGE						
MR EDWARD PROPERTY	424	422	420	418	416	414	
	PASSAGE						
	412	410	408	406	404	402	

LIVERPOOL ROAD

15. On the part of the appellant it was further contended that the words in section 41 of the Public Health Act, 1875, "appear to be in bad condition or to require alteration or amendment," did not refer to defects in the structure, and did not empower the respondents to order structural alterations, and the said notice of March 16, 1903, was therefore *ultra vires* and bad. 1904.
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16. On the part of the respondents it was contended that the said drain or sewer at the place where the nuisance occurred was a single private drain to which section 19 of the Public Health Acts Amendment Act, 1890, applied, and further that as the works specified in the notice were necessary for abating the nuisance the respondents were authorised to require the execution of the same under and by virtue of the provisions of section 41 of the Public Health Act, 1875.

17. Our attention was called to the several reported cases hereinafter set out:—*Travis v. Uttley*, 1894, 1 Q. B. 233; 63 L. J. M. C. 48; *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245; *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217; *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164; *Fulham Vestry v. Solomon*, 1896, 1 Q. B. 198; 65 L. J. M. C. 33; *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; *Seal v. Merthyr Tydfil Urban District Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37; *Lancaster v. Barnes Urban District Council*, 1898, 1 Q. B. 855; 67 L. J. Q. B. 744; *Beckenham Urban District Council v. Wood* (1896) 60 J. P. 490.

18. We found that the drain was used by two or more houses belonging to different owners, and that the drain was a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, and we made an order upon the appellant to abate the nuisance and to do any works necessary for the purpose within 28 days.

19. The question upon which the opinion of the Court is desired is whether we, the said justices, being such a court of summary jurisdiction, upon the above statement of facts came to a correct determination and decision in point of law, and if not what should be done in the premises.

Rhodes for the appellant. This structure is not a "single private drain" within section 19 of the Public Health Acts Amendment Act, 1890. That section applies only where no two of the houses belong to the same owner, as in *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571. If this is not so, the anomaly ensues that the conduit begins by being a public sewer and then, at a certain

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point, is converted into a single private drain: *Jackson v. Wimbledon Urban District Council* (1904) 2 L. G. R. 545.

Secondly, even if the conduit is a single private drain, the works here required were not such as are contemplated by section 41 of the Act of 1875, because they were of a structural character, and the words "require alteration or amendment" in that section do not refer to structural alterations: *Fulham Vestry v. Solomon*, 1896, 1 Q. B. 198; 65 L. J. M. C. 33, per Kennedy J.

Fleetwood Pritchard for the respondents. The second point has been decided adversely to the appellant's contention in *Southwold Corporation v. Crowdy* (1903) 1 L. G. R. 899.

As to the first point, section 19 of the Act of 1890 applies. At the place where the repairs were required the conduit received the drainage of houses belonging to different owners, and therefore fulfilled the conditions of that section. The conduit was no doubt a "sewer" within the meaning of the Public Health Acts; but a conduit which is a "sewer" for other purposes may be a single private drain for the purpose of section 19: *Reg. v. Hastings Corporation*, 1897, 1 Q. B. 46; 66 L. J. Q. B. 80.

[CHANNELL J. The real solution of section 19 is that the draftsman of the Act did not understand the law, and thought that so long as a drain pipe which drained a number of houses was situate on private property, and the houses belonged to the same owner, the pipe was a private drain and not a sewer; but that, unfortunately, is a solution we are not allowed to adopt.]

Bradford v. Eastbourne Corporation, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571 is on all fours with the present case, and is conclusive in the respondents' favour.

LORD ALVERSTONE C.J. Speaking for myself I may say that I hope that the Court of Appeal or the House of Lords may be able, by sweeping away some of the conflicting decisions upon this subject, to reduce the law to a logical system, or else that the Act of 1890 may be amended by the insertion of a definition of the expression "single private drain."

I cannot help feeling that it is unfortunate that the Legislature should ever have allowed it to become law that a person may convert that which would otherwise be a private drain into a sewer, and impose upon the local authority the obligation of repairing it, simply by allowing other persons to send the drainage of their houses through it. But the language of the definition clause in the Act of 1875 is plain, and it cannot now be disputed that under that Act a drain pipe which receives

the drainage of more than one building is a sewer none the less because it is made entirely through private property. Therefore, apart from the Act of 1890, the conduit in the present case, which was constructed before 1890, was a sewer. The Act of 1890 provides, by section 19, that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain," the procedure under section 41 of the Act of 1875 may be put in force. And the question is what is meant by a "single private drain." It is said that the cases of *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, and *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217, have decided that where a pipe running through private land receives the drainage of several houses, the effect of the Act of 1890 is to convert the pipe into a private drain if the houses belong to different owners, although it would have left it a sewer if the houses had all belonged to one person. That conclusion seems to me absurd and ridiculous, and one which the Court should be at pains to avoid if by any possibility it can be avoided. It is true that the facts in the *Eastbourne* case are almost identical with those in the present, and in that case the Court seem to have thought that the fact of the pipe being situate wholly on private land was sufficient to make it a private drain for the purposes of section 19, though it might be a sewer for other purposes. And if that case stood alone we might be compelled to follow it. But we have to choose between conflicting decisions. Whatever the Legislature may have meant by section 19, I am at all events satisfied of this, that they did not intend the test of whether a pipe on private land was a private drain or not to depend upon the question of the houses which it drained belonging to one owner or to more. It may be that, as my brother Channell has suggested, the framers of the Act of 1890 were under the impression that a pipe on private land which drained several houses belonging to the same owner was a private drain under the Act of 1875, and being under that impression desired to place a pipe which drained several houses belonging to different owners on the same footing. But we are not permitted to adopt that explanation, and under those circumstances we are driven to the conclusion that section 19 must have been designed to meet the rare case of a drain-pipe made for the purpose of draining several houses for the profit of the person constructing it, which under section 13 of the Act of 1875 does not vest in the local authority, and consequently remains a private drain. I am of opinion that in this case the pipe which received the drainage of No. 428, Liverpool Road, was a sewer and not a single private drain. and that section 19 of the Act of 1890 has no application.

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And on that ground the appeal must be allowed. With regard to the other ground of the appeal, I think the case of *Southwold Corporation v. Crowdy* (1903) 1 L. G. R. 899, is conclusive against the appellant. That case decided that section 41 of the Act of 1875 applies to all cases in which the bad condition of the drains is such as to amount to a nuisance, even though the alteration of the conduit necessary to abate the nuisance may involve an alteration of the structure.

DARLING J. I find myself unable to arrive at anything that could be reasonably called an opinion with respect to the meaning of section 19 of the Act of 1890. It seems to me that the simplest way out of the difficulty is for Parliament to recognise that a mistake has been made in the legislation, and by amending the section to get rid of the absurdities that necessarily result from the manner in which it has been passed, and put the section on an intelligible basis. With respect to our decision in this particular case, I content myself with saying that if anyone can reconcile these Acts of Parliament it is my brother Channell, and whatever his view upon this section may be, to that view I am ready to subscribe.

CHANNELL J. I should be glad if this case went before a higher tribunal, so that if possible an authoritative decision upon this subject might be obtained, though at the same time I do not think that a thoroughly satisfactory decision is possible. The problem is how to reconcile the provisions of section 19 of the Act of 1890 with the general definition clause in the Act of 1875, and that is a problem which in my opinion is really insoluble.

There is one point upon that section made by the appellant as to the meaning of the words "belonging to different owners," which I may get rid of at once. I am perfectly clear that the proper interpretation of these words is "not all belonging to the same owner." It could not have been intended that, if there was a row of twenty houses, different considerations were to apply according as they belonged to twenty different owners, or only to nineteen owners by reason of two houses in the row belonging to the same person. Whatever the object of the Legislature was in enacting this section, it is intelligible that they should say with reference to that which is a single private drain that the fact of the houses not all belonging to the same owner shall not prevent the making of an order under section 41 of the Act of 1875. But why did they limit the application of section 19 to the case of a pipe draining houses not all belonging to the same owner? What did they mean by a single private drain? The most natural answer to that question is that which I suggested in the course of the argument, namely, that the person who framed the section was labouring under the

idea that a pipe might be a single private drain under the Act of 1875, although it drained different houses, provided they all belonged to the same owner. That is certainly not the general law, although there are certain exceptional cases in which it may happen. There is another possible solution of the problem as to how this section 19 came to be passed, which is this. The Act of 1890 is an adoptive Act, and a considerable number of the clauses in it are clauses which had been passed from time to time in various local Acts, and section 19 is one of such clauses; for instance, it appears in section 134 of the Carlisle Corporation Act, 1887 (50 Vict. c. xix.), which was one of the Acts discussed in *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164. But then these local Acts did not contain a definition of the term "drain" similar to that in section 4 of the Act of 1875, while some of them contained clauses similar to section 250 of the Metropolis Management Act, 1855, whereby the expression "drain" is made to include any drain for draining a block of houses by a combined operation under the order of the local authority. Under these circumstances the sections of the local Acts corresponding to section 19 of the Act of 1890 were perfectly easy to construe; there was no difficulty about them. But when these sections got imported into the Act of 1890, in which the term "drain" was to be interpreted as defined by section 4 of the Act of 1875, a difficulty at once arose. Personally I do not think a perfectly satisfactory solution of that difficulty is possible; but one must offer the best one can, and it seems to me that the best available is that suggested by Cave J. in *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164, that there may be in law such a thing as a single private drain draining more than one house; for instance, where it drains two houses within the same curtilage, or where it drains a number of houses for the profit of the maker of the drain, or possibly where there is an agreement between a local authority and a building owner that they will sanction a combined system of drainage upon the terms of the pipe remaining a private drain. If section 19 be understood as limited to those cases, then you can give it a sensible interpretation—otherwise not. If you can show in a particular case that a drain is a private drain of one of those descriptions, then you may make an application under section 41, although the houses drained by it belong to different owners. But the fact that the houses belong to different owners will not make it a private drain. In the present case the pipe does not belong to one of the exceptional classes that I have indicated, and consequently the general rule applies, and, as it drains more than one house, it is a sewer and not a

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private drain, and consequently section 19 has no application. The appeal must be allowed.

Appeal allowed.

Solicitor for the appellant—E. Lorimer Wilson, Manchester.

Solicitors for the respondents—Sharpe, Parker, & Co., for W. H. Hickson, Eccles.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It seems that even on the footing that the pipe in question in the above case was a "single private drain" within the meaning of section 19 of the Act of 1890, the course taken by the local authority was mistaken, and that at any rate the justices in making an order for the execution of the necessary works completely misconceived their powers.

Section 41 of the Public Health Act, 1875, provides, putting it shortly, that on a written application stating that a drain is a nuisance, the local authority may cause the drain to be examined, and if upon examination the drain appears to be in bad condition, may give notice to the owner or occupier requiring him to do the necessary works, and that if the notice is not complied with the person in default shall be liable to a penalty, and further that the local authority may do the works themselves and recover the expenses from the owner.

Section 19 of the Act of 1890 provides that in the case of the "single private drain" there dealt with, "application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses" in shares apportioned as in the section mentioned.

In *Lancaster v. Barnes Urban District Council*, 1898, 1 Q. B. 855; 67 L. J. Q. B. 744; 78 L. T. 355; 46 W. R. 623; 62 J. P. 405, the Court expressed the opinion—not merely *obiter*, but as the basis of the decision—that the penal provisions of section 41 of the Act of 1875 are not applied by section 19 of the Act of 1890 to the "single private drain"; and if that is so it is clear that the only remedy of the local authority in the case of a single private drain where their notice to do the work is not complied with is to execute the works themselves and recover the expenses, and that they cannot take out a summons, as was done in the above case, for mere non-compliance with the notice.

Further, under section 41 of the Act of 1875, the only power the justices have upon a summons for non-compliance with a notice under that section is to inflict a penalty. They have no power to order the execution of works. So that there seems to be no possible doubt that in ordering the execution of works in the above case the justices were entirely wrong.

It may be pointed out that the decision on the main point in the above case is not only contrary to *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; 74 L. T. 762; 45 W. R. 31; 60 J. P. 501, but also to *Seal v. Merthyr Tydfil Urban District Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37; 77 L. T. 303; 61 J. P. 551, which appears not to have been cited.

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KING'S BENCH DIVISION.

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Water—Supply—"Domestic purposes"—"Dwelling-house"—Work-house school—"Business"—Non-compliance with regulations of water company—Bore of service pipe—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 35, 48, 50, 53—Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12—Norwood (Middlesex) Water Order, 1878 (scheduled to 41 & 42 Vict. c. lvi.), s. 17.

A poor law school is a dwelling-house within enactments requiring a water company to supply water to dwelling-houses for "domestic purposes" within the meaning of the Waterworks Clauses Acts. And, though the carrying on of such a school is a business, water used in the school for purposes of a domestic character is used for "domestic purposes" within the meaning of those Acts; for it is the character of the purpose, and not the character of the premises in which the water is used, that is the important factor in determining whether it is used for "domestic purposes" or not.

The words "domestic purposes" in the Waterworks Clauses Acts refer to user not merely for washing, drinking, and flushing closets and the like in a house, but extend to user for the amenities of the house, even where the house is used for business purposes; but the limit of such amenities must be ascertained with due regard to what is reasonable and to what is the ordinary user at the present day. Thus the heating of premises by hot-water pipes is, while the generating of steam for the supply of power is not, a domestic purpose.

Where a water company required to supply water for domestic purposes are empowered to make regulations for preventing the misuse of the water, and to refuse a supply if such regulations are not complied with, a person otherwise entitled to a supply for his domestic purposes cannot demand such supply if the appliances for the use of water in his house do not conform with the regulations.

Where, there being no other prescribed limit, the bore of a service pipe to be laid by the owner or occupier of a house for obtaining water for his domestic purposes is limited by section 50 of the Waterworks Clauses Act, 1847, to half an inch, unless the undertakers consent to the use of a larger pipe, and the company by their regulations fix three-quarters of an inch as the maximum bore, a person entitled to a supply for domestic purposes cannot insist on being supplied by means of a pipe of larger bore, but he is not precluded from insisting on a supply by means of as many small pipes as may be necessary.

Barnard Castle Urban District Council v. Wilson, 1901, 2 Ch. 813; 1902, 2 Ch. 746; 70 L. J. Ch. 859; 71 L. J. Ch. 825, discussed.

THIS was an action by the plaintiffs claiming (1) £461 18s. 6d., the price of certain gallons of water sold and delivered; (2) a declara-

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tion that the defendants were not entitled without an agreement in that behalf to require the plaintiffs to supply water to the defendants' schools in the parish of Norwood (commonly called Southall) in the county of Middlesex, for any purpose, or (alternatively) for any of the purposes specifically described in paragraph 4 of the statement of claim; and (3) a declaration that the defendants were not entitled without the plaintiffs' consent to have or maintain a pipe with a bore exceeding half an inch communicating with the plaintiffs' pipes or to have or maintain a certain valve or by-pass.

By the South-West Suburban Water Act, 1883 (46 & 47 Vict. c. cxlvii.), and the statutes and Orders incorporated therewith, including the Waterworks Clauses Acts, 1847 (10 & 11 Vict. c. 17) and 1863 (26 & 27 Vict. c. 93), and the Norwood (Middlesex) Water Order, 1878, the plaintiffs were authorised and required to supply water within the parish of Norwood, in the county of Middlesex, in accordance with the provisions of such enactments.

The defendants were the owners and occupiers of premises in the parish of Norwood, where they had erected and maintained schools for the maintenance, education, and training of the workhouse children (to the number of about 350) of their own parish, which was far removed and in no way connected with such parish.

On December 6, 1901, the plaintiffs gave the defendants notice to terminate on March 25, 1902, an agreement then subsisting between the plaintiffs and the defendants for the supply of water to the schools, offering at the same time to enter into a new agreement for the further supply of water. The agreement thus terminated was one by which the defendants paid a certain price per 1,000 gallons by meter, and for the supply under which a 3-in. service pipe had been laid.

On March 10, 1902, the defendants passed a resolution to demand of the plaintiffs a supply of water for domestic purposes for the schools at a charge based on the annual rack rent or value of their premises, discontinuing at the same time any supply for the use of the defendants' swimming-bath. On March 11, 1902, the defendants communicated that resolution to the plaintiffs.

On March 20, the plaintiffs wrote to the defendants that, inasmuch as the defendants required a supply for domestic purposes only, the 3-in. pipe must be disconnected, and a $\frac{1}{2}$ -in. service pipe substituted, and that certain alterations, which the plaintiffs briefly indicated, must be made by the defendants in their system so as to disconnect the supply from purposes not of a domestic nature. The letter concluded by stating that the plaintiffs would supply, as from March 25, water for domestic purposes for which the charge would be based upon the annual value of the premises. On March 25 the defendants replied

that they had instructed the superintendent of their schools neither to make nor to allow any alterations to the schools or service mains connected with the supply of water, except to disconnect the swimming-bath, and they sent a copy of a resolution which the defendants had passed that the defendants' solicitors be instructed to resist any action on the part of the plaintiffs to avoid the defendants' resolution of March 10. and that the solicitors be instructed to enforce the performance of that resolution on the part of the plaintiffs.

On June 5, 1902, the plaintiffs, having been allowed inspection of the defendants' water services, gave details of the alterations which the plaintiffs said were necessary. On June 25, the defendants, in reply, simply referred to their previous resolution demanding a supply for domestic purposes. On June 30, the plaintiffs replied that if the guardians wished for a domestic supply only they must comply with the plaintiffs' previous request. The defendants, however, refused to make any alterations at all.

Subsequently the plaintiffs demanded payment upon the footing of so much per 1,000 gallons, and the defendants tendered payment on the footing of an annual charge based on the annual value. This tender the plaintiffs did not accept. The plaintiffs did not cut off the supply, but by writ issued on April 17, 1903, commenced the present action.

The plaintiffs by paragraph 4 of their statement of claim alleged as follows: "At the time of the determination of the said agreement between the parties the defendants were using the water so supplied by the plaintiffs for a considerable number of purposes other than domestic purposes, that is to say, (a) for garden and greenhouse supply, (b) for automatic flush cisterns with a continuous action by day and by night, (c) for a continuous and constantly running supply to a very large number of urinals, (d) for a large number of hydrants, (e) for three large Lancashire boilers used for (*inter alia*) driving machinery and pumping water, (f) for use in the laundry or laundries used for the business of laundry work and teaching the same to the female inmates of the schools, (g) for washing out a swimming-bath with a capacity of 25,000 gallons."

The plaintiffs contended that the defendants were not entitled under section 17 of the Order of 1878, or otherwise under the Acts above referred to, to demand any supply of water for the schools otherwise than by agreement with the plaintiffs.

The defendants counterclaimed for a declaration that they were entitled to be supplied with water for all the purposes mentioned in paragraph 4 of the plaintiffs' statement of claim other than purposes (a) and (g) at a rate not exceeding £6 per cent. per annum on the rack

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rent or value of the schools and at the rates for water-closets and baths specified in the Order of 1878.

The material sections of the Waterworks Clauses Act, 1847, are the following:—

Section 35 provides that "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water rate for the same. . . ."

Section 48 empowers the inhabitants to lay service pipes from the houses to the pipes of the undertakers.

Section 50 is as follows: "The bore of any such pipe as last aforesaid shall not exceed the prescribed limits, and where no limit is prescribed it shall not exceed half an inch, except with the consent of the undertakers."

Section 53 provides that "every owner and occupier of any dwelling-house, or part of a dwelling-house within the limits of the Special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the Special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

Section 12 of the Waterworks Clauses Act, 1863, provides as follows: "A supply of water for domestic purposes shall not include a supply of water for cattle . . . or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

Section 17 of the Order of 1878 provides as follows: "The undertakers shall, at the request of the owner or occupier of any dwelling-house, or part of a dwelling-house, entitled under the provisions of this Order to demand a supply of water for domestic purposes (which shall include one water-closet), furnish to such owner or occupier a sufficient supply of water for such domestic purposes, at rates not exceeding the yearly rates hereinafter specified; (that is to say,) . . . where such rack rent or value exceeds one hundred pounds, at a rate per centum on such rack rent or value not exceeding six pounds."

Section 19 of the Order enables the undertakers to make and enforce reasonable regulations for preventing the waste or misuse of water, and to prescribe the pipes, cocks, cisterns, and other apparatus proper and suitable for the purposes of supply.

Section 20 of the Order empowers the undertakers, if the regulations are not observed by any person, to refuse a supply or cut off the

supply, and provides for the determination of any difference as to whether the regulations are reasonable, or have been complied with, by two justices.

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Danckwerts, K.C., and *G. Wallace* for the plaintiffs. Under section 53 of the Waterworks Clauses Act, 1847, the owner or occupier of premises is entitled to demand a supply of water for "domestic purposes," but by section 12 of the Waterworks Clauses Act, 1863, it is provided that domestic purposes are not to include a supply for "any trade, manufacture, or business." What the defendants are doing at their school is bringing up and fitting for life pauper children. The school is therefore a business: *Rolls v. Miller* (1884) 27 Ch. D. 71; 53 L. J. Ch. 682. To constitute a business it is not essential that there should be payment: *Ibid.* The water therefore required for the school is not for "domestic purposes": *Barnard Castle Urban District Council v. Wilson*, 1901, 2 Ch. 813; 1902, 2 Ch. 746; 70 L. J. Ch. 859; 71 L. J. Ch. 825. *Pidgeon v. Great Yarmouth Waterworks Co.*, 1902, 1 K. B. 310; 71 L. J. K. B. 61, in which it was held that the occupier of premises used by him as a boarding-house was entitled to demand a supply of water for domestic purposes, was decided on a misapprehension of your Lordship's view in the *Barnard Castle* case (*supra*). In that case the plaintiffs admitted, and the case was fought before your Lordship on the footing that the defendants were entitled to a supply for domestic purposes, although they were carrying on a business. The test of whether water is supplied for "domestic purposes" is whether or not it is used for domestic purposes which are apart from the purposes of a business. Take the case of an hotel where the hotel keeper does not reside on the premises; it is submitted that in such a case he would not be entitled to require a supply of water except upon a contractual basis.

[BUCKLEY J. Then there would be an insanitary house. If a guest wished to wash his hands I should say that the water was required for a domestic purpose.]

If the defendants are entitled to require a supply they can only use it for strictly domestic purposes. If they require a further supply for other purposes, it must be by agreement with plaintiffs. They cannot demand a supply for mixed purposes. The words "domestic purposes" in the Order of 1878 cannot have the wide meaning contended for by the defendants, because they only include in the case of a dwelling-house one water-closet and do not include a bath. Then as to the purposes alleged by the defendants to be domestic: (b) Automatic flush cisterns with a continuous action by day and by night; (c) continuous and constantly running supply to a very large number of

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urinals. These involve, it is submitted, an unreasonable user, and are not domestic purposes. Even if they are domestic purposes they are contrary to the plaintiffs' regulations. (d) Hydrants. These again are not domestic purposes. (e) The Lancashire boilers. As to these it is obvious that water for a boiler to drive machinery is not for a domestic purpose, nor is (f) for use in the laundry used for the business of laundry work.

Further, assuming that the defendants are entitled to a supply for "domestic purposes" they are taking it through a pipe with a bore of 3 inches instead of $\frac{1}{2}$ inch or $\frac{3}{4}$ inch as provided by the plaintiffs' regulations. They are therefore committing a breach of the regulations which entitles the plaintiffs to stop the supply.

They also referred to *Bristol Waterworks Co. v. Uren* (1885) 15 Q. B. D. 637; 54 L. J. M. C. 97; Waterworks Clauses Act, 1847, ss. 35, 44, 50.

Macmorran, K.C., and *R. Cunningham Glen* for the defendants. The defendants' establishment is a Poor Law school. It is in reality part of their workhouse. The children are taken out of the workhouse and sent to a separate establishment. A supply of water to the inmates of a workhouse is a supply for domestic purposes: *Lisheard Union v. Lisheard Waterworks Co.* (1881) 7 Q. B. D. 505. It may be that the carrying on of a school is a business, but that does not disentitle the defendants to a supply for domestic purposes for the persons in the school: *Barnard Castle Urban District Council v. Wilson* (*supra*). In *Pidgeon v. Great Yarmouth Waterworks Co.*, 1902, 1 K. B. 310; 71 L. J. K. B. 61, it was held that there might be a supply for domestic purposes to persons in a boarding-house. Any house in which water is required for domestic purposes is a dwelling-house, although no one sleeps or takes meals there: *Cooke v. New River Co.* (1888) 38 Ch. D. 56; 57 L. J. Ch. 383.

Then as to whether the purposes here in dispute are domestic purposes. (a) is given up. (b) and (c) No one can dispute that water used for flushing latrines and urinals is used for a domestic purpose. [BUCKLEY J. I agree that reasonably done washing out closets is a domestic purpose.] Then as to (d), hydrants used for cleaning the pavement outside. There is nothing to prevent a person receiving a supply for domestic purposes from fitting the taps with hoses. The hydrants are there to be used in the case of fire. The plaintiffs' regulations as to (b), (c), and (d) are, it is submitted, *ultra vires*. If they are *intra vires* the defendants have not transgressed them. As to (e) boilers, these are in a somewhat different position. Some of the purposes for which they are used are purely domestic: *Smith v. Müller*, 1894, 1 Q. B. 192. If used for generating steam for laundry, that

might be for a domestic purpose. As to (f), the laundry is not used for instruction.

Then as to the 3-in. bore. Section 50 of the Waterworks Clauses Act, 1847, which provides that the bore of the pipe is not to exceed the prescribed limits, and, where no limit is prescribed, $\frac{1}{2}$ inch, applies only to a case where the pipe is laid by a private individual, and was intended for the protection of water companies. It is not a general prohibition. Under section 53 every owner or occupier is entitled to receive from the undertakers a sufficient supply of water for his domestic purposes. There is nothing in the Act to hinder the defendants from using as many pipes as are requisite in order to give them a sufficient supply. The defendants have at present a pipe with a 3-in. bore put in by the plaintiffs at the defendants' request. The plaintiffs are therefore estopped from saying that such a pipe is not necessary for an efficient supply, and consequently cannot cut off the supply.

They also referred to *Weaver v. Cardiff Corporation* (1883) 48 L. T. 906; Public Health Act, 1875, ss. 4, 62.

Danckwerts, K.C., in reply. The only obligatory provision as to supply is that contained in section 53, which entitles every owner and occupier of any dwelling-house "to demand and receive from the undertakers a sufficient supply for his domestic purposes." "Domestic purposes" there mean domestic purposes of the dwelling-house of which he is in occupation. A dwelling-house means a house in which people sleep: *Riley v. Read* (1879) 4 Ex. D. 100; 48 L. J. Ex. 437; *Charterhouse School v. Gayler*, 1896, 1 Q. B. 437; 65 L. J. Q. B. 233. Section 12 of the Act of 1863 must be read with section 53 of the Act of 1847. The object of section 12 was to preclude owners of business premises from the right to demand a supply for domestic purposes. Special provisions are made by the sections 38-41 of the Act of 1847 for fire-plugs. The plaintiffs are entitled to say that the defendants have not complied with their regulations, and therefore that the plaintiffs are not bound to supply them. If the defendants contend that the plaintiffs' regulations are *ultra vires* or unreasonable, their remedy is to go before the justices as provided by the Order. The plaintiffs ask for a declaration that the defendants have not put themselves in a position to demand a supply for domestic purposes.

Cur. adv. vult.

March 2. BUCKLEY J. stated the facts down to and including the letter of March 25, and continued:—In adopting this attitude, the defendants, in my judgment, were wholly in the wrong. From what follows it will appear that some of the purposes for which the existing

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supply was then used were not domestic purposes, and that the supply, so far as used for domestic purposes, was used by the defendants in a manner not permissible by the plaintiffs' regulations, duly made under the Order of 1878. The plaintiffs were, I think, within their rights in requiring that, before the supply at a charge based upon the annual value was made, the necessary proper alterations should be carried out in the defendants' system. [His Lordship then stated the further facts down to the issue of the writ and continued:—] The relevant statutory provisions are shortly as follows:—The Order of 1878 incorporates the Waterworks Clauses Act, 1847. By section 48 of that Act any owner or occupier of a dwelling-house may lay pipes from the undertakers' pipes into his premises. By section 50 the bore of any such pipe is not to exceed the prescribed limits, or, if none be prescribed, is not to exceed half an inch, except with the consent of the undertakers. By section 53 every owner and occupier of a dwelling-house shall, when he has laid his communication pipes, be entitled to demand and receive a sufficient supply of water for his domestic purposes. By section 35 the undertakers are to provide a supply of water sufficient for the domestic use of all the inhabitants who shall be entitled to demand a supply. By the Waterworks Clauses Act, 1863, s. 12, a supply of water for domestic purposes is not to include, amongst other things, a supply for any trade, manufacture, or business. By the Order of 1878, s. 17, the undertakers shall, at the request of the owner or occupier of any dwelling-house, furnish a sufficient supply for domestic purposes. By section 19 the undertakers may make and enforce reasonable regulations for preventing the waste or misuse of water, and may prescribe the pipes, cocks, cisterns, and apparatus suitable for the purposes of supply. By section 20, in the event of the regulations not being observed, the undertakers may refuse to supply, or may cut off the supply, unless and until the regulations are complied with, and any difference as to whether the regulations are reasonable or have been complied with may be referred by either party to, and shall be settled by, two justices. By section 21 the undertakers may supply with water for other than domestic purposes for such remuneration and upon such terms as may be agreed.

The correspondence shows that the plaintiffs did not thereby deny the right of the defendants to receive a supply for domestic purposes upon complying with proper conditions. By their statement of claim, however, and at the Bar, they have put forward a contention that the defendants are not entitled except by agreement to a supply for domestic purposes at all. This contention is based upon an argument that the purposes of these schools constitute a business; and that section 12 of the Act of 1863 excludes them from a supply for domestic pur-

poses. Even if (which is not here the case) the premises were occupied, not as a dwelling-house by persons resident and sleeping there, but purely for the purposes of a business—say, of a factory—I should not be prepared to hold, at least without further argument, that, even in that case, the supply of water for what I may call sanitary purposes—such as supplying washhand-basins or the ordinary flushing of water-closets—could be refused upon the mere ground that no one, or only a caretaker, slept upon the premises. It is noticeable that for domestic purposes there is a right to demand a supply, and that there is no right to demand a supply for other purposes. It is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor. The test of residence is not a test of the purposes of user. If the contention be well founded, a factory would be excluded from a right of supply for even sanitary purposes, a conclusion at which I should be very slow to arrive. The contention rests upon the basis that a house is not a dwelling-house unless the residence in or occupation of the house extends to sleeping in it. In *Cooke v. New River Co.* (1888) 38 Ch. D. 56, 66; 57 L. J. Ch. 383, Lindley L.J., speaking, no doubt, of a different Act expressed in different terms, says: "I am disposed to think that anything is a dwelling-house within the meaning of this section which is a house and in which water is required for domestic purposes, or for any other purposes for which rates are fixed." As at present advised I think this is true of the Waterworks Clauses Acts. Upon the same point I refer to *Smith v. Müller*, 1894, 1 Q. B. 192. The point, however, does not arise in this case, for these schools are occupied by children, and by those who govern and control them, being persons who are all resident on the premises. There is no question, in my judgment, but that these premises constitute a dwelling-house: *Liskeard Union v. Liskeard Waterworks Co.* (1881) 7 Q. B. D. 505. As a dwelling-house they are, I think, entitled to a supply for domestic purposes, if such premises can be spoken of as having domestic purposes. But, granting that the schools are a dwelling-house, the next contention of the plaintiffs is that these premises have not and cannot have domestic purposes because that which is carried on upon the premises is a business, and that all the supply is for the purposes of that business, and they say that section 12 of the Act of 1863 applies. If I were to define the business carried on I should say that it is the business of providing for, maintaining, and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. It was held in *Rolls v. Miller* (1884) 27 Ch. D. 71; 53 L. J. Ch. 682, that a home for working girls is a business. This, no doubt, was upon a covenant which involved some

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considerations not relevant here, but the reasoning in that case is, I think, applicable to the present case. But, although that which is carried on upon the premises is a business, it is, in my judgment, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is, what is the character of the purpose, not what is the character of the place of user? Thus a boarding-house is a business, but persons in a boarding-house may and do want water for domestic purposes: *Pidgeon v. Great Yarmouth Waterworks Co.*, 1902, 1 K. B. 310; 71 L. J. K. B. 61. The inhabitants of a workhouse, although maintained for a public purpose, can demand water for domestic purposes—that is to say, for use within the workhouse for purposes which are domestic as distinguished from purposes of trade: *Liskeard Union v. Liskeard Waterworks Co.* (1881) 7 Q. B. D. 505. If within the same premises water is required both for domestic purposes and for trade purposes the solution of the matter is, I think, that there must be two supplies—the one for that which can be demanded, and for which payment is to be made upon the rateable value of the premises, and the other for that which cannot be demanded, and can be taken only by agreement at such price as may be agreed, based probably upon the consumption as ascertained by meter. If, therefore, the defendants here wanted water for two such purposes the plaintiffs were, I think, right in saying, “As to the supply which you demand for domestic purposes, put yourself in a position to confine the user to domestic purposes, and we will give you the supply.” As to the rest, the matter would have to wait agreement between the parties.

It remains to investigate whether the purposes to which the defendants put the water supplied were wholly, or in part, and to what extent respectively domestic and not domestic, and, so far as they were domestic, whether the plaintiffs' reasonable regulations were complied with. The short way to deal with this is to indicate such as were not domestic and such as, being domestic, were not taken in accordance with the regulations. It is convenient here to refer to the plaintiffs' statement of claim. No one says, having regard to section 12 of the Act of 1863, that water for garden and greenhouse supply is domestic. Further, the defendants do not say that water for washing out the swimming-bath is domestic. As appears by the correspondence, they had ceased to require any supply to the swimming-bath before the dispute arose. The matters which remain fall substantially under the following heads:—(b) Automatic flushing cisterns with a continuous action by day and by night. Of these there are ten of capacity from 40 to 90 gallons discharging 12 or 15 times in the 24 hours at a total consumption of 6,180 gallons for 24 hours, equal to 1,265,700 gallons

per annum. The plaintiffs have made regulations under section 19 of the Order. These automatic cisterns are in breach of the regulations. There are 40 water-closets flushed from fixed cisterns. By regulation No. 21 no cistern for a water-closet must deliver more than two gallons at a flush; 13 of these water-closets discharge $2\frac{1}{2}$ gallons, and 26 discharge three gallons at a flush. These are in breach of the regulations. The observation upon this head is not that the water is not taken for a domestic purpose, but that it is taken in a way not allowed by the regulations, which seem to me reasonable, and which, until two justices under section 20 of the Order shall have held otherwise, I take to be reasonable. By section 20 of the Order the undertakers may refuse to supply until those regulations are complied with. The next head (c) is for a continuous and constantly running supply for urinals. This continuous flow is in breach of the regulations. My observation on this is the same as on the previous head (b). The next head (d) is for hydrants. Of these there are 11. There has, happily, never been occasion to use them for the purposes of fire, for which they are intended, but they are used for washing purposes by attaching a hose and washing the yards and paths of the premises. This, I think, is a domestic purpose, but, again, it is in breach of regulation 28. It is obvious that a very large amount of water may thus be used which may be unreasonable. The next head (e) relates to three large Lancashire boilers, which are used for three purposes. First, for heating water for warming the buildings by circulation. This seems to me to be a domestic purpose. But secondly, they are used for purposes of power, to drive machinery of two classes; the one is machinery which is used in the laundry, and the other is certain pumps, which are employed for raising water from certain wells which the defendants have on their ground. In my opinion the supply of power for the above is not a domestic purpose. Reading the judgment of the Court of Appeal in *Barnard Castle Urban District Council v. Wilson*, 1902, 2 Ch. 746; 71 L. J. Ch. 825, it seems to me that the wide scope which Vaughan Williams L.J. there thought should be given to the words "domestic purposes" was not adopted by the other two members of the Court. It is plain that it was not adopted by Romer L.J. It is a little more difficult to say what was the view of Stirling L.J. But I think the result of the case is that in arriving at a decision on the words "for domestic purposes" regard is to be had to that which is reasonable having regard to the purposes for which, according to the ordinary habits of domestic life in this country, people require water in their houses. As to the particular question of the use of water for power, I refer to what Romer L.J. says at the top of p. 756, that to use water at high pressure to drive a dynamo for purposes of lighting by elec-

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tricity is not a domestic purpose. I think the same is true of the use of water to generate steam for purposes of power. I notice that in *Pidgeon v. Great Yarmouth Waterworks Co.*, 1902, 1 K. B. 310; 71 L. J. K. B. 61, Channell J. seems to have thought, although Darling J. certainly did not, that I had in the *Barnard Castle* case when it was before me (1901, 2 Ch. 813; 70 L. J. Ch. 859) held that the use of water for a large swimming-bath in a private house would be use for a domestic purpose. I think it is well to point out that I decided nothing of the kind. Counsel for the plaintiffs before me admitted that water for a swimming-bath in a private house would be for a domestic purpose, and although I used some pressure to induce him to argue the contrary (for my opinion was the other way), I did not succeed in arriving at that result. All that I decided was that, it being conceded that a swimming-bath in a private house would be for a domestic purpose, the same proposition was true in the case with which I had to deal. I thought the swimming-bath there was not educational, and if a swimming-bath in a private house would be domestic, the affirmative of which the plaintiffs admitted there, I, upon that hypothesis, thought it was domestic. The Court of Appeal only differed from me on the question of fact, and held that the swimming-bath there was educational. Under these circumstances they had not to decide whether it could have been justified as domestic. If they had had to decide the point, I think they would not have been unanimous in opinion. I think the true result of the cases is that the words "domestic purposes" include user not merely for washing, drinking, flushing closets, and the like, but extend to user for what in the *Bristol Waterworks Co. v. Uren* (1885) 15 Q. B. D. 637, 648; 54 L. J. Q. B. 97, were called the amenities of the house, but that the limits of such amenities must be ascertained with due regard to what is reasonable and what is the ordinary user in our day. This user of the boilers for power is not, in my opinion, a user for domestic purposes. Thirdly, the boilers are used for laundry purposes. Here a subdivision is necessary. So far as they are employed for power to drive laundry machinery, the purpose is not, in my opinion, domestic. So far as they are employed simply for the supply of hot water for laundry purposes the user is, I think, domestic. The latter, again, is said to require a sub-qualification. To some extent the laundry is used for educational purposes. A few of the elder girls go there, one at a time, say three days in a week, to be taught laundry work in the laundry. Strictly, no doubt this is educational, not domestic. But the matter is too small to be worth attention. A parallel case would be a case where a mother sent her daughter into the laundry on washing days to learn something of the laundry work.

As regards the bore of the service pipe, section 50 of the Act of 1847 provides that it shall not exceed the prescribed limits, and where no limit is prescribed shall not exceed half an inch, except with the consent of the undertakers. No. 12 of the plaintiffs' regulations allows a bore of half an inch or three-quarters of an inch for the service of a supply for domestic purposes. The defendants are entitled (if and when they put themselves in a position to take a domestic supply) to use a pipe of three-quarters of an inch bore, but not a larger bore without the plaintiffs' consent. I find nothing to limit them to one such pipe. They are entitled to so many pipes of a bore of three-quarters of an inch as are necessary for obtaining a sufficient supply within section 53 of the Act of 1847.

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For the determination of this action it is sufficient to say that the defendants have not at any time during the period in respect of which the plaintiffs sue for payment put themselves in a position to demand a supply for domestic purposes. It results that the plaintiffs are entitled to payment upon the basis of the fair value of the amount of water supplied. It is, therefore, not necessary for the determination of this action to declare which of the purposes to which the water is at present supplied are and which are not domestic purposes. It is sufficient that some of them are not domestic, and that as regards such as are domestic the regulations are not complied with. For the guidance of the parties I have endeavoured to express as clearly as I can which are of the one and which are of the other character. But it is unnecessary, and I think inexpedient, to introduce into the Order declarations specifically to each case. For instance, as regards the water to the boilers, the question whether the supply to them is domestic or not domestic turns upon the uses to which the boilers are put. Again, the supply to the flushing cisterns is objectionable, not because the flushing of water-closets is not a domestic purpose, but because the nature of the user which the defendants make is in breach of the plaintiffs' regulations. If, hereafter, any question should arise as to whether any particular user is domestic or not domestic, or is in breach of the regulations, it should be raised, I think, in a concrete form.

The Order which I make is as follows:—I declare that the defendants, upon complying with the reasonable regulations for the time being lawfully made by the plaintiffs, under section 19 of the Order of 1878, will be entitled to a supply for domestic purposes at the rate provided for by the same Order. I declare that the defendants are not entitled without the plaintiffs' consent to have or maintain for that purpose any pipe with a bore exceeding three-quarters of an inch communicating with the plaintiffs' pipes, or to have the by-pass and

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valve mentioned in the statement of claim. I declare that the defendants had not, during the period over which the plaintiffs seek to recover payment in this action, complied with such regulations or provided a pipe or pipes of the bore lawfully useable for that purpose, and had not become entitled to a supply for domestic purposes. I declare that the plaintiffs are entitled in this action to payment upon the basis of a supply by meter at a reasonable price per 1,000 gallons. I hope the parties will agree as to what is a reasonable price, but if not, I must put that in course of trial in a proper manner, for it has not been the subject of evidence before me. There will be one order in the action and counter-claim. The defendants must pay the costs of both the action and counter-claim.

Judgment accordingly.

It was ultimately agreed between the parties that the payment for the water taken should be at the rate of 1s. per 1,000 gallons.

Solicitors for the plaintiffs—Bolton & Co.

Solicitors for the defendants—Clarkson, Greenwell, & Co.

High Court of Justice.

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LIVINGSTONE v. WESTMINSTER CITY COUNCIL.

Mar. 4, 9.

Officers—Compensation—Metropolitan borough—Abolition of office—Salary and emoluments—Resolution of council assessing amount—Rescission of resolution—Metropolis Management Act, 1855 (18 & 19 Viot. c. 120), s. 57—Superannuation Act, 1859 (22 Viot. c. 26), ss. 2, 7.—Local Government Act, 1888 (51 & 52 Viot. c. 41), s. 120—Local Government Act, 1894 (56 & 57 Viot. c. 73), s. 81 (7)—London Government Act, 1899 (62 & 63 Viot. c. 14), s. 30.

Where an officer transferred to a metropolitan borough council by section 30 of the London Government Act, 1899, is entitled, under that section and section 120 of the Local Government Act, 1888, as incorporated therewith, to compensation on abolition of office, the maximum compensation that can be granted is determined by the officer's ultimate salary and emoluments and not by an average of his salary and emoluments for the period of five years with reference to which he is required to give particulars by section 120 (2) of the Act of 1888.

It is for the council to decide as a question of fact what the amount of the salary and emoluments is, and if they decide the question honestly and fairly, the Court will not review their decision unless they have proceeded plainly upon a wrong basis.

Where the council have duly considered the officer's claim, and passed a resolution fixing the amount of compensation to be awarded to him, they have no power subsequently to rescind the resolution. Section 57 of the Metropolis Management Act, 1855, which regulates the rescission of previous resolutions by a metropolitan borough council, is restrictive and not enabling.

A resolution of such a council fixing the amount of such compensation at an amount in excess of the statutory limit is not ultra vires, but is good to the extent of the statutory limit, and bad as to the excess.

Semble, that in the case of abolition of office under the London Government Act, 1899, the period of five years with reference to which particulars must be given in a claim for compensation runs to the date of the abolition and not to the passing of the Act.

This was an action by the plaintiff, George Livingstone, to recover arrears of compensation alleged to be due to him as the former holder of an office which had been abolished.

Under the London Government Act, 1899, the powers and duties of the vestry of the parish of St. George, Hanover Square, were on November 9, 1900, transferred to the defendant council, and by section

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30 of the Act the plaintiff was transferred to and became an officer of the defendants.

From 1874 until such transfer the plaintiff was surveyor of the parish of St. George, Hanover Square, and apart from incidental emoluments, was latterly in receipt of a salary of £700 a year, and was subsequently paid at this rate by the defendant council until January 31, 1901, when he was appointed temporary city engineer and surveyor at a rate of £83 6s. 8d. per month under the following resolution of the council :—

“ Resolved—That Mr. George Livingstone, without prejudice to his compensation for abolition of office, be appointed temporarily city engineer and surveyor for a period of three months or until a permanent city engineer and surveyor is appointed and enters on his duties, whichever period is longest, and that he shall continue to perform his duties as surveyor of the parish of St. George, Hanover Square, at a salary of £83 6s. 8d. per month on condition that he undertakes not to apply for the permanent appointment.”

The condition that the appointment should be without prejudice to the amount of his compensation was in conformity with clause 3 of the London (Existing Officers) Scheme, 1900.

The council subsequently appointed a permanent engineer who took up his duties on May 30, 1901, and on May 9, 1901, the council resolved—

“ That the office of surveyor of the parish of St. George, Hanover Square be abolished as from the 31st May instant, and that Mr. G. Livingstone be requested to send in his claim for compensation on abolition of office.”

On July 23, 1901, the plaintiff sent in his claim for compensation, the particulars of which were as follows :—

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Description of Office.	Description of salary and other emoluments.	1896-1897.	1897-1898.	1898-1899.	1899-1900.	1900-1901.	Total.
Surveyor to the Vestry.	Salary	£ 650	£ 658	£ 700	£ 700	£ 800	£ 3,508
	Allowance voted by Vestry for providing horse and carriage to be used in the Vestry work ...	20	20	20	20	20	100
	Wages of coachman, keep of horse, including fodder, &c., repairs to carriage and harness, veterinary care, and shoeing	115	115	115	115	115	575
	Stable and coach-house	25	25	25	25	25	125
	Allowance for services, baths, libraries, and public cemetery, &c. ...	—	—	—	—	100	100
	TOTAL	810	818	860	860	1,060	4,408

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EXPENDED.

Description of Office.	Description of Expenditure.	1896-1897.	1897-1898.	1898-1899.	1899-1900.	1900-1901.	Total.
Surveyor to the Vestry.	Proportion of wages of coachman and keep of horse, including fodder, &c., repairs to carriage and harness, veterinary care, and shoeing	£ 40	£ 40	£ 40	£ 40	£ 40	£ 200
	TOTAL	40	40	40	40	40	200

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	Deduct total amount expended ...	200	0	0
	Net total of salary and other emoluments ...	4,208	0	0
	Average salary and other emoluments for 5 years ...	841	0	0
	<i>Annual allowance claimed</i> ...	518	12	4

The sum of £518 12s. 4d. was $\frac{3}{8}$ ths of the sum of £841, and appears to have been regarded by the plaintiff as the maximum amount he could be awarded under the enactments hereinafter referred to. The fraction $\frac{3}{8}$ ths represented $\frac{1}{8}$ th for each year the plaintiff had been in office, with an addition of $\frac{1}{8}$ ths.

The annual items of £20, £115, and £25 had reference to an arrangement between the plaintiff and the Vestry embodied in a recommendation of their works committee, adopted by the Vestry on August 19, 1875, "that in the event of the surveyor finding a horse and vehicle to assist him in superintending outdoor work the vestry make him an allowance of £20 per annum and provide fodder stable room and attendance."

The defendant council, having considered his claim, on August 1, 1901, passed a resolution awarding him an annual allowance of £518 12s. 4d. in accordance with his claim.

On November 6, 1902, the district auditor being of opinion that in assessing the compensation the defendant council had illegally treated as emoluments the sum of £20 a year, and the estimated value of the provision of fodder and stable room and attendance mentioned in the plaintiff's claim, disallowed so much of the annual allowance as had been paid to the plaintiff in respect of those items up to March 31, 1902, and surcharged them upon the members of the finance committee who signed the cheques, the amount of such surcharge being £61 13s. 5d.

Neither the defendant council nor the councillors surcharged attempted to challenge the surcharge by *certiorari* or by appeal to the Local Government Board; but on November 20, 1902, the defendant council passed a resolution purporting to rescind the resolution of August 1, 1901, granting the plaintiff an allowance of £518 12s. 4d., and resolved:

"That in lieu thereof, Mr. Livingstone be granted an annual allowance of £432 7s. 10d. in accordance with the Treasury scale, being $\frac{1}{8}$ th for each complete year of service (*i.e.*, 27 years), plus $\frac{1}{8}$ ths for compulsory abolition of office, total $\frac{3}{8}$ ths of the average salary and other emoluments of the office for the five years next before the date of the abolition

of the office, which amounted to £701 12s., and that such annual allowance shall commence to be payable subject to a proper adjustment of the same, and of the amounts already paid as from the date of such abolition."

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In revising their assessment of the plaintiff's annual allowance the council excluded the "received" and "expended" items in respect of the horse and carriage, and also deducted £100 from the salary which the plaintiff claimed to have received for the year 1900-1 (viz., £800), being the difference between his annual salary as surveyor for the parish of St. George, Hanover Square (viz., £700 a year), and the increased amount of salary which he actually received in that year in consequence of his appointment as temporary city engineer and surveyor. They also deducted from amounts subsequently becoming due to the plaintiff the sums surcharged by the district auditor, and also the amount which he had been paid in excess under the resolution of August 1, 1901.

The plaintiff was advised by the town clerk that he could appeal to the Treasury against the new resolution, and took certain steps for this purpose; but finding that he could not on the appeal challenge the validity of the second resolution, withdrew his appeal, and brought the present action against the defendants (1) for the unpaid arrears on the resolution of August 1, 1901, and (2) for the sums deducted by the defendants in paying instalments under the resolution of November 20, 1902, in order to recoup themselves the amount of the surcharge.

The defendants contended that the resolution of August 1, 1901, was *ultra vires*, in that the annual allowance alleged to have been thereby awarded to the plaintiff exceeded by the sum of £86 4s. 6d. the amount which under the Acts and rules relating to the Civil Service would be payable to a person on abolition of office, and that they were not bound by the resolution. They alleged that the plaintiff's claim for compensation was in excess of the amount payable to him under such Acts and rules, and that the council, in the mistaken belief that the compensation claimed by the plaintiff was claimed in respect only of pecuniary loss in fact suffered by him by the abolition of his office, resolved in excess of their powers to award the plaintiff an annual allowance of £518 12s. 4d. They further alleged that the plaintiff was not entitled to receive, and that the council had no power to pay to the plaintiff, as compensation for the loss of his office, an annual sum exceeding £432 7s. 10d. They also, by way of counter-claim, claimed a declaration (1) that the resolution of August 1, 1901, was *ultra vires*, and was not binding on the defendants, and that a payment of a sum of £111 19s. 5d. to the plaintiff was an unauthorised payment, and that the plaintiff was not entitled to retain it as against the defendants.

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The following enactments were material to the case :—

Section 30 of the London Government Act, 1899 (62 & 63 Vict. c. 14), provides as follows :—

(1) Where the powers and duties of any authority are transferred by or under this Act to any borough council, the existing officers of that authority shall be transferred to and become the officers of that council The council may abolish the office of any such officer whose office they may deem unnecessary and any officer whose office is abolished, shall be entitled to compensation under this Act.

(2) Subsections four and seven of section eighty-one of the Local Government Act, 1894, shall apply to the existing officers affected by this Act as if references in those subsections to the district council were references to the borough council

(3) For the purposes of this section "existing officers" shall mean officers holding office on the twenty-fourth day of February one thousand eight hundred and ninety-nine and also at the passing of this Act.

(4) A scheme under this Act may make such provisions as may appear necessary for carrying this section into effect

Subsection (7) of section 81 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), provides as follows :—

Section 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply in the case of existing officers affected by this Act as if references in that section to the county council were references to the parish council, or the district council, or board of guardians or other authority whose officer the person affected is when the claim for compensation arises as the case may require

Section 120 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), provides as follows :—

(1) Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office.

(2) Every person who is entitled to compensation, as above mentioned, shall deliver to the county council a claim under his hand setting forth the whole amount received and expended by him or his predecessors in office, in every year during the period of five years next before the passing of this Act, on account of the emoluments for which he claims compensation, distinguishing the offices in respect of which the same have been received, and accompanied by a statutory declaration under the

Statutory Declaration Act, 1835, that the same is a true statement according to the best of his knowledge, information, and belief. 1904.

(3) Such statement shall be submitted to the county council, who shall forthwith take the same into consideration, and assess the just amount of compensation (if any), and shall forthwith inform the claimant of their decision. Livingstone v.
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(4) If a claimant is aggrieved by the refusal of the county council to grant any compensation, or by the amount of compensation assessed, or if not less than one-third of the members of such council subscribe a protest against the amount of the compensation as being excessive, the claimant or any subscriber to such protest (as the case may be) may, within three months after the decision of the council, appeal to the Treasury, who shall consider the case and determine whether any compensation, and if so, what amount ought to be granted to the claimant, and such determination shall be final.

* * * * *

(6) The sum payable as compensation to any person in pursuance of this section shall commence to be payable at the date fixed by the council on granting the compensation, or, in case of appeal, by the Treasury, and shall be a specialty debt due to him from the county council, and may be enforced accordingly in like manner as if the council had entered into a bond to pay the same.

* * * * *

The Superannuation Act, 1859 (22 Vict. c. 26), contains the following provisions :—

Section 2. Subject to the exceptions and provisions hereinafter contained, the superannuation allowance to be granted after the commencement of this Act to persons who shall have served in an established capacity in the permanent Civil Service of the State, whether their remuneration be computed by day pay, weekly wages, or annual salary shall be as follows ; (that is to say,)

To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the annual salary and emoluments of his office :

For eleven years, and under twelve years, an annual allowance of eleven-sixtieths of such salary and emoluments :

And in like manner a further addition to the annual allowance of one-sixtieth in respect of each additional year of such service, until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted ; and no addition shall be made in respect of any service beyond forty years

Section 7. It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said Commissioners to be a reasonable and just compensation for the loss of office ; and if such compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act if ten years were added to the number of years which he may have actually served, such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament, and no such allowance shall exceed two-thirds of the salary and emoluments of the office.

Though section 120 of the Act of 1888 refers to the Acts and "rules" relating to the Civil Service, there appears to be no statutory power to

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make rules relating to the amount payable as compensation for abolition of office. The practice of the Treasury is to make the following additional allowances, in the case of abolition of office, beyond the allowance of $\frac{1}{60}$ th for each year of service.

Actual Service.	Addition.
20 years and upwards	$\frac{1}{60}$ ths.
15 years and less than 20	$\frac{7}{60}$ ths.
10 years and less than 15	$\frac{5}{60}$ ths.
5 years and less than 10	$\frac{3}{60}$ ths.
Under 5 years	$\frac{1}{60}$ th.

Subject to a reasonable deduction where the officer has not been required to give his whole time to the duties of his office.

Danckwerts, K.C., and *W. F. Craies* for the plaintiff. First, the resolution of August 1, 1901, was regularly passed. Under section 30 of the London Government Act, 1899, with which are to be read section 120 of the Local Government, 1888, and section 81 (7) of the Local Government Act, 1894, the city council are the proper authority to determine the amount of the compensation to be awarded to an "existing officer." The only authority to which an appeal is given from the decision of the council is the Treasury: section 120 (4) of the Act of 1888. Unless, therefore, the council act *ultra vires*, in the absence of any such appeal, their decision is final. The council have to decide what is the amount of the salary and emoluments the officer will lose by the abolition of his office, and in estimating the amount of the allowance to be made him they must not exceed the limits prescribed by sections 2 and 7 of the Superannuation Act, 1859, which are incorporated by section 120 (1) of the Act of 1888.

[BUCKLEY J. Suppose the council by mistake go beyond those limits?]

This Court cannot act as a court of appeal on a question of that kind, otherwise the provision in the Act for an appeal to the Treasury would be useless.

[BUCKLEY J. The question of the value of the emoluments is one of fact. Is it a question for the Court, or for the council subject to an appeal to the Treasury?]

For the latter. Here the plaintiff obtained a private advantage out of the use of the horse and carriage, and that is a subject for compensation: *Reg. v. Postmaster-General* (1878) 3 Q. B. D. 428; 47 L. J. Q. B. 435. The resolution, therefore, not having been appealed against, has become final and conclusive, and creates a specialty debt having the effect of a contract under the seal of the council to pay the amount

awarded: section 120 (6) of the Act of 1888. The council have considered the question whether the use of the horse and carriage was an emolument, and exercised their discretion upon it, and the Court cannot therefore review their decision. *Rex v. Stepney Borough Council*, 1902, 1 K. B. 317; 71 L. J. K. B. 238, where it was held that no discretion had been exercised, does not therefore apply. In that case Channell J. doubted whether even in a case where the council declined jurisdiction, the appeal was not to the Treasury. [On this point they also referred to *Brittain v. Kinnaird* (1819) 1 Br. & B. 432; *Reg. v. Bolton* (1841) 1 Q. B. 66; *Allen v. Sharp* (1848) 2 Ex. 352; 17 L. J. Ex. 209.] The district auditor had therefore no power to review the decision of the council.

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Secondly, the council could not by the resolution of November 20, 1902, rescind the previous resolution of August 1, 1901, by which a specialty debt was created in favour of the plaintiff. Further, there was no public notice given of the purpose for which the meeting, at which the second resolution was passed, was convened as required by section 9 of the Metropolis Management Act, 1856. Under section 57 of the Metropolis Management Act, 1855, a resolution cannot be revoked at a subsequent meeting except under the circumstances mentioned in the section. The section does not give a council power to rescind a contract; it only restricts any power, which the council may have independently of the section, to rescind a resolution. The resolution of November 20, 1902, was, therefore, invalid.

Manisty, K.C., and *R. Cunningham Glen* for the defendants. The notice of meeting for November 20, 1902, expressly stated that the meeting was specially convened for the purpose of rescinding the resolution of August 1, 1901. It was not necessary under the Act of 1856 that there should be notice of the business which would come up at the meeting. There was power to rescind the previous resolution. Section 57 of the Act of 1855 presupposes the existence of such a power.

[BUCKLEY J. Suppose the council were to resolve that A. B. should be employed to do certain work at certain fees, could they after three months rescind that resolution?]

No.

[BUCKLEY J. Then where do you draw the line?]

The specialty debt clause is merely procedure.

[BUCKLEY J. Suppose the council put their seal to a resolution in the form of a covenant, could they rescind that?]

No.

[BUCKLEY J. Then how could they rescind the resolution of August 1, 1901?]

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If that resolution was, in fact, *ultra vires*, the defendants are not estopped from alleging that it was so, because they are a trust corporation. The council had a discretion as to the amount of the compensation provided that it did not exceed the maximum prescribed by section 120 (1) of the Act of 1888. The Court will treat an improper exercise of a discretion as a failure to exercise a discretion: *Reg. v. St. Pancras Vestry* (1890) 24 Q. B. D. 371; 59 L. J. Q. B. 244; *Rex v. Stepney Borough Council*, 1902, 1 K. B. 317; 71 L. J. K. B. 238. Here the council have exceeded the discretion conferred on them by section 120 (1) of the Act of 1888 by granting the plaintiff an allowance of £518, inasmuch as they did more than compensate him for his direct pecuniary loss. The resolution of August 1, 1901, was, therefore, *ultra vires*, and the defendants were, therefore, entitled to rescind it. If the Court should hold that the resolution is valid it will leave the members of the council exposed to a continuing surcharge.

Further, the compensation awarded to the plaintiff was based on a statement of salary and emoluments extending over the wrong period of five years, and the resolution awarding it was also *ultra vires* on that ground. The five years referred to in section 120 (2) are the five years before the coming into force of the Act of 1899.

[BUCKLEY J. Assuming that to be so, under section 120 (3) the council made an assessment, having before them the plaintiff's statement. Is this resolution bad? They were not bound to act on the wrong statement, but merely to assess. To show that their resolution was *ultra vires*, you must show that they were bound to assess over a particular period of five years. The Act does not say that they are so bound.]

The most on which the council could assess the compensation would be the "salary and emoluments" of the plaintiff. When he left the service of the vestry this was represented by the amount of his salary. The compensation was to be based on "the salary and emoluments which he had as surveyor to the late vestry." He cannot claim compensation for the £83 a month which he was receiving in 1902 in respect of his temporary employment under the council. The council was acting *ultra vires* in taking that into consideration. As to whether the use of the horse and carriage was an emolument within section 7 of the Superannuation Act, 1859, there was no payment, in fact, to the plaintiff of the £115, which was its estimated figure. He was not getting £115 as an emolument, either in money or money's worth. What he did get was permission to use the horse for his own purposes when it was not wanted for the purposes of his office.

Then as to the question of appeal. If a council, which is a trustee for the public, receives a statement showing, contrary to the fact, that

emoluments have been received, in assessing compensation on that statement, the council may be acting *ultra vires*. The mistake in the present case was not discovered until after the expiration of the three months limited by section 120 (4) for appeal to the Treasury, and no appeal could, therefore, be made. As to the difference between a trading corporation and one which is a trustee for another, see *South Yorkshire, &c., Railway, v. Great Northern Railway* (1853) 9 Ex. 55, 84, which is approved of in *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) L. R. 7 H. L. 653; 44 L. J. Ex. 185. There is jurisdiction in this Court to determine what can be taken into account in estimating the amount of a pension: *Upperton v. Ridley*, 1903, A. C. 281; 1 L. G. R. 659; 72 L. J. K. B. 535.

Danckwerts, K.C., replied.

Cur. adv. vult.

March 9. BUCKLEY J. When the London Government Act, 1899, came into operation in November, 1900, the plaintiff, Mr. Livingstone, was an existing officer of the Vestry of St. George, Hanover Square, within section 30 (1) of that Act. Under a scheme made by virtue of section 30 (4), the Westminster City Council, which by virtue of the Act succeeded to the Vestry, had power to agree with him as an existing officer of the Vestry that his acceptance of an office under the Council for a temporary period should not prejudice any right to compensation to which he would otherwise have been entitled by or under the Act of 1899. The Act having, as I have said, come into operation in November, 1900, the Council passed, on January 31, 1901, a resolution for his temporary employment at a certain salary, without prejudice to the amount of his compensation for the abolition of his office. On May 9, 1901, the Council resolved that his office should be abolished as from May 31, 1901, and asked him to send in his claim for compensation. He did so, with the result that on August 1, 1901, the Council passed a resolution granting him an annual allowance of £518 12s. 4d.

The defendants say that the plaintiff in sending in his claim gave the particulars of a wrong period of five years. They say that, having regard to section 120 (2) of the Local Government Act, 1888, the proper five years would have been five years next before the passing of the Act of 1899. I do not agree; but it is immaterial, for the power of the Council is, by virtue of section 120 (3) of the Act of 1888, a power to assess, not in respect of any particular period, but generally. If the plaintiff did select a wrong five years, the Council should have asked him for another return. In fact, however, I believe it was they who named the particular five years for which he gave the particulars.

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At any rate, having his claim before them, the Council assessed the compensation, and passed the resolution of August 1, 1901.

The first question for decision is whether that resolution was valid. The only ground upon which it is attacked is that the *maximum* sum which could be voted as compensation being 37-60ths of his salary and emoluments, the sum, viz., £841, of which £518 12s. 4d. is 37-60ths, is alleged to have been in excess of his salary and emoluments. The *maximum* is arrived at by reference to several Acts of Parliament, of which the later in each case introduces by reference some part of a former Act. The Act of 1899, s. 30 (2), brings in section 81 (7) of the Local Government Act, 1894, which in turn brings in section 120 of the Local Government Act, 1888. The concluding words of section 120 (1) of the Act of 1888 bring in section 7 of the Superannuation Act, 1859, which in turn sends the reader back to section 2 of the Act of 1859. The result is that section 7 of the Act of 1859, coupled with section 2 of the same Act, fixes as the *maximum* compensation which can be given in any case 40-60ths, or two-thirds of the officer's salary and emoluments; but, having regard to the length of this officer's service, the *maximum* in his case is 37-60ths of the salary and emoluments of his office. The facts which would have to be investigated in order to determine what the plaintiff's salary and emoluments were include the following:—First, what "emolument" within the decision in *Reg. v. Postmaster-General* (1878) 3 Q. B. D. 428; 47 L. J. Q. B. 435, the officer derived under a resolution of the Vestry of August 19, 1875, by which, in the event of his finding a horse and carriage to assist him in his outdoor work, the Vestry made him an allowance of £20 a year, and provided fodder, stable room, and attendance. Secondly, what "emolument," if any, the officer received in respect of a sum of £100 which, by a resolution of the Vestry of October 18, 1900, was voted for certain *extra* services. Thirdly, what emolument or salary (if any) was to be taken into account in respect of the officer's employment under the resolution of January 31, 1901 (which was passed before the resolution of May 9, 1901, abolishing the office) having regard to the fact that section 120 (1) of the Act of 1888 provides that regard is to be had to (*inter alia*) any additional emolument "which he acquires by virtue of anything done in pursuance of or in consequence of this Act." And there may have been other matters to which I need not refer.

The defendants contend that the question of fact—viz., what was the amount of the officer's salary and emoluments—is not one which was by the statute remitted to the Council for determination, but that this Court must in this action examine and determine it, and if this Court finds that £841 is

in excess of the salary and emoluments, the resolution of August, 1901, is *ultra vires* and wholly void. In my opinion that contention is not well founded. For this purpose the salary and emoluments in question are not the average salary and emoluments for any period of five years or any other time, but may be the ultimate salary and emoluments of the office. It was, I think, for the Council to determine the question of fact what the salary and emoluments amounted to, and if they have considered and arrived at a decision upon it, it is not competent to this Court to review their decision. If the decision was wrong it could have been made the subject of an appeal to the Treasury under section 120 (4) of the Act of 1888. If the Council had plainly proceeded upon a wrong basis—if, for instance, they had by mistake taken the officer's salary to be £1,000 when it was only £500—I think, as presently stated, there might have been ground of defence to an action for more than the right amount. Or, if they had thus plainly gone wrong, or had not fairly assessed the compensation in exercise of their powers, it may be that a mandamus would lie to call upon them to assess it anew. But, subject to the above, I think it is for the Council, and not for this Court, to say what was the amount of the salary and emoluments of the office abolished.

The defendants contend that, having regard to the concluding words of section 120 (1) of the Act of 1888, I must examine what was the true amount of the salary and emoluments, and, if I find it to be less than £841, then the resolution of August, 1901, is *ultra vires*. This contention I think fails. Even assuming (which I think is not the case, as will presently appear) that those words could in any case give rise to a question of *ultra vires*, it is, I think, for the Council, which have the jurisdiction if the question of fact be rightly determined, to determine the fact upon which their jurisdiction arises. If the Council have jurisdiction within limits, it is for the Council to determine the questions of fact, the decision of which is necessary to determine the limits. An analogy, although not a perfect one, may be found in cases where the jurisdiction of a magistrate arises only if a particular fact be found to exist, say, for instance, jurisdiction under the Game Laws. The magistrate may convict if the bird be a partridge, but not if it be a thrush. It is for the magistrate to decide whether it was a partridge or not. If jurisdiction arises if an offence charged be true in fact, it is for the person whose jurisdiction is invoked to determine the fact. In *Cave v. Mountain* (1840) 1 Man. & G. 257, 261; 9 L. J. M. C. 90, Tindal C.J. said: "There can be no doubt but that if a magistrate commit a party charged before him in a case where he has no jurisdiction he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be

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true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." As instances I refer to *Brittain v. Kinnaird* (1819) 1 Br. & B. 432, and in particular to the amusing judgment of Richardson J. in that case, and to *Reg. v. Bolton* (1841) 1 Q. B. 66. So, where there was authority to assess a duty on horse dealers, the decision of the assessor that the party was a horse dealer, however erroneous, could not be questioned in an action: *Allen v. Sharp* (1848) 2 Ex. 352; 17 L. J. Ex. 209. Here the amount of the salary and emoluments is a fact lying at the root of the decision which is by the Act remitted to the Council, with a right of appeal to the Treasury. By section 120 (4) of the Act of 1888, the question of the compensation being "excessive" can be brought before the Treasury, and is to be determined by them. It is for the Council or the Treasury, I think, and not for this Court, to determine this question of fact. Further, the concluding words of section 120 (1) of the Act of 1888 are not, I think, words the effect of which is to render the action of the Council *ultra vires* if they by their vote exceed the amount. They are, at most, words which might afford a ground of defence to an action for an amount exceeding the amount which can be given under the Act of 1859. If a statutory corporation, having a capital of a certain amount, issues capital in excess of that amount, the excess, but not the whole issue, is invalid. If the Council, having statutory power to vote an officer compensation up to, say, £500, vote him £600, the vote will be good as to the £500, but bad as to the excess. The question of *ultra vires* does not, therefore, in my opinion, arise, and for the reasons already assigned. I think it is for the Council to determine, acting of course fairly and honestly, the question of fact as to the amount of the salary and emoluments upon which 37-60ths are to be calculated. I think, therefore, that the resolution of August 1, 1901, was valid.

But next it is said that on November 20, 1902, the Council rescinded that resolution. The plaintiff argues that they had no power to do so. In my opinion the plaintiff is right. So soon as the resolution of August, 1901, was validly passed, there arose an obligation which, under section 120 (6) of the Act of 1888, was a specialty debt, enforceable as if the Council had entered into a bond to pay the £518 12s. 4d. I find no power in the Council to go back and relieve themselves from an obligation thus rendered binding upon them. The defendants refer to section 57 of the Metropolis Management Act, 1855. That section is not empowering, but restrictive. It provides only that a resolution shall not be revoked unless certain forms are observed and a particular

majority obtained. It gives no power to revoke a resolution which has created rights as between the Council and another party. Under these circumstances it is unnecessary to consider whether within section 9 of the Metropolis Management Act, 1856, the meeting of November 20, 1902, was aptly summoned for the purpose.

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In my judgment it is not for me to review the figure which the Council on August 1, 1901, adopted. I think that that resolution is valid, that it was not open to rescission, and is now effectual. It results that the plaintiff is entitled to recover the sums which he claims. The defendants must pay the costs of the action.

The defendants' counsel suggested that a decision such as I have arrived at would leave the members of the Council exposed to a continuous surcharge similar to that made at the audit of 1902. This is not so. The result of this decision is that the surcharge was wrong.

Judgment for the plaintiff.

Solicitors for the plaintiff—Fowler & Co.

Solicitors for the defendants—Allen and Son.

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April 22, 25,
26.

CATERHAM URBAN DISTRICT COUNCIL v. GODSTONE RURAL DISTRICT COUNCIL.

May 2.

Adjustments—Loss of profitable area—Formation of new urban district—"Income"—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 62—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 54, 68.

Neither section 62 of the Local Government Act, 1888, nor section 68 of the Local Government Act, 1894, contemplates the payment of compensation as between two areas one of which is placed in a less and the other in a more advantageous financial position in consequence of an alteration of boundaries under those Acts.

Consequently no claim to compensation arises under either of the sections in question in respect of the loss occasioned to a rural district council by the conversion under the Acts into an urban district of a parish in the rural district the contributions from which towards the expenses of the council exceed the expenditure of the council attributable to the parish.

Decision of the Court of Appeal, 1903, 1 K. B. 554; 1 L. G. R. 311; 72 L. J. K. B. 279 reversed.

Re Rochdale Union and Haslingden Union, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531, and Re Buckinghamshire County Council and Hertfordshire County Council, 1899, 1 Q. B. 515; 68 L. J. Q. B. 417 overruled.

APPEAL by the Caterham Urban District Council from a decision of the Court of Appeal affirming a judgment of Wright J. on an award of an arbitrator stated in the form of a special case.

The facts set out in the award are very fully stated in the report of the case in the Court of Appeal, 1 L. G. R. 311. For the purposes of the present report the following short statement will suffice.

By an Order under the Local Government Acts, 1888 and 1894, made by the County Council of Surrey and duly confirmed, with modifications, by the Local Government Board, the parish of Caterham, which had theretofore formed part of the rural district of Godstone was severed from that district and, as from the commencement of the Order in April, 1899, constituted an urban district.

The Godstone Rural District Council thereupon made a claim upon the Caterham Urban District Council for an adjustment under section 62 of the Local Government Act, 1888. The claim was based upon the allegation that for some years preceding the separation of the parish of Caterham from their district their receipts from rates levied in that

parish for highway purposes had exceeded their expenditure on the maintenance of highways in that parish. From documents annexed to the award it appeared that the Godstone Rural District Council claimed a sum of about £36,000, being the capitalised value at 30 years purchase of £1,200, which was said to be the average yearly excess of the contributions of the parish of Caterham towards the highway expenses of the Godstone Rural District Council over the expenditure on highways in the parish.

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The Caterham Urban District Council contended that assuming the fact to be that there had been this excess of receipts over expenditure, there was no matter requiring adjustment under the section.

The claim was referred to arbitration and the arbitrator made an award in the form of a special case setting out the facts and awarding that the claim was a matter for adjustment under the section.

The award went on to provide that if the Court was of opinion that the contention of the Godstone Rural District Council was correct in law, then judgment was to be entered for them with a declaration that they were entitled to have their claim adjusted by arbitration under section 62 of the Local Government Act, 1888.

The special case came before Wright J. who, holding himself bound by *Re Rochdale Union and Haslingden Union*, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531, gave judgment for the Godstone Rural District Council.

The Caterham Urban District Council appealed to the Court of Appeal, where the judgment of Wright J. was affirmed. The case is reported in the Court of Appeal, 1903, 1 K. B. 554; 1 L. G. R. 311; 72 L. J. K. B. 279.

The Caterham Urban District Council appealed to this House.

Bray, K.C., and *Montague Shearman, K.C.*, for the appellants. The Court of Appeal held that the present case was governed by *Re Rochdale Union and Haslingden Union*, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531 in the Court of Appeal where *Re Buckinghamshire County Council and Hertfordshire County Council*, 1899, 1 Q. B. 515; 68 L. J. Q. B. 417 was followed. It is submitted that the present case is distinguishable from those cases, but if your Lordships think otherwise, then that those cases were wrongly decided and should be overruled. The loss of an area contributing to highway expenses cannot, it is submitted, form a subject matter for an adjustment of "property, income, debts, liabilities, and expenses" within the meaning of section 62 of the Local Government Act, 1888. It is contrary to the clear intention of the Legislature that compensation should be given for such a loss; for the Legislature has constantly given facilities for the alteration of highway areas without making any provision for compensation. Moreover the adjustment of

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highway rates on the formation of a new urban district is expressly provided for by section 145 of the Public Health Act, 1875, which is not repealed, and which provides that the new urban district shall not contribute to the expenses of any highways outside the district.

The word in section 62 relied on as the foundation of the claim is "income"; but the requisite adjustment on the formation of a new urban district is now provided for by section 54 of the Local Government Act, 1894, in which the word "income" does not occur.

Section 62 of the Act of 1888 and section 68 of the Local Government Act, 1894, which is to very nearly the same effect, are moreover not directed to the payment of compensation at all. They are concerned with cases where the parties are jointly interested in property, &c., and are not directed to a general financial adjustment intended to preserve the financial *status quo*. This becomes abundantly clear when the words of the sections are contrasted with those of section 32 of the Act of 1888 dealing with an adjustment of the "financial relations" between counties and county boroughs.

The claim is based on an alleged vested right acquired by the Godstone Rural District Council to contributions in perpetuity from Caterham towards the maintenance of highways, and an assumption that the relative position of the two areas will continue for many years unaltered. There is no such vested right, and the assumption that there will be no change may be entirely false in fact.

[They also referred to *Re Sowerby Urban District Council and Mytholmroyd Urban District Council* (1896) 74 L. T. 313.]

C. A. Russell, K.C., and George Humphreys for the respondents. The case is really governed by the decisions in the *Rochdale* case and the *Buckinghamshire* case. Section 68 of the Act of 1894 is substantially the same as section 62 of the Act of 1888. In both sections the word "income" occurs. The decision in the *Rochdale* case was followed in *Re St. Thomas (Devon) Rural District Council and Heavitree Urban District Council* (1902) 86 L.T. 153. Section 54 of the Act of 1894 does not affect the matter. It deals with the effect on parish councils produced by the creation of urban districts; and the appellants' argument is in effect that that section *pro tanto* repealed section 62 of the Act of 1888, though there is no trace of an intention to effect such a repeal. Nor has section 145 of the Public Health Act, 1875, any application. Here the order within the true meaning of section 62 of the Act of 1888 affected the respective incomes, liabilities, and expenses of the appellants and respondents in respect of the maintenance and repair of highways in their respective districts. The respondents were adversely affected by reason of loss of contribution from the parish of Caterham to the maintenance and repair of high-

ways in the Godstone rural district. In other words, the contributions which have been withdrawn from the respondents in consequence of the order exceed what it cost the respondents to maintain the highways in the parish of Caterham in proper repair; and there has been a consequential increase in the rates for the maintenance and repair of highways in the Godstone rural district. The intention of the Legislature was to equalise or adjust such a burden or loss. It is reasonable that the adjustment should be made, as the roads which Caterham is asked to continue to contribute towards the maintenance of are more useful to Caterham than to any other part of the Godstone area.

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Bray, K.C., was not called on to reply.

The House took time to consider.

May 12, 1904. THE EARL OF HALSBURY L.C. I am of opinion in this case that the judgment of the Court of Appeal and of Mr. Justice Wright should be reversed; but in truth, though the question arises in this case and the consequence must follow, it is really the decision in the case of *Re Rochdale Union and Haslingden Union*, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531, which is here under appeal. There seems to have been some misapprehension about the decision in that case. Lord Russell commences his judgment by saying that he agrees with the judgment of Mr. Justice Channell "substantially," and entirely in the principle involved in it; but, upon the point now in debate, the judgment of Mr. Justice Channell and Mr. Justice Ridley, who entirely agreed with him, was the other way. The language of the section now under construction does not seem to me to be appropriate to the compensation of one district for being placed "in a less advantageous financial position" * (those are the words used by the Legislature itself) than before the alteration in its boundaries. This is language which the Legislature has used elsewhere when what is now contended for was contemplated by the Legislature, but I do not think that the 68th section ever contemplated "adjustment" as being applicable to such a state of things as has been brought about by a diminution of rateable area. Where two areas are being divided, and each becomes responsible for its own administration, and where previously they possessed property, it is obvious enough that they must have some mode of adjusting the division of the property which each possessed prior to such separation—the buildings, for example, the workhouses for the administration of the Poor Law—and, to quote the language of the section, "property, income, debts, liabilities, and expenses." The only

* The actual words in section 32 of the Act of 1888, to which Lord Halsbury L.C. was apparently referring, are "worse financial position."

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word within which the present claim can be embraced is the word "income." Now, it may be conceded that in a loose mode of speech the capacity for being rated for future liabilities might be so described, but it would not be accurate. And it is not with the word itself alone that one has to deal, but with the word associated, as it is here, with the words, "property, debts, liabilities, and expenses." I cannot think that the Legislature intended so grave a departure from the general and very obvious meaning of the words that it has actually used. Where it did intend to allow compensation to be given—compensation, be it observed, not adjustment—it has shown that it can use appropriate and express words for the purpose, and the words "property and income from property" can well be satisfied by a division of property and income resulting from property without importing the element of compensation for loss of income.

Even if the word "income" itself were appropriately used, I think the word "adjustment" as distinguished from "compensation" means a division of existing assets, while "compensation" would quite rightly be interpreted to mean the loss of some right to obtain income by rating or of some area which would furnish the right to get income. But it seems to me quite contrary to principle in the case of an alteration of boundaries applicable to a municipal body, which is to be for the future self-sufficing, to make the adjustment of its "property, income, debts, and liabilities," a subject of compensation arrangements. Of course, if the Legislature has done it, it must be acquiesced in, but I entirely dissent from the idea of presuming that this has been done without express words.

For these reasons, my Lords, it seems to me that the judgment appealed from ought to be reversed, and I so move your Lordships.

LORD DAVEY. The question to be determined in this appeal was thus stated by Lord Justice Vaughan Williams:—"It is said," he observes, "that by reason of the separation of the parish of Caterham from the Godstone rural district, the council of that district will lose the profit which they formerly derived from the contributions of the parish of Caterham"; and the question, he added, was whether that apprehended loss was matter for adjustment pursuant to the provisions of section 62 of the Local Government Act, 1888. Mr. Russell disclaimed stating the question in that way. But I think that the Lord Justice accurately described the claim which is put forward by the respondents. What they are seeking is not an adjustment, in the ordinary sense of that word, of common property or liabilities, or of any reciprocal liabilities of Caterham and Godstone towards each other, but compensation for a loss which they apprehend they will suffer by the severance of Caterham from the Godstone rural district. I do

not assume that the arbitrator, if he should be required to proceed with the matter, would award the respondents the full amount of the extravagant claim put forward by the respondents; and I refer to that claim only as showing the true nature of their demand. The first observation that occurs to me is that section 62 says nothing about compensation for apprehended loss of profit or injury. Your Lordships are familiar with Acts of Parliament which give a right to such compensation, and one would have expected if that was the meaning of the Act it would have been expressed in plain terms. Local authorities are by the section in question authorised to make agreements for the purpose of adjusting "any property, income, debts, liabilities, and expenses." The *prima facie* meaning of these words is to give powers or facilities for adjusting any matters which by reason of the Act or a scheme made under it require adjustment. In the following words the expression is altered. The section goes on to say that any agreement authorised by the Act to be made "for the purpose of the adjustment of any property, debts, liabilities, or financial relations may provide for the transfer or retention of any property, debts, and liabilities, . . . and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person." I have troubled your Lordships by reading the section at length because the later words in my opinion confirm the *prima facie* meaning which I attach to the earlier words. It must be admitted, I think, that the property, debts, or liabilities to be retained or transferred must mean existing property or debts, or a liability actually incurred, and the expression financial relations, I think, also refers to any reciprocal financial obligations which the undivided district and the severed portion may have already incurred towards each other. I construe the words "income" and "expenses" in the same manner. I think that "income" means income presently enjoyed, or to which there is a present title, and does not include income which may hereafter be derived from the making of rates. There may be income derived from property which is held in trust for the district, or some income such as a rent-charge or other annual payment applicable under some charitable trust or otherwise to the benefit of the district or relief of the ratepayers in it. I think the words would also include the proceeds of any rate already made on the whole district. It is true that income in this sense would strictly be included under the general word "property," and that is, perhaps, the reason why the word is dropped out in the subsequent enumeration of matters of adjustment. I am, therefore, of opinion

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that the words of the section do not necessarily, or according to their proper construction, confer any such right as is claimed in this litigation.

But I think the case may be put on a broader principle. The very object of the scheme which has been made under section 57 of the Act is to enable the present appellants to rate their own district and expend the rates so raised for the exclusive benefit of their own district. In fact, when one speaks of the severance of an administrative unit it is only a compendious way of expressing this result. That the rates derived from the severed district will be lost to the district from which it is severed is the inevitable consequence and intention of putting the Act in force, and if this were understood by the Legislature to be a matter for compensation some words would be found in the Act which confer the right to such compensation. Adjustment seems to me a different idea from compensation. When a severance takes place of an administrative unit some adjustment is necessary. There are, or may be, common property or income, debts, liabilities, or expenses owing or incurred by or on behalf of the undivided area. These matters require adjustment, and section 62 appears to me to be nothing more than a procedure section for enabling such matters to be adjusted. But the respondents have no vested interest in the profit to be derived from the Caterham highway rates after severance, and there is no abstract right of either of the parties to be compensated by the other for any future financial detriment arising from acts directed or authorised by the Legislature; and in my opinion there is nothing in the Act which creates such a right. I am, therefore, of opinion that the appeal should be allowed. It follows from what I have said that I think the cases of *Re Rochdale Union and Haslingden Union*, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531, and *Re Buckinghamshire County Council and Hertfordshire County Council*, 1899, 1 Q. B. 515; 68 L. J. Q. B. 417, were wrongly decided, and should be overruled.

LORD JAMES OF HEREFORD. In this case I agree with the opinions already expressed, that the judgment of the Court of Appeal should be reversed; for I concur in the view that the loss of a portion of a rate-paying area does not support a claim for an adjustment of "property, income, debts, liabilities, and expenses" within the meaning of section 62 of the Local Government Act, 1888. It seems to me that the separation of a portion of an area within which a rate has been levied cannot occasion a loss of "income" within the meaning of the section to the remaining portion of the area; nor can such change in the existence of the rateable area occasion any claim for adjustment under the word "liabilities." Both these words "income" and "liabilities" must be read as referring to ascertained and existing income and liabilities, and cannot be held to include the mere

liability to be rated if the order of division had not been made. It may be that the application of this view may in some cases confer on one portion of a divided area substantial advantage at the expense of another portion. But if such gain or loss would amount to injustice, it may be that the remedy is to be found by objecting to the order being made by the county council under section 57 of the Act, or to its confirmation by the Local Government Board.

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LORD ROBERTSON. I am very clearly of the same opinion. I do not think that the claim of the respondents comes within section 62 ; and when I say so I mean not merely that the word "adjust" and the other phrases used are not appropriate to cover it, but that the claim is in its nature and substance altogether heterogeneous to the things contemplated, and is outside the scheme of setting up new authorities as stated in the Act. It must be remembered that when under section 62 Caterham and Godstone proceed to "adjust" (whatever that means), they meet as separate and self-contained rating authorities, Caterham having been by deliberate statutory proceeding vested with the full and exclusive power of rating for its own use within the boundaries assigned to it, and Godstone, while retaining its old name, having a different and smaller jurisdiction compared to that which formerly existed. The direct and necessary result of setting up Caterham as an urban district is to establish not merely one, but two new rating units, namely, Caterham and the lesser Godstone. The rating in each is necessarily on the new basis of the new area, and it would be merely an accident if the rates in the two areas were the same after as before the separation. Now, the assumption of what I must venture to call the fallacy of the judgments under review is that the Legislature intended that the two new bodies should set about what Mr. Justice Bruce calls "restoring the true balance" ; that is to say, the former balance of rates. I see no warrant for any such assumption. On the contrary, I should suppose that in some cases, at least, one of the reasons why a new urban district is set up is because the rating is unfair, and would be made more equitable by dividing the rating area into two. The inhabitants of some proposed new district (I am not for the moment speaking of Caterham) may very well say that they have grown into a self-contained community, are made to pay for things they have no interest in, and because of their large valuation are paying more than the people who are interested in them. All these considerations and the like, *pro* and *con*, are for the county council and the Local Government Board.

But the *Rochdale* case and the *Bucks* case depend upon the view that in the matter of rates the *status quo* before the order is to be treated as the standard of right after the order, and that any detriment on the one

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side and advantage on the other caused by the independence of the new district are to be redressed by adjustment. I see no trace of an intention thus to stereotype by compensation the results of a system of rating which *ex hypothesi* has ceased.

Of course, it is quite conceivable that the Legislature might have made it a condition of the setting up of a new rating body that it should purchase its independence, and might have taken the financial position in the year of independence as fixing the price. But this is an idea unexpressed in the statute, and remote from the simple one expressed in section 62, which primarily, at least, deals with extant things and extant liabilities which belong to the undivided community and must perforce be divided now that the community is broken up and the partners are taking with them what belongs to them. And the difficulty of applying the words of section 62 to a claim of compensation becomes, as I think, an impossibility when the nature of the claim is clearly realised. I have read with care all the judgments in the previous cases. In the *Rochdale* and in the *Bucks* cases the principle laid down is that which I have already referred to, that the "true balance," meaning thereby the existing balance at the date of separation, must be "restored." This is most clearly shown in Mr. Justice Bruce's judgment in the *Bucks* case, at page 527, and in Lord Justice A. L. Smith's in the *Rochdale* case, at page 545. It is significant that all subsequent judicial opinions have been based on the authority of these cases, and that in none has this principle been independently reasserted.

Appeal allowed.

Solicitors for the appellants—Cooper, Turner, and Evans, for E. A. Head, East Grinstead.

Solicitor for the respondents—F. B. Winter.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

LUMBY v. FAUPEL.

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Feb. 9.

Landlord and tenant—Tenant's covenant to pay rates, &c.—Private street works executed before date of lease—Apportionment made after commencement of tenancy—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

The share of the expenses of private street works executed under section 150 of the Public Health Act, 1875, for which the owner of any premises is liable, becomes a charge on the premises as from the completion of the works, though it is not payable till the apportionment has been made. Where, therefore, a lease of the premises is granted after the completion of the works, but before the apportionment, the landlord cannot recover the expenses from the tenant under a covenant on his part to pay all rates "taxes and assessments" in respect of the demised premises, whether or not such a covenant is wide enough to include expenses of the character.

Decision of the Divisional Court (1903), 1 L. G. R. 493, affirmed, but on other grounds.

Surtees v. Woodhouse, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, followed.

APPEAL from a decision of the Divisional Court (Lord Alverstone C.J., Wills and Channell JJ.) reversing the judgment of a county court judge in favour of the plaintiff in an action.

The action was brought to recover the sum of £25 18s. 11d., the apportioned amount of paving expenses which the plaintiff as the owner of No. 46, Broadway, Wimbledon, had been compelled to pay to the Wimbledon Urban District Council, who had carried out private street works in the street on which the premises abutted under section 150 of the Public Health Act, 1875.

The defendant held the premises in question from the plaintiff under a lease granted, upon the surrender of a previous lease, on November 2, 1899, after the works to the street had been carried out, but before the notice of apportionment was served on the plaintiff.

The plaintiff sought to recover the expenses under a covenant in the lease on the defendant's part to pay "all rates taxes and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise."

The county court judge gave judgment for the plaintiff.

The Divisional Court reversed the decision of the county court judge on the ground that expenses of private street works under section 150 of the Public Health Act, 1875, are not "rates taxes or assessments"

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within the meaning of such a covenant as that in question. The case in the Divisional Court is reported 1 L. G. R. 493.

The plaintiff appealed.

W. O. Hodges for the plaintiff.

Danckwerts, K. C., and *J. S. Green* for the defendant.

[The arguments turned almost entirely on the question whether the apportioned expenses of private street works executed under section 150 of the Public Health Act, 1875, come within a covenant to pay rates, taxes, and assessments. As the Court gave no decision on this point, it has been thought unnecessary to report the arguments.]

COLLINS M.R. I think this appeal fails. I come to that conclusion, not on the point that has been mainly argued, but upon the last point, which is a very short one, and upon which it appears to me the authorities are conclusive. The case of *Surtees v. Woodhouse*, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, decided this—I read from the headnote in the Law Reports—"Where by a covenant in a lease the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged on the demised premises or the owner or occupier in respect thereof. *Held*, . . . that the covenant did not apply to expenses of private street works which, under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date." In this case paving expenses had been incurred in respect of the premises before the date of the lease to the defendant, and, though the amount payable in respect of them had not been assessed at the date of the lease, still the charge, according to the authority to which I have referred, had become a charge upon the premises. The liability had been incurred. The defendant had surrendered the lease which he held at the time when these expenses did become a charge, and he had received a complete release relieving him from all obligations towards the lessor in respect of the premises. After that he took the lease in question, and the covenant in the lease appears to me, for all purposes of this discussion, to be on all fours and identical with the covenant in *Surtees v. Woodhouse*. The covenant here is this: "And the lessee hereby covenants with the lessor in manner following, that is to say, that the lessee will pay the rent hereby reserved at the time and in the manner aforesaid, and will also pay all rates taxes and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of

Parliament or otherwise except as aforesaid." It seems to me that that covenant is identical for all purposes of this discussion with the covenant in *Surtees v. Woodhouse*, and, just as there it was held that the fact that the expenses had ripened into a charge before the commencement of the new lease was a complete answer to any claim made upon the new lease, so it seems to me, it is a complete answer here. I am unable to follow the distinction sought to be drawn between the obligations arising on the two covenants. It appears to me that the grounds of the decision of *Surtees v. Woodhouse* apply just as much whether the word is "outgoings" or, as it is here, "assessments," because the basis of the decision is that the charge accrues before the apportionment is made, and the fact that the charge subsists is not affected or any fresh liability imposed by virtue of the fact that the apportionment comes after. The charge is for an amount which is afterwards ascertained, and, although the apportionment does not take place until after the currency of the new lease, nevertheless it gives no new right at all in respect of a liability which has accrued, and which in this case was satisfied before the new lease was granted. Lord Justice Vaughan Williams says this: "In my judgment"—he is reading from the words of the covenant in *Surtees v. Woodhouse*—"those words would not cover a rate or charge which had become effective before the date of the lease by reason merely of the completion of the works;" and then, "apart from the words 'present and future,' the covenant is to my mind perfectly plain, and does not impose upon the tenant the obligation to pay charges to which the property had been assessed for private street works, but which had not become payable." And Lord Justice Stirling says: "It appears to me that by the combined effect of this last section"—section 257 of the Public Health Act, 1875—"and of section 12 of the Private Street Works Act, 1892, the apportioned amount became charged on the owner at the time of completion of the works as from that date." That is to say, though the apportionment did not take place till afterwards, nevertheless the apportioned amount had become a charge. My brother Mathew gave judgment to the same effect.

For these reasons I think on this point this appeal must be dismissed.

ROMER L.J. I agree.

MATHEW L.J. I am of the same opinion, for the reasons given by my Lord.

Appeal dismissed.

Solicitors for the plaintiff—Ashley, Lumby, and Cooper.

Solicitors for the defendant—Gregson, Wareham, Waugh, and Gregson.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

May 21, 22.

PARKER AND ANOTHER v. CLEGG.

Bye-laws—Sea bathing—Charge for bathing machine—Charge for costumes and towels—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69.

A bye-law as to bathing made by an urban authority under section 69 of the Town Police Clauses Act, 1847, substantially in the model form, fixed the maximum charges for the use of bathing machines stationed on any stand, and provided that the prescribed charges should include charges for the use of towels and a bathing costume.

The appellants, who were the proprietors of bathing machines used within the district, charged a bather, in addition to the maximum charge for the use of the machine fixed by the bye-law, the sum of 3d for the use of a costume and towels, and were convicted of a breach of the bye-law in respect of the charge of 3d. thus made. The bather had not demanded the use of a costume and towels without extra charge.

Held, that the conviction must be quashed,

by LORD ALVERSTONE C.J. and WILLS J., on the ground that the bye-law in so far as it purported to restrict the charges that could be made for the use of a costume and towels was ultra vires and bad;

by CHANNELL J. on the ground that if the bye-law prohibited an extra charge for a costume and towels absolutely it was ultra vires and bad; and that if it merely required the bathing machine proprietor to provide such requisites as were necessary for decency without extra charge, leaving him free to make an extra charge for articles of superior quality, in which case it might be a good bye-law, no breach of the bye-law had been shown.

CASE stated by justices for the borough of Margate, before whom the appellants had been convicted for that they, being proprietors of bathing machines on a stand, to wit, the cutting and sands opposite the Clifton Baths, Margate, unlawfully did demand and receive for the use of a bathing machine when hired to set down a person for the purpose of bathing a sum in excess of the amount authorised therefor by the bye-laws of the borough then in force contrary to the bye-laws and to the statute in such case made and provided.

It appeared while the case for the prosecution was being opened that the information had not been laid on behalf of the local authority within the meaning of section 253 of the Public Health Act, 1875, and counsel for the defence objected that the information would not lie, the

informant not being a party aggrieved. The justices, however, overruled the objection.

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Evidence in support of the prosecution was given by a constable, who stated that by direction of the respondent he went to the Clifton Baths and proceeded to the ticket office, where he found a female in attendance for issuing tickets. He said nothing to her, but placed 1s. on the counter. He had no towel, drawers, or costume with him. The attendant handed him a blue ticket, two towels, and a bathing costume, and 3d. change. She also in his presence tore off from a roll of tickets a yellow ticket on which he saw the price 2d. printed, but the attendant herself retained it. The witness did not see or read any notice painted on the walls of the ticket office, but he did not look for any such notice or think about it. He had never been to the office before. After receiving his change he proceeded to the appellants' staging or breakwater that leads into the water and passed along to a waggon for the purpose of being driven out to a bathing machine. Before the waggon started the blue ticket was collected from the witness by the driver. The witness then bathed and afterwards returned to shore upon the waggon.

Counsel for the defence contended that—

(a) On the true construction of the bye-laws it was not an offence to demand and receive 9d. for the use of the bathing machine.

(b) That bye-law No. 15 was *ultra vires* and invalid because it assumed to fix the charge to be made for costumes and towels and to require the appellants to provide costumes and towels.

(c) That the Clifton Baths and the foreshore in front thereof could not lawfully be made a "stand" for bathing machines because the cutting and sands at and opposite the Clifton Baths were private property: *Mace v. Philcox* (1864) 15 C. B. n.s. 600; 33 L. J. C. P. 124.

(d) That there was no evidence to show that the place at and upon which the sea bathing in connection with the Clifton Baths was carried on was a part of the seashore used as a public bathing place within the meaning of section 69 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and that the bye-laws were consequently *ultra vires* so far as they purported to apply to Clifton Baths.

In view of the case of *Blundell v. Catterall* (1821) 5 B. & Ald. 268, cited on behalf of the prosecution, the justices overruled all the above objections.

Edward Howard, manager for the appellants of the Clifton Baths for six years, was called and proved that he was manager at the time of the alleged offence. The charges made at the baths for sea bathing were those stated in the price list. In addition to the blue and yellow tickets above referred to, a red ticket was in ordinary use, marked 6d.,

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for the use of a bathing machine only, without towels or costume. Many hundreds of bathers brought their own towels and costumes and availed themselves of the red tickets. And the appellants preferred to issue the red tickets, because their loss in supplying the costumes for 2d. was considerable. A list of the above charges was painted up in large letters on the wall of the ticket office, so that it distinctly appeared there that the charge for the use of a bathing machine only was 6d. The sums of 1d. and 2d. above referred to were in no way charged for the use of the bathing machine, and any person could have a bathing machine for 6d. The appellants allowed no one to bathe on the foreshore without purchasing a ticket; and during six years he had stopped hundreds of people who had attempted to do so. Those who refused to conform to the rules were required to go away, on the ground that the place was a private bathing establishment.

The appellant Parker, who had known the Clifton baths for 50 or 60 years, proved that they had been used as a bathing establishment, including sea bathing, for the whole of that time. That sea bathing could not be carried on without having a place where the machines could at times be drawn up out of danger; that machines were in fact so drawn up on the appellants' land above high-water mark; that the place had been prepared by the appellants and their predecessors in title at very great expense; that the only means of access to it was from the road above by passing over the appellants' private property or by passing along the shore at low water; that the prices charged by the appellants were commercially obtainable, although the use of a bathing machine with a costume and towels could be had for 6d. at bathing places on parts of the foreshore belonging to the Corporation.

The appellant Reeve stated that for 25 years at least numbers of the public had been prevented from using the sands and foreshore at the Clifton baths for bathing unless they obtained tickets from the appellants.

The justices decided to convict the appellants, and imposed a fine of 5s. and costs.

The question of law for the opinion of the Court was whether, upon the facts above stated, the objections and contentions of the appellants were or were not respectively good in law.

Bye-law No. 15 of the bye-laws made by the Mayor, Aldermen, and Burgesses of the borough of Margate, acting by the Council, with respect to sea bathing in the borough of Margate, allowed by the Local Government Board April 16, 1902, was as follows:—

“Every proprietor or attendant of a bathing machine stationed on any stand shall be entitled to demand and receive for the use of such

machine when hired to set down any person for the purpose of bathing, a sum not exceeding in each case the charge hereinafter prescribed—

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For every person using a machine for less than half an hour	6d.
For every additional half-hour or portion of half-hour ...	6d.
For every child under 10 years of age bathing under the charge of the bathing attendant only	6d.
For every child under 10 years of age bathing with other children under 10 years of age, and using the same machine	4d.

The several amounts hereinbefore prescribed shall include charges for the provision by the proprietor, and the reasonable use by the bather, of the several articles specified in the following regulations:—

(i.) For every person of the male sex if bathing from a stand appointed for the exclusive use of persons of the male sex—

(a) Two clean towels;

(b) One clean pair of suitable drawers or other clean and sufficient covering to prevent indecent exposure of the person.

(ii.) For every person of the male sex if bathing from a stand appointed for the joint use of persons of the male and female sexes—

(a) Two clean towels;

(b) One clean suitable costume or dress (from the neck to the knees) to prevent indecent exposure of the person.

(iii.) For every person of the female sex—

(a) Two clean towels;

(b) One clean gown or other clean and sufficient dress or covering to prevent indecent exposure of the person."

Daldy for the appellants. The information in the present case was in respect of an alleged offence against a bye-law made under section 69 of the Town Police Clauses Act, 1847, as incorporated with the Public Health Act, 1875. Section 316 of the Act of 1875 provides that penalties incurred under the provisions of any Act incorporated with that Act shall be recovered in the same way as penalties incurred under the Act of 1875. Section 253 of the Act of 1875 thus becomes applicable to the proceedings; and that section provides that proceedings for the recovery of any penalty under the Act shall not, except where otherwise provided, be taken by any person other than by a party aggrieved, or by the local authority, without the consent of the Attorney-General. The respondent, therefore, in the present case was not a competent prosecutor. *Jobson v. Henderson* (1900) 82 L. T. 260, where it was held that proceedings

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under section 28 of the Town Police Clauses Act, 1847, as incorporated with the Public Health Act, 1875, are not within the operation of section 253, turned upon the powers of summary arrest contained in section 28 of the Act of 1847, and does not govern this case.

Secondly, the bye-law is bad. Section 69 gives power to regulate charges for the use of bathing machines, but does not give power to regulate or prohibit charges for bathing costumes and towels.

Thirdly, the power to make bye-laws under the section is confined to public bathing places. The appellants' bathing establishment is not a public bathing place, but clearly, on the evidence, completely the private property of the appellants: *Mace v. Philcox* (1864) 15 C. B. n.s. 600; 33 L. J. C. P. 124. Accordingly, the bye-law is inapplicable altogether to the appellants' bathing place, or if it purports to apply to it, is *ultra vires*. It is impossible that the local authority should have power to restrict the charges a landowner may make for the use of his land.

Pitman (*Hohler* with him) for the respondent. The appellants' bathing place is none the less a public bathing place because it is private property. There is no right strictly on the part of the public to bathe from any part of the seashore, whether it is the property of an individual or Crown property. The expression "public bathing place" must therefore mean a place that is in fact used by the public. The bye-law is *intra vires* as a bye-law for preventing indecent exposure. It is enacted, in the interests of decency, to impose an obligation on the proprietors of bathing machines to provide costumes free of charge. Otherwise, a certain number of persons will bathe without proper costumes.

LORD ALVERSTONE C.J. The substance of the matter is that the bather was charged 9d. for the use of the machine, towel, and costume, and there was involved in that charge the right to go upon private property for the purpose of getting the bathing costume and towel and the ticket of the machine, and also of passing to the machine. Whether that machine was always on private property, or not, I think is quite immaterial.

With regard to Mr. Daldy's first point, that the proceedings could not be taken by the chief constable without the consent of the Attorney-General, I express no opinion. There is a good deal to be said both ways.

The only points on which I wish to express an opinion are those argued by Mr. Pitman. I certainly think section 69 of the Town Police Clauses Act, 1847, gives power to the local authority to make bye-laws with regard to both public and private property within the

ambit of the powers given by the statute. No doubt *prima facie* the section is not concerned with private property at all. It is dealing with the control of a *quasi* public right—I admit it is not a public right in the ordinary sense—but the right—or practice I ought to say more than the right—of people to go and bathe on the seashore. Accordingly, the section says: “Where any part of the sea-shore or strand of any river used as a public bathing-place is within the limits of the special Act the commissioners may make bye-laws for the following purposes.” It is obvious that the section does not contemplate dealing with private property in the first instance, and I think that is not to be lost sight of in dealing with the rights of the parties. The authority may make bye-laws “for fixing the stands of bathing machines on the sea-shore or strand, and the limits within which persons of each sex shall be set down for bathing, and within which such persons shall bathe.” I do not think it can be seriously contended that under that power the authority can fix the stands for bathing machines on private property. The Legislature were referring to the sea-shore and strand—at any rate *prima facie*—over which there would not be the private rights of property which were referred to in *Mace v. Philcox* (1864) 15 C. B. n.s. 600; 33 L. J. C. P. 124, where a question arose of trespass by a person with a licence from the local authority drawing a machine over another person's property. The power *prima facie* I think would apply to fixing the stands on what may be called the public beach. Then the section goes on to give power to make bye-laws “for preventing any indecent exposure of the persons of the bathers.” It is perfectly obvious that that power would entitle the authority to make bye-laws applicable whether the bathers had been or were on private property or not. The power is to make bye-laws for public decency. Then the section gives power to make bye-laws “for regulating the manner in which the bathing machines shall be used, and the charges to be made for the same,” and “for regulating the distance at which boats and vessels let to hire for the purpose of sailing or rowing for pleasure shall be kept from persons bathing within the prescribed limits.” That again is in order to avoid the annoyance to people who are bathing in the sea of boats coming close to them. Except in the third clause of the section, referring to bye-laws “for regulating the manner in which the bathing machines shall be used, and the charges to be made for the same,” there is nothing about charges.

I think we are all of opinion that whether the bathing is on a public place or a private place, the authority may make bye-laws as to public decency, as, for instance, that no person shall bathe without a proper costume, and that no person shall be able to justify bathing without a proper costume because he had entered the machine from private

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property, or that the machine even was on part of the foreshore as to which there were some private rights. But I fail to see that the authority have power to regulate the charges which shall be made, because the statute gives power to prohibit people from bathing in a way which would infringe the clause as to the prevention of indecent exposure. That is going very much further than the statute warrants. The statute has given the authority power to fix the charge for the use of bathing machines. It also says that they may make regulations in the interests of public decency; and I agree that there may be involved in that powers practically to impose upon the bathing machine proprietor the obligation of keeping dresses, if he wishes to carry on his trade, because there are numbers of people who may make use of his machine who have not dresses of their own. But it is found in this case that persons come in large numbers who have their own bathing costumes and towels; and it is obvious that these persons would only require the bathing machine while they were still prepared to fulfil the regulations as to decency. I point out also that it has not been suggested in this case that there is any want of *bonâ fides*. There is a separate ticket for the machine, a separate ticket for the use of the towel, and a separate ticket for the use of the costume.

I therefore come to the conclusion that while there is a power to impose regulations as to decency, and to prevent people bathing without proper costumes, there is no power given by the statute to the local authority to fix the charges for anything but the bathing machines. I think that it would be most unreasonable if there were, because the costume and towels supplied may be better or worse, and persons may make their bathing machines more popular by having better things of that kind. It is true that one man may have a better machine than another; but the statute has given power to fix the charges for bathing machines because the greater part of the bathing machines would be on the public strand and would be in the nature, I will not say of cabs, but of vehicles standing for hire; and that would not apply to the dresses and towels, except in so far as nobody can bathe without having a proper dress, and no one ought to bathe without having a proper towel.

Under these circumstances it seems to me that the particular bye-law which seeks to impose the obligation of providing bathing dresses without any charge beyond the 6d. goes beyond the powers of the local authority. I am, therefore, of opinion that the appeal should be allowed.

WILLS J. I have come to the same conclusion. It seems to me that the power to make bye-laws, which is given by section 63 of the Town Police Clauses Act, 1847, is the same with regard to every class

of bye-law that is provided for, because the whole section is controlled by the introductory words providing that "where any part of the seashore or strand of any river used as a public bathing place is within the limits of the special Act" then the bye-laws may be made. Therefore one must first find that a part of the seashore is used as a public bathing place.

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Now, I think, although in one sense the appellants' bathing place is not a place of public access, yet the use that is made of it clearly brings it within the words "public bathing place." It is a place to which all the public have equal facilities for going, and which is intended to be used by the public as a public bathing place. Therefore I should not put it in the same category with a place which is simply upon private property belonging to a particular owner and never used for the purpose of commerce, and only used for his private purposes.

Granting, however, that the circumstances exist enabling the public authority to make bye-laws which shall cover this place as far as area is concerned, I still think that the power of making bye-laws "for regulating the manner in which the bathing machines shall be used, and the charges to be made for the same," clearly does not include a power to regulate the charges for things quite different from bathing machines. Under the power to prevent any indecent exposure, I think the authority may make a bye-law that no person shall bathe without an adequate bathing costume, and I should think that equally it would be competent for them to make a bye-law that the person who provides the bathing machine for the use of people in general shall be obliged to provide adequate means of observing public decency in the way of providing bathing dresses. On the other hand, I think there is nothing in the power to make bye-laws for preventing indecent exposure of the person of the bathers to give the local authority any right to prescribe that towels shall necessarily be used or provided. But, then, supposing that the bathing machine proprietor is bound to provide these things for use if people have not got them, supposing he is bound to see that adequate means are placed at the disposal of the bather for observing the bye-law as regards public decency, I can see nothing whatever to give the authority any right to say he shall not make a charge for them.

For these reasons I entirely agree that the bye-law cannot be enforced, and the appellants are entitled to succeed.

CHANNELL J. I agree. I think the first question is whether or not this site, which is clearly, upon the evidence, private property, is used as a public bathing place in such a way as to give the local authority power to make bye laws in respect of it; and I think it really is. Those to whom it belongs admit visitors and people to bathe there, and they probably bathe in such a way that they can be seen all about the neigh-

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bourhood, from the top of the cliffs, and so on, and for the main purposes for which this power of making bye-laws is evidently given, it is clear, I think, that the place, although private property, is used as a public bathing place. As Mr. Pitman pointed out, even what is generally known as and called the public beach is really the property of the Crown, and there is no absolute right to go and bathe from it, and still less to have machines on it. Therefore it is obvious that the section must extend to making bye-laws in reference to property which is private property, but is held out to the public as a place where they may come to bathe.

It follows, therefore, that all these powers exist, but it is necessary, as my Lord has pointed out, to see very carefully how far they extend. Now it seems to me that it is quite unnecessary to deal with the majority of them, about indecent exposure and the regulating of the manner in which the bathing machines may be used. What we have to consider is whether this bye-law forbids a charge which the bathing machine proprietors choose to make for accommodation in the way of costumes and towels, which may be of a special character, and whether it obliges them to give the use for nothing of articles of that kind, which they, in fact, provide, however expensive and ornamental those particular articles may be. It seems to me quite clear that if the bye-law does purport to do that it is *ultra vires* and bad. If, on the other hand, it does not, then there has been no breach by the appellants. It may be that, inasmuch as it is necessary for the public decency that everybody who uses the machine should use a costume of some kind, and the bathing machine proprietors must, therefore, provide a costume of some kind, and, inasmuch as if they make an extra charge for this, people will be induced to do without it—it may be, I say, possibly incidental to their other powers that the authority have the power to say, “You shall provide something that will satisfy public decency, and provide it for nothing.” But if the bye-law said that and no more, and did not prevent them making a charge for something beyond—a better kind of costume; a better kind of towel—if that is the true meaning of this bye-law, then there has been no breach of it. The result, I think, is quite clear that this conviction cannot be sustained.

Appeal allowed. Conviction quashed.

Solicitors for the appellants—Grubbe and Troughton.

Solicitors for the respondent—Warren, Morton, and Miller, for E. Brooks, town clerk, Margate.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

OLIVER AND ANOTHER *v.* CAMBERWELL BOROUGH COUNCIL.

Jan. 19.

Nuisance—Abatement under compulsion—Metropolis—Intimation to owner of premises—Drain discovered to be sewer—Recovery of expenses from local authority—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 3, 4.

The service by a sanitary inspector on an owner of premises of an intimation under section 3 of the Public Health (London) Act, 1891, that a nuisance arising from a drain exists on the premises, is not putting such compulsion upon the owner to execute the necessary work as will entitle him, upon the subsequent discovery that the alleged drain is a sewer, and therefore repairable by the local authority, to recover from that body the expense he has been put to in abating the nuisance, even though the intimation is expressed as requiring the owner to abate the nuisance, and states that if the nuisance is not abated the local authority will commence proceedings against the owner by the service of a statutory notice.

So held, upon the authority of *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580; *Proctor v. Islington Borough Council* (1902) 18 *Times* L. R. 505; and *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31, the Court intimating that their decision would have been otherwise if the matter had been *res integra*.

Per Kennedy J. *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972, is not reconcilable with the above-mentioned cases.

THIS was the plaintiffs' appeal from a judgment of a county court judge in favour of the defendant council in an action in which the plaintiffs sought to recover from the defendants the expenses they had been put to in doing work necessary to abate a nuisance arising from a drain pipe under their house in compliance with an intimation under section 3 of the Public Health (London) Act, 1891, when, upon investigation, it turned out that the drain pipe was in reality a "sewer," and thus repairable by the defendants.

The county court judge held that this intimation under section 3 was not in itself a sufficient compulsion to do the work to enable the plaintiffs to recover from the defendants the expenses they had been put to in repairing the sewer. The following is a copy of the intimation:—

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The Vestry of Camberwell (*sic*).
Public Health (London) Act, 1891.
Public Health Department,
Vestry Hall, Camberwell, S.E.,
March 18, 1903.

Intimation.

To the Owner, 119, High Street, Peckham.

Sir or Madam,—Take notice that I, the undersigned, having visited the above premises, find that the nuisances numbered nine, twelve, twenty-one, thirty-eight, and forty in the schedule at the back hereof, which are liable to be dealt with summarily, exist thereon.

I, therefore, now by this written intimation make the existence of the said nuisances known to you, as being the person who is required to abate them. And I have to request that the same be abated within the period of seven days.

At the end of this time I shall again visit the premises, and if the necessary works have not then been completed, the vestry (*sic*), as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice.

I am, your obedient Servant,

EDWD. HOMES,

The officer appointed by the vestry of the
said parish to take proceedings under
the above-named Act.

The nuisances enumerated on the back of this notice were :—

9. Water-closet so defective as to be a nuisance.
12. Insufficient external ventilation to water-closet.
21. The waste pipe of sink directly connected with the drain.
38. The drain defective.
40. The drain unventilated.

The county court judge, in giving judgment, said :—" The question is on a system of drainage, and the point arose whether or not a work was a drain or a sewer. These cases often arise, and each case must to some extent be looked upon on its own particular facts. According to the Acts of Parliament the main question is really a matter of public policy, and affecting the protection of the public health. The intimation from the local authority in this case I hold to be a mere intimation, and not a statutory notice as the section provides. This intimation gave the person receiving it a chance to raise the question whether the work was a drain or a sewer. The question or issue was not raised. An intimation of this character, to give an opportunity of raising that question, is a very different matter to the statutory notice

of compulsory steps to be taken. That has not taken place here. The intimation was a mere statement of the barest kind, and cannot be considered a statutory notice. That being so, there was no compulsion on the plaintiffs to do this work; on the contrary, it was their duty to raise the issue whether it was a sewer or a drain. I find as a fact that the plaintiffs knew this was a sewer, and never raised the question in a proper way to the borough council. It is impossible to hold under these circumstances they can afterwards come here and compel the borough council to pay for these repairs. It would be a most dangerous thing for the public if they could. If this had been a sewer, and the question had been raised in a proper way, the borough council would have dealt with it itself, for the policy of the Act is that sewers must be dealt with by the local authorities and no one else if possible. Then there is a question of wrongdoers. I find as a fact that plans were submitted to construct these drains in a certain way, that these plans were wilfully disregarded, and drains were deliberately constructed of an entirely different kind. It was alleged that the plaintiffs were not the representatives of the wrongdoers. If that is correct it could be proved—it ought to have been proved. I say on the evidence that as far as one can possibly judge the inference is that the plaintiffs are the representatives of the wrongdoer. The solicitor who was called in this case had not taken the trouble or showed no inclination to tell me what the real state of the title is, although he had sufficient notice from the town clerk that the question would be raised. Everyone should desire to put the full facts before the court, but in this case there was not sufficient evidence before me, and therefore I cannot give judgment upon that point. On the first point, however, I hold that the intimation was a mere intimation to give a chance to the plaintiffs to raise the issue whether the work was a sewer or a drain. That issue was not raised, although the plaintiffs knew it was a sewer. I find as a fact that the borough council never knew it until after the work was done. I find upon that ground alone for the defendants. And I hold that the notice verbally given to the sanitary inspector by a conversation was not a proper notice that the system of drainage was a sewer."

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Naldrett for the plaintiffs. The plaintiffs who now appeal performed the necessary work to abate a nuisance in compliance with the defendants' notice, and are now entitled to recover the expenses they have been put to in doing work which was properly the duty of the defendants to do. The intimation, although under section 3 of the Act, is sufficient compulsion to enable them to recover what they claim from the defendant council. Had it been a notice under

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section 4 there would beyond question have been compulsion on the plaintiffs, and they, having performed the work, could have recovered: *Andrew v. St. Olave's Board of Works*, 1898, 1 Q. B. 775; 67 L. J. Q. B. 592. But it has been held by the county court judge that because the notice was given under section 3 instead of section 4, the defendants are entitled to object that the plaintiffs can recover nothing from them. The form of the intimation is in itself important, for its wording throughout conveys the idea of compulsion; and no ordinary person upon the receipt of such a notice would arrive at any other conclusion than that he was compelled by its terms to instantly abate the nuisance. *Andrew v. St. Olave's Board of Works* followed *Gebhardt v. Saunders*, 1892, 2 Q. B. 452, in which Charles J. expressed the opinion that apart from the provisions of section 11 the plaintiff was entitled to recover at common law on the ground that he had been compelled to expend money upon work for which the defendants were legally responsible. In the present case the plaintiffs have certainly been compelled to expend money upon work for which the defendants are legally responsible. In *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972, Channell J. held that it was not necessary to show that there was actual direct or irresistible compulsion; it was sufficient that the sanitary authority took steps which amounted to compulsion. That is what the defendants have done here.

Courthope Munroe for the defendants. The learned county court judge was right. It is essential for the plaintiffs to show that the work was done under compulsion; and in this case there was no compulsion, the work was done by the plaintiffs voluntarily. An intimation under section 3 of the Act of 1891 is a mere warning, and puts no compulsion on the person to whom it is addressed, as has been held by the Court of Appeal in *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580, and by Wright J. in *Proctor v. Islington Borough Council* (1902) 18 *Times* L. R. 505, and *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31. *Proctor v. Islington* went to the Court of Appeal, but was settled, no judgment being pronounced. In *Gebhardt v. Saunders*, 1892, 2 Q. B. 452, and *Andrew v. St. Olave's Board of Works*, 1898, 1 Q. B. 775; 67 L. J. Q. B. 592, notice had been given under section 4; and such a notice, as was pointed out in these cases, does put compulsion on the person to whom it is addressed. *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972, was decided under the Public Health Act, 1875, which contains no provisions for the giving of an intimation similar to those in section 3 of the Act of 1891. That case was dis-

tinguished by Ridley J. in *Ellis v. Bromley Rural District Council* (1899) 63 J. P. 711. *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217, is another authority against the plaintiffs. The intimation under section 3 proceeds not from the local authority, but from the inspector of nuisances. The giving of it is in no sense the act of the local authority.

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Secondly, it is not conceded that the pipe was a sewer at all. It appears that the predecessors of the Council ordered the premises to be drained by a combined operation; and it must be conceded that if that order had been complied with the pipe would have been a drain and not a sewer. In fact, however, the builder wrongfully departed from the order, and it is said upon the authority of *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245, that the consequence is that the pipe which was thus wrongfully laid is a sewer and not a drain. No doubt that is so as between the council and strangers to the transaction. But it appears from the judgment of Channell J. in *Butt v. Snow* (1903) 2 L. G. R. 222; 89 L. T. 302, that as between the builder who did the wrongful act and the Council the pipe remains a drain, and it is submitted that it must be so also between the Council and the plaintiffs who derive their title under the person who did the wrongful act.

Naldrett in reply. This is a notice which leaves no doubt as to the attitude adopted by the local authority, namely, that in seven days they will commence proceedings. To the plaintiffs' mind this amounted to compulsion, which warranted them in taking the steps they did. A notice served by an officer of the local authority for the purpose of having duties performed is compulsion: *North v. Waltham-stow Urban District Council*. In *Ellis v. Bromley Rural District Council* there was no notice.

[*Courthope Munroe* mentioned *St. Leonard's Vestry v. Holmes* (1885) 50 J. P. 132.]

WILLS J. I confess to giving the decision I am about to give with some reluctance because I do not agree with it, and, if I were free from authority I should not so decide; but I can hardly think that the decision of this question is really open to us after the decision in the Court of Appeal in *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580. It is quite true that decision does not go entirely upon the point now in question, but that point was distinctly raised and distinctly dealt with in the judgment of Lindley L.J. It is quite clear that he had before him a notice substantially the same as that in the present case, and notwithstanding that, he held that the notice under section 3 of the Act of 1891 is not equivalent for the

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purpose of compulsion to a notice under section 4. My brother Wright has twice decided the same thing upon exactly the same point, and, although sitting here as a Divisional Court we are not bound by his judgment, still it is an important factor in considering what our judgment ought to be. Inasmuch as the three cases to which I have referred deal with the very point in question, and there is really no substantial distinction of any sort or kind to be drawn between the notice which was in question in those cases and the notice which is in question in the present case, I think we are bound to follow those decisions, and to say that there was no legal compulsion in this case upon the plaintiffs to do the work, and that therefore they cannot recover against the defendants.

I cannot give this judgment without saying at the same time that I do so with great reluctance, and only because I am compelled to do it. To my mind a perfectly different view of sections 3 and 4 taken together might have been taken, and I think it might very well have been held that an intimation under section 3 was intended to be a notice with which a man might comply if he was so disposed without waiting for the more formal notice to be given under section 4. I will say in a moment why in this case I think it is the intimation of the borough council and not merely of the inspector of nuisances; but where a man obeys the intimation of the council which they accompany with a threat that they will make it compulsory upon him to do the work if he does not do it voluntarily, it seems to me contrary to natural justice that he should stand in a worse position than if he refuses to do what they have told him to do, and waits for a further compulsory order. I think the fact also has been overlooked that in that section there are words which seem to point to the fact that the notice is something more than a mere intimation, because what is said is that the sanitary authority shall give such direction to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it. I think that seems to indicate that when a person gets the notice he is required to abate the nuisance. It seems to me a very thin distinction indeed to say that if a notice can be given the consequences of which, as is admitted and has been decided, are that it amounts to a compulsion to do the thing, there is less compulsion because the person served is told that if he does not do the work within a fortnight, the sanitary authority—who are not in the position of an ordinary litigant or individual, but are the persons who have charge of this matter and whose duty it is to see that all proper steps are taken—will take proceedings against him. Mr. Courthope Munroe says that is only the language of the

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inspector; with great respect to him I think that is nonsense. An inspector does not use forms of this kind without the knowledge of his employers, and the sanitary authority who give him these forms to distribute, and allow him to make use of them, are, I think, legally as well as morally liable for their contents, and if they allow a man to sign himself as the officer deputed by them to take proceedings under this Act, and to state that unless the notice is complied with within a week proceedings which will be compulsory will be taken without any further decision of the sanitary authority, and without anything beyond what has already taken place, I think they must be bound by such a statement, and that that notice must be taken as their notice that they will proceed to make it compulsory. As I say, the distinction is a very thin one, and it is not one which commends itself to my judgment, and I am far more disposed to take the sort of view in this question which was taken by my brother Channell in the case of *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972, than I am to take the view taken by my brother Wright and prior to that by Lindley L.J., certainly, in the Court of Appeal, in the case to which I have already referred. However, I am bound by that authority, and I adopt it loyally; but, at the same time, inasmuch as this question, probably either in this case or some other, will not stop here, I think there is no objection to my expressing what my individual opinion would have been if I were not fettered by authority. I do so the more because I think many of the considerations which I have dealt with have not really been before the Courts which have decided the question so as to bind us.

It appears also that a question was raised before the learned county court judge with which we cannot deal, because he has given no judgment about it. But it is a very important question, and, had our judgment been that the case must go down for a new trial, that question would have had to be dealt with. There is a good deal to be said (though I give no judgment upon it) for the view—I do not think upon the evidence in this case it has been made out, because the evidence seems to me to be singularly meagre and unsatisfactory on the point, and the learned county court judge so felt it because he has given no judgment upon it—that if it really be the fact that a thing which ought to have been a drain was by the fraudulent act of a builder (because not to mince matters that is what Mr. Courthope Munroe suggests) made into a sewer within the definitions applicable to this case, by joining it on to another drain and sending it somewhere else than where the sanitary authority had allowed it to go—if that kind of thing had been practised upon them, and that was only found out when the investigation came on the present occasion in consequence

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of the opening of the ground, there is, of course, a great deal to be said for the view that neither the person who was actually responsible for such misconduct nor those who claim under him could take advantage of it. But as to that I express no opinion, and I only desire to say that it has not escaped us; but we feel the seriousness of the question which might have to be decided, and which apparently has not yet been decided, although there are expressions from Channell J. which indicate the trend of his opinion on the matter.

For these reasons I think we are bound, however much I feel that if I had been unfettered by authority I should not give this decision myself, to follow the decision which has been cited, and we must dismiss this appeal.

KENNEDY J. I have come to the same conclusion, and I think I may without impropriety join in the expression of my brother as to the feeling of reluctance with which we pronounce a judgment we should not have pronounced if our judgment had been independent and entirely unfettered.

In this case the only point which we really have to decide is whether or not this was, on the evidence, a voluntary work on the part of the plaintiffs—whether they incurred the expense of the work voluntarily or not. If they incurred it voluntarily they cannot, on finding that they need not have gone to the expense of doing the work, and that another person ought to have borne a portion of it, go to that other person and say they have paid what he ought to have paid. If on the other hand the payment has been made by them, not voluntarily, but under pressure of the very person who ought to have done the work and incurred the expense, then it cannot be doubted but that they are entitled to recover the money from the other person. Therefore, shortly put, as it presents itself to me at any rate the question is this: Is the fact that the plaintiffs in this case did the work causing the expense after receiving and in consequence of the document of March 18, 1903 (which I call because it is called so by the statute and also in large letters at the head of the paper—an intimation) sufficient to deprive the conduct of the plaintiffs of its voluntary character for the purpose of saying whether they can get the money back on finding that the work ought to have been done by the sanitary authority and not by them? It is obvious from the different decisions that have been given, and the different views—for they are different in my judgment—in the two decisions of my brother Wright on the one hand and in the decision of my brother Channell on the other, that it is not an easy question; but, having had the great advantage of the full argument of counsel and having given it consideration, I am entitled to say that I should feel great difficulty in coming to the con-

clusion I have been obliged to come to if it had not been for the decision of the Court of Appeal. If my judgment had been unfettered I should have found it very difficult to say that it really mattered as regards the voluntariness of what was done by the plaintiffs whether they did it on receiving an intimation in the form used in this case or on receiving a notice under section 4 (1). How can it be said that the plaintiffs' act was voluntary? It was not done under compulsion in the sense of duress or in the sense of there being any liability to a penalty if they had not complied with the intimation *per se*. But the work was not done in the slightest degree because the plaintiffs wished to do it for anybody else or because they were willing to do it for themselves, but because a public authority came to them and intimated to them, to use the exact words, that it was their bounden duty to do it, and that if they did not do it legal proceedings would be taken against them before a magistrate. I cannot say, with great respect, that I concur in the illustration given by my brother Channell. Rights of indemnity which may arise where agents of any sort, commercial or otherwise or on the Stock Exchange, are employed do not seem to me strictly analogous to this question. Here it is the duty of a citizen to obey the authority *prima facie* of a public body governing his district in an urgent matter—a matter of health, which is alleged to be affected by that citizen's want of care or wrongdoing in the management of his premises. In a form which is the form recognised by the local authority an intimation is conveyed to him that if he does not do it actual proceedings will be taken. Is not what he does under that involuntary? I should have been inclined myself to come to that conclusion; and I am bound to say that, while no doubt it is true that this is an intimation under section 3, and not a notice under section 4, it is in each case—and I entirely agree with my brother as to that—a notice which emanates from the local authority. It is just as if in an action a party were to try to cut himself or his personality into two because he deposes an attorney or representative to act for him in all its stages as well as in the letter writing which precedes the action. If the schedule to the Act of 1891 be looked at it will be seen that, just as in the intimation which was sent in this case the inspector signs himself as the officer appointed by the local authority to take proceedings, so again under section 4, which is the section which is admitted by Mr. Courthope Munroe to be the section dealing with the act of the local authority, the notice is to be signed, not by the local authority, but with the signature of their officer. In my view, however, whatever one might have thought on the argument now addressed to us and the authorities now cited, I do feel it is impossible not to do what one is bound to do, that is, loyally follow

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the decision of a superior Court. It may be that the only report of the case of *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580, produced to us, which is evidently a summarised report, may not have fully represented in their right proportion the views of the learned Lords Justices. It may be there was much more stress laid upon the fact that the plaintiffs there had taken upon themselves to treat a notice addressed to somebody else as addressed to them than appears in the report; but I am bound to say, reading that report fairly and in its natural meaning, I think at any rate the majority of the Court did base their decisions upon the distinction between a document served under section 3 as an intimation and a document which is a notice requiring an abatement of a nuisance under section 4, on the ground that the latter would constitute a proceeding compliance with which would be an involuntary act, whereas an intimation under section 3 would leave the person who received it so far free that he could not say he was acting otherwise than voluntarily. If that case was decided on that ground, as well as on the other ground, of course it binds us, and we cannot go behind it. The third Lord Justice no doubt based his judgment on the other ground, but there is no expression of dissent on his part, and at any rate the view of the majority is the view of the Court and is binding upon us. Therefore it seems to me that we must decide as my brother Wills has decided, whatever otherwise might have been our view.

With regard to the other point, it is clear that the learned county court judge has not decided the matter as to which, speaking for myself, I will say no more than that it may be of importance, and I say *may* with emphasis because I do not quite understand, having been myself party to *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245, what is meant by "a chain of title," because I think in *Kershaw v. Taylor* a third person had acquired the premises either by purchase or descent—it does not matter which—but was taking under the title of a predecessor.

WILLS J. I should like to add this—that I hope in common fairness the sanitary authority in this case will alter the form of their intimation, because as it is they are taking advantage of a threat, and when the party comes and says he was induced by the threat to act they say he had no business to act upon it.

Mr. Courthope Munroe. May I say, my Lord, that since the borough council has been formed a new form of notice has been brought out, which is quite harmless and contains no threat of any kind.

Appeal dismissed. Leave to appeal.

Solicitors for the plaintiffs—Mead and Sons.

Solicitors for the defendants—Marsden and Sons.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Note.

In connection with the present case reference may be made to the judgment of Wright J. in *Silles v. Fulham Borough Council* (1903) 1 L. G. R. 643, as well as to the cases cited in the argument. A note of the proceedings in the Court of Appeal in *Proctor v. Islington Borough Council* will be found in a note to the case above mentioned at 1 L. G. R. 652. Since the present case was decided the rights of a private individual who has executed work for which a local authority were properly responsible under pressure from that authority have been again considered by Channell J. in *Haedicke v. Friern Barnet Urban District Council* (decided June 7, 1904) of which a report will appear in due course.

On the question discussed but not decided in the above case as to the respective rights of the owner of the property and the local authority where a pipe for the drainage of two or more houses has been laid unlawfully, see *Heaver v. Fulham Borough Council*, post p. 672.

High Court of Justice.

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CHANCERY DIVISION.

Dec. 16, 17. **ATTORNEY-GENERAL and LONDON PROPERTY INVESTMENT TRUST, LIMITED v. RICHMOND CORPORATION and OTHERS.**

Land—Sale of surplus land by local authority—Building restrictions—Power to vary—Bye-laws—Rights of purchasers inter se—Highways—Cul-de-sac—Presumption of dedication—Evidence.

The defendant corporation offered surplus land for sale by auction in lots subject to certain conditions of sale and building restrictions, but reserved power to vary the latter. Each purchaser was to submit for approval plans complying with the corporation's bye-laws, and to covenant in his conveyance (which was to be in common form for all the purchasers) to build according to his approved plans. The size of the lots only admitted of the erection thereon, consistently with the bye-laws, of buildings of a certain height. The plaintiff company and the defendants G. & Sons became the purchasers of adjoining lots, obtained the approval of their respective plans, and took their conveyances, respectively covenanting to build according to the approved plans. Subsequently, G. & Sons acquired other land not included in the sale but adjoining their two lots. The larger area of the combined sites admitted of the erection of buildings of much greater height and dimensions than was possible on the two lots alone. Fresh plans for larger buildings were submitted to and approved by the corporation. In an action by the plaintiff company to restrain the erection of buildings in accordance with these plans in breach of the alleged building scheme,

Held, that having regard to the reservation of power to vary the plans, no one purchaser acquired as against any other purchaser, either at the auction or after the execution of the conveyances to the various purchasers, a right to insist that the latter's buildings should be of any particular height or dimension.

A cul-de-sac may be a highway, but where there is no evidence that it has ever been paved, cleansed, or lighted by the parish or other public authority, the Court will not, merely because the entrance to the cul-de-sac has not been separated from the public highway by a bar, presume dedication to the public.

ACTION.

In the year 1898 the defendant corporation acquired statutory powers enabling them, for the purpose of widening and improving George Street, Richmond, Surrey, to put in force with reference to certain land on the north side of George Street (subject nevertheless to the continuance of any existing public rights of highway) the powers of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement.

The defendant corporation duly acquired the land, and after widening George Street, they, on June 17, 1902, with the consent of the Local Government Board, put up for sale by auction in lots the surplus land not required for the purposes of the improvement, subject to certain conditions of sale and building stipulations. The conditions material for the purposes of this report were conditions 8 and 9. Condition 8 provided as follows: "The purchaser of each lot shall within three calendar months from the date of the sale of such lot submit to the corporation for their approval proper and sufficient plans and elevations for a new building to be erected upon such lot, and also a proper and sufficient specification for the construction of such new building, such plans and elevations to be in addition to the plans and sections required to be deposited under the bye-laws of the corporation with respect to new streets and buildings, and such plans, elevations, and specification to comply in all respects with such bye-laws and with the building stipulations set out at the foot of these conditions, and such purchaser shall make such modification in the said plans, elevations, and specification, or any of them, as the corporation or the borough surveyor may reasonably require, and no purchaser shall be entitled to possession of the lot purchased by him until such plans, elevations, and specification shall have been approved by the corporation in writing under the hand of the borough surveyor." Condition 9 provided as follows: "The purchase of each lot shall be completed at the Town Hall on the 30th day of September next, and thereupon the purchaser of such lot shall be entitled, subject to these conditions, to a conveyance of such lot accordingly, such conveyance to be in the form of the draft already approved by the corporation and signed by the town clerk for the purpose of identification, and to be subject to the covenants and conditions in such draft contained. A copy of the draft so approved may be seen by intending purchasers at the Town Hall on any day before the sale and will be produced in the auction room, and each purchaser shall be deemed to purchase with notice of the form, contents, and effect thereof. The plans elevations, and specification to be referred to in the conveyance shall be the plans, elevations, and specification approved by the corporation under condition 8 hereof."

At the foot of the conditions of sale were appended various building stipulations, the first providing as follows: "Each building shall cover the entire frontage of the lot upon which it is to be erected, and shall in all respects comply with the bye-laws made by the corporation with respect to new streets and buildings, and the net cost in labour and materials of each building (exclusive of fixtures and fittings) shall be not less than the amount following, namely, as to lots 1 and 2,

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£1,250 each; as to lot 3, £1,750; as to lot 4, £2,000; as to lot 5, £1,750; and as to lot 6, £1,000." The only other building stipulation material for the purposes of this report was the last, which provided as follows: "The corporation reserve the right to waive or alter any of these stipulations as to any land not sold at this sale or (with the consent of the purchaser thereof) as to any land so sold."

The plan annexed to the particulars and conditions of sale showed that lot 3 was bounded on the south by George Street, on the west by land already the property of the defendants, Gosling and Sons, and on the east by lot 4. Lot 4 was bounded on the south by George Street, on the east by Pensioners' Alley (now Golden Court), on the north by Golden Square, and on the west by lot 3. Lot 5 was bounded on the west by Pensioners' Alley, and was on that side faced by lot 4 on the opposite side of Pensioners' Alley at a distance of 12 feet, on the south by George Street, and on the east by lot 6. Lot 6 was bounded to the west by lot 5, and to the south by George Street. The plan further showed Golden Square to the north of lots 3 and 4 as an open space marked as private property.

At the auction the defendants Gosling and Sons became the purchasers of lot 3. James Chambers bought lot 4, and the plaintiff company purchased lots 5 and 6. Subsequently, the defendants Gosling and Sons acquired the benefit of Chambers' contract. The plaintiff company alleged, but the defendants denied, that the auctioneer stated that the buildings on lot 4 would be restricted in height so as not to exceed 35 ft. 6 in. The size and position of lot 4, however, were such that the possible air space available in the rear of the lot would, under the 55th bye-law of the corporation, only permit of the erection of buildings not exceeding 35 feet in height on the remainder of the lot. The plaintiff company had plans, elevations, and specification prepared of the buildings proposed to be erected on lots 5 and 6, and the same were approved by the defendant corporation. By an indenture of September 9, 1902, lots 5 and 6 were conveyed to the plaintiff company in fee simple subject to certain perpetual yearly rent-charges (which were afterwards redeemed by the plaintiff company), and the company thereby covenanted to erect forthwith a messuage upon each plot in accordance with the plans, elevations, and specifications already approved by the corporation.

In the month of September, 1902, the defendants Gosling and Sons submitted to the defendant corporation plans of their proposed buildings on lots 3 and 4, but such plans were not approved because they did not comply with the 55th bye-law of the defendant corporation. Modified plans were then submitted and approved, and lots 3 and 4 were in February, 1903, conveyed to the

defendants Gosling and Sons by the corporation. This conveyance contained a covenant by Gosling and Sons to erect buildings upon their lots in terms similar to those of the covenant in that behalf contained in the conveyance to the plaintiff company.

On June 9, 1903, the defendants Gosling and Sons acquired the site of Golden Square from the Crown, and also other land to the north-west of Golden Square from the corporation. By reason of such further acquisition the defendants Gosling and Sons were enabled to provide in the rear of their proposed buildings the larger open space required by the bye-laws for buildings of a greater height than those already approved by the corporation in respect of lots 3 and 4, and thereupon they submitted further plans of higher buildings which they proposed to erect on the combined sites of lots 3 and 4 and Golden Square. These further plans were duly approved by the Corporation, and the defendants Gosling and Sons began to build in accordance therewith.

The plaintiff company then commenced this action against the corporation and Gosling and Sons, in which they alleged that the permission by the defendant corporation of the erection of Gosling and Sons' proposed buildings was a breach of the alleged building scheme contained in the terms, conditions, and stipulations of sale, and was a derogation from their grant to the plaintiff company; and that Golden Square from time immemorial had been an open space of which the surface had been dedicated to the public. The plaintiff company claimed a declaration that the buildings in question were a derogation from the defendant corporation's grant and a breach of the alleged building scheme, and an injunction restraining the erection of such buildings to a height greater than was prescribed by the building scheme, and the Attorney-General at and by the relation of the plaintiff company claimed an injunction restraining the defendants Gosling and Sons from building on Golden Square or otherwise preventing the public from having the free enjoyment of the surface thereof as the same had been enjoyed theretofore.

From the evidence at the trial it appeared that Golden Square was not a thoroughfare, but a *cul-de-sac*. It was a narrow court with three cottages on one side and three tenements and a plumber's shop on the other. It communicated at one end with George Street by means of a narrow alley—Pensioners' Alley—formerly 9 feet wide, but which the corporation had now widened to 12 feet. At this end was an archway under which foot passengers could enter. At the north end it communicated with Richmond Green by means of a covered way through which carts could enter and leave. When proceeding to acquire statutory powers to widen George Street, the corporation had

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scheduled Golden Square and obtained power to acquire it, and it had been dealt with by the corporation on the footing that no public right of way existed over it. They had bought up the private rights of way over it, and had ultimately conveyed them to the defendants Gosling and Sons.

The result of the further evidence adduced at the trial sufficiently appears in the judgment.

Macnaghten, K.C., and *A. Mulligan* for the plaintiffs. The plaintiff company complain, first, that the defendants Gosling and Sons are building higher than they are entitled to under the building scheme; and, next, that they have bought and are building upon Golden Square, which is a public highway. In their conveyance the defendants covenanted to build in accordance with plans already approved and which complied with the building scheme as regards the height of the buildings. That covenant enured to the benefit of the other purchasers at the auction, and the defendant corporation were not entitled to release their co-defendants from the covenant, as they subsequently purported to do by approving fresh plans of buildings of a greater height for a larger site. The site of Golden Square was originally part of the waste of the manor of Richmond, and as such was vested in the Crown. It has been used for many years by the public without interruption, and is none the less a highway because it is a *cul-de-sac*.

Vernon Smith, K.C., and *W. M. Cann* for defendant corporation. It is not true to say that the covenant by the defendants Gosling and Sons enured for the benefit of the other purchasers. It was simply a covenant between them and the corporation which the latter could release. There never was any intention to constitute a general building scheme. There is nothing in the conditions or stipulations to show what was to be done in the event of two lots being bought together. Moreover, the corporation expressly reserved the right to alter or waive any of the stipulations with regard to any land sold with the purchaser's consent. That reservation of itself negatives any idea of a general building scheme.

Micklem, K.C., *W. Barnard*, and *F. Hollis Walker* for the defendants Gosling and Sons. There were no mutual provisions between the various purchasers and no general building scheme. On this part of the case these defendants adopt the arguments of their co-defendants. With regard to Golden Square, there never were any public rights of way or user to which it was subject, or any other rights over it other than the private rights which these defendants have acquired. It has

never been repaired by the corporation or their predecessors, and was never dedicated to the public.

Macnaghten, K.C., in reply. The plaintiffs submit that the evidence shows that Golden Square has been open to the public for 40 years. There was no physical obstruction to access, and carts could enter it. The fact that a blind alley leading from a main road has been open to the public for 40 years is sufficient in law to constitute it a highway; and with regard to the presumption of dedication, it does not make any difference that it belongs to the Crown: *Turner v. Walsh* (1881) 6 App. Cas. 636, 639; 50 L. J. P. C. 55; *Reg. v. East Mark Tything, Inhabitants* (1848) 11 Q. B. 877; 17 L. J. Q. B. 177. In *Rugby Charity Trustees v. Merryweather* (1790) 11 East 375 n., it was clearly stated by Lord Kenyon C.J. that a *cul-de-sac* could be a highway. In *Woodyer v. Hadden* (1813) 5 Taunt. 125, some doubt was thrown on Lord Kenyon's statement, but in *Bateman v. Bluck* (1852) 18 Q. B. 870, 876; 21 L. J. Q. B. 406, that statement was affirmed. The Crown has never repaired this square or exercised acts of ownership over it or interfered with anyone using it, but has left it open to the public as derelict, and it must now be considered as a highway: *Vernon v. St. James, Westminster, Vestry* (1880) 16 Ch. D. 449; 49 L. J. Ch. 130; 50 L. J. Ch. 81; *Rex v. Lloyd* (1808) 1 Camp. 260.

With regard to the height of the buildings, the plaintiffs relied upon the corporation to see that the conditions of sale were carried out. They are entitled to have those conditions observed by the defendants Gosling and Sons, and the covenant entered into by those defendants cannot be altered to the prejudice of the plaintiffs.

SWINFEN EADY J. There are two questions raised by this action which are entirely distinct. The first question is whether the defendants the corporation of Richmond were entitled, as they did on July 7, 1903, to approve the plans of the defendants Gosling and Sons and to consent to their putting up buildings in George Street, Richmond, in accordance with those plans. The plaintiff company, who are the purchasers of adjoining lots, insist that the buildings must be erected in accordance with a building scheme with which the defendants are not entitled to interfere. The facts are very simple. It appears that the corporation of Richmond acquired statutory powers to widen George Street, and for this purpose they took certain land, and put up the surplus land for sale in lots by auction on January 17, 1902. The plaintiff company purchased lots 5 and 6 and the defendants Gosling and Sons lots 3 and 4. Two points were made by the plaintiffs with reference to this matter. First, it was said that, having regard to the conditions of sale, the purchasers were bound to put up, and were

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only entitled to put up, such buildings as could be erected on the land offered for sale at the auction without using or obtaining the benefit of any other land which belonged to the same building owner. In other words, it was said that the purchasers were only entitled to erect such buildings as, according to the bye-laws, could be put up on the land so offered, and that if any air space had to be provided it had to be provided out of such land. The second point was independent, and was this, that, even assuming the plaintiffs were not right on the first point, after the conveyances to the various purchasers were executed no deviations from the plans covenanted to be observed could be allowed, even although a purchaser and the corporation so agreed. [His Lordship then referred to the eighth and ninth conditions of sale, and continued :—] The effect of these conditions is that the conveyance was to be in a special form and that the purchaser was to covenant to build in accordance with plans to be submitted to the corporation within three calendar months and with the stipulations contained at the end of the conditions of sale. [His Lordship, after referring to the stipulations, continued :—] So far as the conditions of sale are concerned, apart from the stipulations, there is no obligation on a purchaser to build along the entire frontage or to cover the entire area of the land, nor is there anything which restricts him to erecting buildings solely on the land put up for sale without utilising any other land he may buy. There is no stipulation that the building must be put up with reference only to the land sold and conveyed at that sale ; it will, therefore, be seen that the matter was entirely at large as to the class, style, and nature of the building to be erected. True it is that the bye-laws must be observed, and stipulation 1 provides that the building must cover the entire frontage of the lot on which it was to be erected, and that the buildings must be of a certain value ; but under stipulation 14 the corporation have power, with the consent of the purchaser of any land, to waive or alter any of the stipulations. No one purchaser, therefore, acquired, as against the other purchasers, a right to insist that the latter's buildings should be of any particular dimensions or value. The plaintiffs contend that they acquired a right at the date of the auction when they entered into their contract. The question is, what is the right they then acquired ? In my judgment they did not acquire the right they now claim that when once a plan was approved by the corporation it could not afterwards be varied by agreement between the parties. What happened in the present case was that the defendants Gosling and Sons subsequently to the sale acquired certain adjoining land which enabled them to put up buildings of different dimensions to what they could have done if they had been confined to building

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only on the land purchased by them at the auction, and the corporation consented to their plans being modified. The plaintiffs have no right as against the corporation and Gosling and Sons to prevent the new buildings, which are in conformity with bye-laws, from being put up. The model deed contained a covenant that the buildings were to be erected in accordance with the plans approved by the corporation, but these plans might be altered with consent of the parties. This is not like the case where a purchaser is invited to bid at an auction on the representation that the buildings are all to be of the same character. On this part of the case, therefore, the plaintiffs fail.

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The second part of the case is entirely different, and with it the corporation are not concerned. The plaintiffs allege that a particular portion of the land over which Gosling and Sons are going to build, viz., Golden Square, is part of a public highway, and the Attorney-General has been joined as a plaintiff. In my judgment the fact that Golden Square was not a thoroughfare, but a *cul-de-sac*, did not prevent its being a highway. As a matter of law such a place may be a highway. In *Rugby Charity Trustees v. Merryweather* (1790) 11 East 375 n., Lord Kenyon laid down that there might be a highway through a place which was not a thoroughfare, and left it to the jury to say whether there was such highway or not. That decision was approved in *Bateman v. Bluck* (1852) 18 Q. B. 870; 21 L. J. Q. B. 406. The question, therefore, is one of fact whether Golden Square has or has not been dedicated to, and used by, the public as a highway. The answer to that question depends on the evidence adduced by the parties and the proper inference to be drawn from it. It is not like the case put by Lord Campbell in *Bateman v. Bluck*, where he said (at p. 876) by way of illustration: "Take the case of a large square with only one entrance, the owner of which has for many years permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers." The present case is one of a narrow court with three cottages on one side and three tenements and a plumber's shop on the other. It opened into a narrow alley formerly 9 feet wide, but which has now been widened to 12 feet. There was a building over the entrance at each end. At the George Street end there was an archway under which foot passengers could enter. At the Greenside end there was a covered way through which carts could enter and leave. There is no evidence that Golden Square was ever used by a single person other than as an approach to houses in the square or to premises which had their back entrances opening on the square. The whole of the evidence adduced is that of persons

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using Golden Square as a means of access to the cottages and the business premises having their back entrances in the square. Not a single person was called to prove that any member of the public used the square as distinct from persons going there on business. Even if it were a fact that any cottager in Golden Court was in the habit of passing through Golden Square he might possibly, no doubt, obtain a private right of way appurtenant to his cottage, but there is no evidence from which I can infer that the square was used by the public. Another matter to which I attach particular importance is that Golden Square was never repaired or paved by the local authority. There is a distinction in this respect between Pensioners' Alley and Golden Square. Pensioners' Alley was originally paved with cobbles and subsequently with wood pavement, but Golden Square has never been cleaned or paved by the local authority. It is not shown that it has ever been lighted by the local authority. In other words, it is not shown that any public money has ever been spent on it. In the cases in which a *cul-de-sac* has been held to be a highway great importance has been attached to paving, cleansing, and lighting. In *Bateman v. Bluck* the court had been paved, cleansed, and lighted by the parishioners. In *Vernon v. St. James, Westminster, Vestry* (1880) 16 Ch. D. 449, at p. 454; 49 L. J. Ch. 130; 50 L. J. Ch. 81, Malins V.C. said: "It (*i.e.*, the court) has certainly been lighted, cleansed, and paved by the parish for the last 70 or 80 years, if not more, and latterly has been in every respect treated by the parish authorities as one of the public places under their control." The evidence in the present case is exactly the other way. In no single respect has this square ever been treated by the public authority as under their control. In a later case of *Bourke v. Davis* (1889) 44 Ch. D. 110, Kay J. (at p. 122) said: "But it is argued that a *cul-de-sac* may be a highway. That is so in a street in a town in which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public." Those circumstances are of very considerable weight in considering what is the true inference to be drawn in the present case. It also appears that when the corporation of Richmond were proceeding to acquire statutory powers to widen George Street they scheduled Golden Square and obtained power to acquire it, and it had been dealt with by the corporation on the footing that no public right of way existed over it. It further appears that they bought up the private rights of way over Golden Square and conveyed them to Gosling and Sons. It is true that no bar was put up to separate Golden Square from Pensioners' Alley, but, having regard to the very narrow passage, it may well be that such a bar would not only be of

no use, but a great obstruction to the carts going to the plumber's shop. But be that as it may, I am clearly of opinion that the absence of a bar does not compel me, as a matter of law, to hold that there has been a dedication to the public. In *Woodyer v. Hadden* (1813) 5 Taunt. 125, where the litigation was as to John Street, Shoreditch, there was no bar. There a house had been built on a street 24 feet wide, and the street had been paved at the private expense of the inhabitants and lighted and cleansed by the parish. The jury found that there was no dedication of the street to the public. On a motion for a new trial it was insisted that there was no bar, and *Rex v. Lloyd* (1808) 1 Camp. 260, was cited, but Mansfield C.J. and Gibbs J. observed that that was the case of a thoroughfare. Ultimately the rule *nisi* for a new trial was discharged. Lord Mansfield (at p. 141) said: "There must be a way to these houses, and the carts and carriages which went there went only to these houses, and could go nowhere else, because of the wall at the end." Then, referring to the observations of Lord Kenyon, he said: "Lord Kenyon and my brother Chambre say this would be a snare to trespassers. I think not. While it was open without any notice affixed not to come there, I think its being open and inviting persons would support a plea of licence." In my judgment the true inference to be drawn from all the facts of the case, after giving full weight to the fact that there was no bar, is that Golden Square is not, and never has been, a public highway; that it has always been a private square; and that the persons living in the square may have private rights of way to their houses for themselves and for all persons coming to them by their express licence. For these reasons the plaintiffs' action wholly fails, and must be dismissed, with costs.

Solicitor for the plaintiffs—H. Coulson.

Solicitors for the defendant Corporation—Field, Emery, Roscoe, and Medley for F. B. Senior, Richmond.

Solicitors for defendants Gosling and Sons—Trollope and Winckworth for Smith and Burrell, Richmond.

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COURT OF APPEAL.

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LONDON AND NORTH-WESTERN RAILWAY v. WESTMINSTER CITY COUNCIL.

Sanitary conveniences—Public conveniences—Metropolis—Construction of convenience under street—Colourable use of statutory powers—Subway—Trespass—Mandatory injunction—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44.

In constructing a sanitary convenience under the powers conferred by the Public Health (London) Act, 1891, s. 44, the sanitary authority may make reasonable and proper approaches under the roadway for the purposes of entry and exit, but may not make approaches of a size and character not required for these purposes, but intended to make the approaches available as a subway for the use of foot passengers in crossing the street; and a mandatory injunction will be granted to remove so much of the works as are in excess of the authority's statutory powers at the suit of a person whose land they have used for the purpose.

Decision of JOYCE J., reported 1902, 1 Ch. 269; 71 L. J. Ch. 34, reversed.

Per VAUGHAN WILLIAMS L.J. The meaning of subsection 2 of section 44 of the Public Health (London) Act, 1891, is that, if the sanitary authority use the subsoil of the road for the purposes specified, then ipso facto the subsoil vests in them.

APPEAL by the plaintiffs from a decision of Joyce J. (reported, 1902, 1 Ch. 269; 71 L. J. Ch. 34).

The plaintiffs were the owners of certain freehold messuages at the corner of Parliament Street and Bridge Street, in the parish of St. Margaret's, Westminster, which were conveyed to them in 1886. At this date the pavement in front of the Parliament Street premises was 12 feet wide. In 1899, when Parliament Street was widened by the then local authority, the width of this pavement was increased to 21 feet. The plaintiffs had vaults under this pavement, extending out into the roadway, and for the purposes of this appeal the plaintiffs' title to the subsoil up to the middle of the street, as it existed at the date of their conveyance, was not contested.

Some years back the then local authority were desirous of making a sanitary convenience in the neighbourhood of Westminster Abbey. There was a difficulty in obtaining some necessary consents, and they conceived the idea of providing the convenience at a point more to the north, in connection with a subway or scheme of subways under Parliament Street, which subway or subways they hoped to get some

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public authority to construct. Failing in this, the defendants ultimately, in November, 1900, proceeded on their own account to construct under the middle of Parliament Street certain public conveniences with approaches thereto by means of subways from either side of the street, the entrance to these subways being by means of staircases placed at or near the edge of the pavement. One of these staircases was placed opposite to the doorway of the plaintiffs' premises. It extended to a distance of 33 feet along the footway, and was fenced off from it and from the roadway by an iron railing. It was constructed chiefly in the roadway, but to the extent of 2 feet 9 inches it encroached upon the footway as it existed after the widening of the street. The wall of the staircase nearest to the plaintiffs' premises was built up close to the wall of the plaintiffs' vault.

The subway was 8 feet in height and 10 feet in width throughout its entire length, and the conveniences were so constructed that the inside of the conveniences was not visible from the subway.

A portion of the plaintiffs' subsoil under the footway, and a portion of the plaintiffs' subsoil under the road, had been used by the defendants in these operations.

The plaintiffs objected to the works so constructed by the defendants, alleging that the defendants had no power under the Public Health (London) Act, 1891, to construct a subway; and that inasmuch as the subsoil of the road was vested in the plaintiffs *ad medium filum via*, the making of the subway constituted a trespass upon their property; and that even if for the purpose of making the conveniences the subsoil of the roadway was vested in the defendants, and not in the plaintiffs, the subsoil of the footway was not so vested, and that to the extent to which the staircase was constructed in the footway it constituted a trespass; and, further, that the erection of a portion of the staircase over the wall of the plaintiffs' vaults constituted a trespass.

The plaintiffs also alleged that by erecting the staircase and railing opposite to the entrance to their premises the defendants had obstructed the highway to the particular damage of the plaintiffs by obstructing and interfering with the access of the plaintiffs from their premises to the highway. The plaintiffs claimed an injunction to restrain the defendants from continuing to trespass by permitting the subway, staircase, and railings to remain upon the plaintiffs' land, and, alternatively, an injunction to restrain the continued obstruction of the highway.

The defendants pleaded that they had acted under the powers conferred by the Public Health (London) Act, 1891 (54 & 55 Vict., c. 76), the material provisions of which are as follows:—

Section 44 (1). Every sanitary authority may provide and maintain public lavatories

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and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage.

(2) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority.

Section 141. In this Act, unless the context otherwise requires . . .

The expression "street" includes any highway, and any public bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not, and whether or not there are houses in such street.

* * * * *

The expressions "building" and "house" respectively include the curtilage of a building or house, and include a building or house wholly or partly erected under statutory authority.

* * * * *

The expression "sanitary convenience" includes urinals, water closets, earth closets, privies, and any similar conveniences.

At the time of the trial (reported, 1902, 1 Ch. 269; 71 L. J. Ch. 34), the works were nearly completed.

Joyce J. held that the primary object of the defendants was to provide and maintain the public sanitary conveniences, and that they had acted within the statutory powers conferred on them by the Public Health (London) Act, 1891, s. 44, except so far as they had taken a portion of the plaintiffs' subsoil under the footway. His Lordship therefore granted an injunction as to this portion alone, but, considering that the plaintiffs had failed in substance as to the rest of their case, made no order as to costs.

The plaintiffs appealed.

On the appeal the Court of Appeal, as the result of the evidence, came to the conclusion that in making the approaches as they did the object of the defendants was to provide a convenient subway to enable foot-passengers to cross the street, and not merely to provide a means of entry to and exit from the conveniences. In connection with this view of the evidence Vaughan Williams L.J. and Stirling L.J. referred to the following minutes and letters in the course of their judgments. A minute of July 27, 1898: "Parliament Street and Parliament Square subway and convenience. The surveyor has submitted a plan showing a proposal for the formation of a subway to facilitate vehicular traffic and to provide a safe crossing for foot passengers under Parliament Street and Parliament Square in connection with the widening of the first-named thoroughfare and embracing in the scheme a project for the construction of a large

convenience. The committee recommend that the vestry give their approval in principle to the proposition and that the scheme be submitted to the First Commissioner for Works for his consideration with an intimation that the vestry would undertake the construction and maintenance of the convenience." A further minute of January 11, 1899: "In reference to the proposal for the construction of a convenience and subways at the south end of Parliament Street and to the representations made in the matter to the First Commissioner for Works by direction of the vestry on June 27 last it has now been reported by the surveyor that the department does not intend to take any steps to provide the suggested subways and has expressed the opinion that the construction of the convenience should not be commenced till after the coming session of Parliament." A further minute of December 6, 1900: "We have received a letter from the London and North-Western Railway Company objecting to the construction of a sanitary convenience opposite No. 35, Parliament Street. Inasmuch as the work involves not merely the construction of a subway but part of a system of subways we do not deem it necessary to stop its progress." A letter of September 20, 1900, written by Mr. Wheeler, the defendants' surveyor, to Mr. Whitelaw, the plaintiffs' agent, as follows: "I am constructing on behalf of the Westminster Vestry and in accordance with their directions a subway from one side of Parliament Street opposite your offices to the western side which is approached by staircases on footpath. Unfortunately this will necessitate the acquiring by lease or purchase a portion of your vault. I should therefore feel obliged if you would inform me what your company would require for assisting in giving a great convenience to the public at so dangerous a crossing and enclose a plan"; and another letter of December 4, 1900, written to the then solicitor of the plaintiffs as follows: "Your letter of the 19th ult. on the subject of the works in progress at the south end of Parliament Street was laid before the Works Sewers and Highways Committee of the City Council at their last meeting, when I was directed to explain that the intention is the construction of a subway to facilitate pedestrians crossing from one side to the other of a thoroughfare of great width and very considerable traffic, an object with which the committee consider your company will be in the fullest accord. The formation of an entrance at the position in question is necessarily obligatory to give proper effect to the scheme. Admission to the conveniences, which will be accessible from the subway, could otherwise have been provided from refuges above them. I may add for your information that the plan and project generally received the approval of Her Majesty's Office of Works."

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Mr. Wheeler, the surveyor, who was called as a witness by the defendants, admitted in cross-examination that under ordinary conditions, to make the approaches to a convenience more than six feet wide would be a waste of space and a waste of money. Another witness, Mr. C. S. Smith, the chairman of the committee, also admitted that the approach was a subway as well as an approach.

Younger, K.C., M. Shearman, K.C., and Eustace Hills for the appellants. Under section 44 of the Public Health (London) Act, 1891, the defendants, as the sanitary authority, have power to provide sanitary conveniences other than privies in situations where they deem the same to be required; and under subsection (2) for this purpose the subsoil of any road exclusive of the footway adjoining any building, or the curtilage of a building, is vested in them. Under the interpretation section, section 141, "street" includes "any highway, and any public bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not, and whether or not there are houses in such street"; "building" and house" respectively include "the curtilage of a building or house, and include a building or house wholly or partly erected under statutory authority"; and "sanitary convenience" includes "urinals, water-closets, earth-closets, privies, and any similar conveniences."

The defendants have no power to take the subsoil of the roadway except for the purpose of the convenience. The approaches are not, as they say, merely part of the convenience. The defendants have encroached on the company's land without authority, for although they were justified in making a sanitary convenience they have no power to make a subway. They expressed their intention of making a subway at this point, and made the entrance much wider than was required for the purposes of the convenience only. This was not authorised by the Public Health (London) Act, 1891, s. 44. Having come upon the property for an unauthorised purpose, they are trespassers *ab initio*: *Harrison v. Rutland (Duke)*, 1893, 1 Q. B. 142; 62 L. J. Q. B. 117; *Hickman v. Maisey*, 1900, 1 Q. B. 752; 69 L. J. Q. B. 511; *Six Carpenters' Case* (1610) 8 Co. Rep. 146a; 1 Sm. L. C. (11th ed.) 132. They should therefore be restrained by the Court. Under the Act the defendants have a right to make a sanitary convenience with an entrance to it, but not a long approach from the plaintiffs' side of the street. It is clear that their principal object was to make a subway. [STIRLING L.J. referred to *Stockton and Darlington Railway Co. v. Brown* (1860) 9 H. L. C. 246. COZENS-HARDY L.J. referred to *Dodd v. Salisbury and Yeovil Railway Co.* (1859) 1 Giff. 158.]

Hughes, K.C., and *Dighton Pollock* for the respondents. It is not disputed that this convenience is in a suitable and convenient spot. There has been no excess of authority, for anything incident to this purpose of the Act is authorised by it. The entrance and exit is just as much within the discretion of the local authority as is the situation itself. It is not necessary to take the shortest entrance; and if that from the footway is the most convenient, it is the one which the authority ought to select. Assuming that the width of the approach is only such as is properly required for the purposes of the convenience, it is perfectly immaterial that the approach serves another purpose. It is not like adding to the burthen of an easement, which the servient owner may justly complain of. We rely on *London, Brighton, and South Coast Railway v. Truman* (1885) 11 App. Cas. 45; 55 L. J. Ch. 354; *Wilkinson v. Hull, &c., Railway and Dock Co.* (1882) 20 Ch. D. 323; 51 L. J. Ch. 788; and *Lewis v. Weston-super-Mare Local Board* (1888) 40 Ch. D. 55; 58 L. J. Ch. 39.

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Then as to the excess. The extra four feet which are not required cannot affect the title to the six feet which are required, and a trespass of this kind is the proper subject of damages rather than of a mandatory injunction.

Younger, K.C., in reply. Where a statute authorises a public body to take property without making compensation—which is the case here—it is of the utmost importance that they should be restrained from exceeding their statutory authority: *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451. *Goodson v. Richardson* (1874) L. R. 9 Ch. 221; 43 L. J. Ch. 790, shows that an injunction should be granted.

VAUGHAN WILLIAMS L.J. As far as the objects of the vestry, who were the predecessors of the council of the City of Westminster, and the objects of the council are concerned, I have a good deal of sympathy with them, and I cannot doubt myself but that they acted in good faith in this sense—that their desire was a desire to do that which might be best for the public; and of their good faith in that sense, I have not the slightest doubt. Moreover, I think they rather drifted into the position they ultimately took up than took that position up deliberately. [His Lordship reviewed the facts of the case and referred to the minutes of July 27, 1898, and January 11, 1899, and continued:—] That, to my mind, shows very plainly how this matter was initiated—how at first the vestry had no notion of making the subway themselves, and no notion of doing anything more than availing themselves of the subway, when it should come to be made, as a place into which the exit from the conveniences should be made, and

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from which the entrance should be made. In the state of things which had come about, it seems to me quite clear that eventually the council determined that they would make the subway themselves, from which the entrance was to be to the conveniences, and into which the exit was to be.

Now, for the moment, I will not say any more about the evidence, which, to my mind, shows conclusively that that was the truth, but I will deal for a moment with what the powers of the authority were under the Public Health (London) Act, 1891, and in particular section 44. My view of that section is, first, that I do not think that subsection 2 really intends that there should be vested in the sanitary authority immediately so much of the subsoil as could possibly be used for the purposes mentioned, but I think that what that section seems to point at is, that if the sanitary authority in fact do use the subsoil for this purpose, then *ipso facto* the subsoil shall vest in the sanitary authority. I mention that because, if that is the right view, it seems to me to negative altogether the idea that the sanitary authority are to acquire the land and pay for it, or pay compensation for it, in any shape whatsoever. I do not think, if that is the right view, that it could be that the words "may defray the expense . . . of any damage occasioned to any person by the erection or construction thereof" could possibly cover the money payment in respect of the vesting of the land taken in the sanitary authority. That is of some importance, although, in the view that I take of this case, it is not essential that I should determine the matter now; but I think it right to mention that this view which I have taken of the construction of this section might be of importance if one had to decide whether or not the sanitary authority were intended to be the judges of what land should be taken, and how much of it, because, when the House of Lords had to deal with a similar question in *Stockton and Darlington Railway v. Brown* (1860) 9 H. L. C. 246, I find in the speech of Lord Cranworth these words: "Some general propositions admit of no doubt. In the first place, I think it clear that when the Legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided only that they take them *bonâ fide* with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of

the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." I am not quite sure myself—assuming it to be an essential part of Lord Cranworth's definition as to the occasions on which the company, or others, taking the land have jurisdiction to say to what extent they will take the land, that the land so taken shall be taken under the condition that there is secured to the landowner adequate compensation for the taking of the land—that this is a case in which one could say that that was true, because, for reasons that I have already given, I have great doubts whether the words in section 44 as to damage do secure adequate compensation to the landowner. But I do not propose to decide that question or enter into it, because, in my judgment, it is not necessary in this case to do so. I say that it is not necessary in this case to do so, because, in my judgment, in the present case it is not true to say that the corporation have taken this land, which they have taken, with the object of using it for the purposes authorised by the Legislature. If the judgment of Lord Campbell, who delivered the first judgment, is looked at, as well as this judgment of Lord Cranworth's to which I have been referring, both of them affirm in the clearest possible manner that if a company or other authority purporting to acquire the land under the powers of the Act of Parliament is not acquiring it for the purposes mentioned, but is acquiring it for other and different purposes, then the duty of the Court would be to restrain that authority. Lord Campbell's words are: "If it had been proved that the company was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands of Brown, which were to be applied to other and different purposes, I think the Court would have been justified in interfering by injunction"; and Lord Cranworth says precisely the same thing.

Now I want to say one word about *mala fides*. Lord Campbell uses the words "*malâ fide*." Mr. Justice Joyce said that he could not find on the evidence here that the council or the vestry, or either of them, acted otherwise than *bonâ fide*. I think that when Lord Campbell says "was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands . . . which were to be applied to other and different purposes" than those authorised by the Act of Parliament, he meant merely to explain there what would be *mala fides*. You are acting *malâ fide* if you are seeking to acquire and acquiring lands for a purpose not authorised by the Act of Parliament, and in such a case it is right to restrain persons who are misapplying the powers of an Act of Parliament.

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Now, as I have already said, my view is that the defendants here, and their predecessors, did acquire these lands for purposes not justified by the Act of Parliament. It really was hardly denied during the argument but that in truth and in fact the defendants did construct this approach, as it has been called, of dimensions which were wider than would be required for the approach to a sanitary convenience, and which were suitable for a subway. It also really was hardly denied but that in so doing they did it for the very purpose that this subway might be used as a highway. They have no Parliamentary authority to acquire land for the purpose of making a subway, and under those circumstances it seems to me that they ought to be restrained. I have said that in argument it was hardly denied that the facts were such as I have stated, but really it could not be denied in the face of two such letters as the letters of September 20, 1900, and December 4, 1900. [His Lordship read the letters, and continued :—] Now, in the face of those letters it is not to be wondered at that there was considerable hesitation in arguing at all but that the object and purpose which the council of Westminster had in view here was the construction of a subway. We heard an argument about whether the Act of Parliament authorised or justified the taking of the subsoil for the purpose of making approaches to the sanitary convenience—I shall say one word about that in a moment—but let me assume to the full that the Act of Parliament does justify that. It only justifies such a course in a case where the making of the approach where it is made is really necessitated by the conditions of access to and egress from the convenience. But how can that be said to be so here when this very letter tells us that admission to the conveniences which will be accessible from the subway could otherwise have been provided from the refuges above? It ceases (if that passage is true) to be true that these subways have in fact been constructed as approaches to the sanitary conveniences. It is merely that, these subways having been built by the Westminster Council, it is supposed by the Westminster Council that it will be a convenient thing that there should be placed sanitary conveniences, the access to and egress from which shall be in a subway which is being constructed by the council.

With regard to the approaches, I agree with a great deal that counsel for the respondents said. I think that where you are to have underground conveniences you must have approaches other than mere access (entrance to) and egress (exit from) them, because in the nature of things you must have some stairs or some slope, which will occupy considerable lateral space, leading you to immediate proximity to the situation of the conveniences, and therefore I think that you must have an approach, and I think probably that if the council or other

sanitary authority had really fixed upon a particular passage as affording a proper approach for the conveniences as such, it might not have been right for us to review their discretion in that respect. But no such question arises in the present case if you arrive at the conclusion that I have arrived at, in fact, which I cannot put better than this, that the true position of affairs is accurately described in the letter of December 4 which I have just read.

Under these circumstances, I think that this appeal ought to be allowed. I think that the remedy which should be given to the plaintiffs here should be wider than that which Mr. Justice Joyce gave. Now what is the best way of giving this remedy? As I said before, one wishes, in giving this remedy, to give it in such a manner as shall be least detrimental to the public. There is the subway; there are these conveniences. Whether they are in a convenient position or not it is not for me to say—the sanitary authority will consider that—but I have no doubt that, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians crossing that wide thoroughfare. Under these circumstances, although I think that we ought not to limit the injunction to what has been called the excess of four feet, yet I want to give an opportunity for the defendants, the council, to do that which I am sure they would wish to do—that which is most for the benefit of the public, and at the same time consistent with the law as we lay it down. If we now say that this is a case in which it may be right ultimately to grant an injunction, we can yet give to the Westminster Council an opportunity of making or undertaking to make alterations which will relieve us from the necessity of granting any injunction at all. If we hold our hand in that way, and give to the council liberty to apply to us—of course the other side must have liberty to apply in case there is delay—it may be that the council will satisfy us that they have either made, or are immediately going to make, such alterations as will justify us in saying we shall not grant an injunction at all.

I think that is all I have to say at present, except that I take it for granted that the plaintiffs will, in a matter of this sort, facilitate the work which the council have to do, and will be prompt and ready to agree to any alterations which may reasonably and properly be suggested by the council.

STIRLING L.J. In this case the defendants, the council of the City of Westminster, purporting to act under statutory powers conferred on them as the sanitary authority within the city, have erected two subterranean constructions at the south end of Parliament Street—one being a public sanitary convenience, and the other a subway. Both those erections stand in part on the subsoil of Parliament Street

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at a point where that subsoil is vested, or is admitted to be vested for the purpose of the present proceeding, in the plaintiffs, who are the owners of a house in Parliament Street. The plaintiffs allege on this appeal that that subway has been erected without any statutory power for the purpose. In this appeal, whatever may have been the case at other times, the erection of the sanitary convenience is not complained of; but it is alleged, as I have already said, that the subway has been erected without any proper authority, and at the Bar an injunction has been asked against the defendant council to restrain that council from maintaining or using the subway. That relief is sought on two grounds: First, on a ground which is thus stated by Lord Cranworth in *Galloway v. London Corporation* (1866) L. R. 1 H. L. 134; 35 L. J. Ch. 477: "It has become a well-settled head of equity that any company authorised by the Legislature to take compulsorily the land of another for a definite object will, if attempting to take it for any other object, be restrained by an injunction of the Court of Chancery from so doing." That is one ground. The other ground is, that the council, having erected this subway without any authority, are in the position of trespassers, and continuing trespassers, on the soil of the plaintiffs; and for that reason, in accordance with the decision of this Court in *Goodson v. Richardson* (1874) L. R. 9 Ch. 221; 43 L. J. Ch. 790, the plaintiffs are entitled to the injunction which is sought. If the fact be, as is alleged, that the subway has been erected without any statutory authority, it seems to me that relief may properly be given on both these grounds, and that the main question in the action really is, whether or no this subway has been so improperly erected.

Now, as regards the statutory authority, the matter stands thus: However useful it may be that, in much frequented streets, subways for the purpose of the passage of passengers should be made, the Legislature has not yet thought fit to confer that power on any corporate body having authority within the City of Westminster. It has conferred by section 44 of the Public Health (London) Act, 1891, a power on every sanitary authority within the area which is governed by the Act to provide and maintain, amongst other things, public sanitary conveniences in situations where they deem the same to be required, and has provided that for the purpose of such provision the subsoil of any road shall be vested in the sanitary authority; and it is under this section of the Act, and under this alone, that the defendants, the council of Westminster, justify what they have done. The council allege that it is within their power under the section not merely to determine the situation where this sanitary convenience is to be placed, but also the proper and reasonable mode of providing

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for the entrance and exit of the persons who are to use it, and they contend that they are not limited to making those entrances and exits simply by lifts or by stairs, but that they may, if they see fit, make proper approaches to these conveniences from the pavement to the place where they are situate in the roadway. I shall assume that that contention is well founded, and then the question simply reduces itself to this: Was this subway constructed as an approach to the convenience, or was it constructed with the object that it might be made use of by the public for passing from one side of Parliament Street to the other? Upon that I come to the conclusion on the evidence that the latter was the real object with which it was constructed. I do not desire to go through the evidence, much of which has already been referred to by my Lord, but I will state very briefly some of the (to my mind) striking passages of the evidence. [His Lordship referred to the minutes of July 27, 1898, January 11, 1899, and December 6, 1900, to the two letters of September 20, 1900, and December 4, 1900, and to the evidence of Mr. Wheeler and Mr. Smith, and continued:—] Therefore it seems to me from its size, and from the statement of the chairman of the committee, it has actually been constructed in such a way as to be far more than an approach, and that it is not a reasonable and proper approach to the convenience which has been lawfully erected.

Under these circumstances, I think the plaintiffs are entitled to the injunction which they ask; but at the same time, as it is possible that the subway may be so altered as to make it a reasonable and proper approach to the convenience, I think it is reasonable that the council should have an opportunity of making such alteration, if they see fit to avail themselves of leave for that purpose, and therefore I quite agree in the form of judgment which is proposed.

COZENS-HARDY L.J. I am of the same opinion, and I entirely agree with what has fallen from my Lord and Lord Justice Stirling, and I should not desire to add anything were it not for the fact that we are differing from the judgment of Mr. Justice Joyce.

Now two things, I think, are quite clear here: First, the Westminster Council have no power at all to construct a subway—or at least, if they have power under some of their general Acts to incur the expense of constructing a subway, although no such statutory power has been called to our attention, they certainly have not any power to take the plaintiffs' land for the purpose of constructing a subway. I think it is equally clear that they have power under section 44 of the Act of 1891 to provide and maintain sanitary conveniences, and for the purpose of such provision to take and use that portion of the property of the plaintiffs which is under the road, exclusive of the footway. But,

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those two propositions being quite clear, I think we must approach the consideration of this question having regard to the perfectly well-established and extremely important jurisdiction which the Court of Chancery has exercised from the earliest days of railway legislation, and probably long before—the jurisdiction, I mean, to say that public bodies authorised by Parliament to take certain land shall not be allowed to take that land except for the purpose authorised by Parliament; and if that doctrine is important in ordinary cases where compensation is provided for all land taken, it is specially obligatory on the Court to have regard to it in a case where a public body is authorised to take another person's property without making any provision for his compensation.

In my view, therefore, the question for our consideration is really this: With what purpose was this land taken? I think you cannot avoid considering that question first. The language of Lord Cranworth in *Stockton and Darlington Railway v. Brown* (1860) 9 H. L. C. 246, was this: That although the railway company are the sole judges of what they require and will take for their purposes, there is this proviso, "Provided only that they take them *bonâ fide* with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose."

Now, here I cannot bring myself to doubt what was the purpose for which this land was taken. My Lord and Lord Justice Stirling have both gone through the evidence, and it would be a waste of time for me to repeat it. I observe that Mr. Justice Joyce said (and this is no doubt the foundation of his judgment), "Their primary object was, in my opinion, the construction of the conveniences with requisite and proper means of approach thereto and exit therefrom." If I had come to that conclusion of fact, I think I should probably have agreed almost entirely with the judgment; but, being unable to come to that conclusion, as a matter of fact—having satisfied myself from the documentary evidence that the primary object was to construct a subway for facilitating the passage of passengers from one side of Parliament Street to the other—I come to the conclusion that the Westminster Council are now seeking to justify that which was a wrongful act, and saying that they might justify the taking not the whole, but a part of it, for a purpose authorised by section 44 of the Act of 1891. I do not think that they ought to be allowed to do that. I feel very strongly that in every case in which a public body entrusted with the duties of performing a public work say that they have, in the exercise of their discretion, fixed upon a particular place and a particular mode, the Court ought to be extremely slow to interfere with their discretion. But when they have not really been acting under

the authority of the Act, when they have been doing something outside the Parliamentary power, and have been governed by considerations of a different kind and for a different purpose, the question of discretion seems to me to have no bearing whatever on the case.

For these reasons I agree with what has been said, and think that the injunction ought to be granted, qualified as my Lord has said. I observe in the Court below, the learned judge finding as he did that the plaintiffs had succeeded in part and failed in part, gave no costs, but the plaintiffs must have the costs in the Court below as well as the costs of the appeal.

The appeal was allowed, and an injunction was granted ordering the defendants to pull down the whole of the staircase railings and other works placed upon the plaintiffs' land, other than the conveniences and such further portion of the construction as the Court might upon application sanction as a proper approach to the conveniences, the order being suspended for two months.

Solicitor for the appellants—C. de J. Andrewes

Solicitor for the respondents—Percy Gates.

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KING'S BENCH DIVISION.

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Feb. 8, 9, 10,
11, 16, 17, 18,
19.

March 5.

Highways—"Extraordinary traffic"—Haulage of timber—Limitation of time—"Particular . . . work extending over a long period"—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, (1, b).

Haulage by timber merchants of timber over roads adapted for ordinary agricultural traffic in a district where there is no systematic cultivation of timber, under such circumstances that, having regard to the total weight carried within a given period, and to the means whereby the haulage is done, the traffic is unusual and does unusual damage to the roads, thereby occasioning unusual expense to the road authority, constitutes "extraordinary traffic" within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, for the expenses occasioned by which the timber merchants are accordingly responsible.

Where such haulage is carried out during a lengthened period under a series of separate contracts made between the timber merchants and the owners of an estate who are selling timber, the damage done is not the consequence of a "particular . . . work extending over a long period" within section 12 (1, b) of the Locomotives Act, 1898. And an action for the recovery of the expenses though brought within six months after the last haulage was done, is, under that subsection, out of time as regards expenses caused by damage done more than twelve months before the issue of the writ.

ACTION tried before Walton J. without a jury in which the plaintiffs, the Norfolk County Council, claimed £671 os. 11d. extraordinary expenses incurred by them in repairing certain main roads in the county of Norfolk by reason of the damage arising from the excessive weight passing along such roads and the extraordinary traffic conducted thereon by or in consequence of the orders of the defendants during the three years ended March 31, 1902. The plaintiffs alleged that the nature of the damage done was the crushing of the road metalling and the destruction of the formation and crust of the road; and that the traffic causing the damage was conducted at irregular intervals between March 31, 1899, and March 31, 1902. That a certain bridge had been damaged by a locomotive of the defendants and by the excessive weight and extraordinary traffic conducted over the same by the defendants and without the plaintiffs' consent during the said period. The writ in the action was issued

on August 4, 1902. The defence was that no excessive weight had been passed along the roads, nor had any extraordinary traffic been conducted thereon by any orders of the defendants; that the defendants used the main roads during the said period properly and with due care for an ordinary trade of the district, namely, the periodical haulage of timber cut by them from woods adjoining or served by the said main roads. That no damage had been done to the bridge, but the defendants used it properly and with due care, and that the engine alleged to have caused damage to the bridge was duly licensed by the plaintiffs. As to the whole of the plaintiffs' claim the defendants relied on the provisions of the Locomotives Act, 1898, s. 12 (1, b), and objected that the plaintiffs could not recover any expenses in respect of damage done to the said main roads and bridge more than six months, or alternatively more than 12 months, before the commencement of the present action.

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The timber in question had been felled on the Beeston Estate, in the parishes of Hoveton St. John, Hoveton St. Peter, Beeston St. Lawrence, Neatishead, Barton Turf, and Ashmanhaugh, in Norfolk, and was conveyed to the Wroxham Railway Station, Wroxham Staithe, and North Walsham between March 31, 1899, and March 31, 1902. Approximately 1,500 loads had been carried during that period by a traction engine drawing timber drays and other vehicles. The facts are more fully set out in the considered judgment of the Court *infra*.

Section 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), provides as follows:—

Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid

Section 12 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29), provides as follows:—

(1) Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows:—

(a) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court.

(b) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has

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been done, or where the damage is in consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work

Macmorran, K.C., and *Hansell* for the plaintiffs. First, it is submitted that the traffic conducted by the order of the defendants in this case was extraordinary traffic within *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161, where it was held that "extraordinary traffic" within section 23 of the Act of 1878, as distinct from "excessive weight," included all such continuous or repeated user of the road as was out of the common order of traffic. Even ordinary loads may cause extraordinary traffic on account of the frequency with which they are hauled over a highway, as in *Etherley Grange Coal Co. v. Auckland District Highway Board*, 1894, 1 Q. B. 37, where a colliery company carrying on their business, which was the staple trade of the district, were held to have caused extraordinary traffic.

Secondly, it is submitted that the plaintiffs are not confined under section 12 (1, b) of the Locomotives Act, 1898, to recovery in respect of the damage caused within 12 months before the issue of the writ; but that the case falls within the second alternative of that subsection, which refers to damage done in consequence of "work extending over a long period" if the action is brought within six months of the completion of the work. The hauling of the timber was all one work going on for a long time.

Bray, K.C., and *H. Gregory* for the defendants. The action is out of time except as regards damage done within 12 months before the writ under section 12 (1, b) of the Locomotives Act, 1898.

Secondly, it is submitted that the traffic in question was not extraordinary traffic at all. This is a woodland part of the county of Norfolk, and timber is constantly cut when it arrives at maturity. The weights of the loads of timber carried over these highways were not excessive, and the haulage of the timber over them was only an ordinary trade of the district, and cannot be held to be extraordinary traffic: *Raglan Highway Board v. Monmouth Steam Co.* (1881) 46 J. P. 598.

Macmorran, K.C., in reply.

Cur. adv. vult.

March 5, 1904. WALTON J. This is an action by the Norfolk County Council against Edward Green and Edward Harry Green, and the plaintiffs say in their statement of claim that they are liable to repair the main roads which are hereinafter mentioned, and that they have incurred extraordinary expenses in repairing the same by reason of the damage arising from the excessive weight passed along such

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roads, and the extraordinary traffic conducted thereon, by or in consequence of the orders of the defendants, during the three years ending March 31, 1902, and the roads, in respect of which the claim is made, are stated to be the Norwich and Stalham road and the Barton and Neatishead road.

Now the facts are to a large extent admitted. Between 1897 and March, 1902, the claim extending up to March 31, 1902, a considerable quantity of timber was felled on the Beeston Estate, which is in the north-eastern part of Norfolk between Norwich and the sea, Beeston Park lying on the road from Norwich and Wroxham to Stalham.

About the year 1894 Sir Philip Preston, the life tenant of the Beeston Estate, died, and was succeeded by Sir Henry, who died four years later, in 1897. The trustees of the estate after Sir Henry's death had heavy expenses to meet. It happened that at this time there was upon the estate a good deal of fallen timber which had been blown down in a gale. The trustees found that they could raise a considerable sum by the sale of this and other timber, and accordingly, between 1897 and March, 1902, they sold a large quantity of timber. The first sales in 1897 and in 1898 and 1899 were made to a timber merchant named Woods, but early in 1900 the trustees found that they could make better terms with the defendants, Messrs. Green, and from that time they dealt with them, making sales to them from time to time during 1900 and 1901. These sales were separate transactions, and the trustees might at any time in 1900 or 1901 have ceased to do business with Messrs. Green, and Messrs. Green might at any time have ceased to buy timber from the trustees.

The timber thus bought by the defendants was hauled by them for the most part to Wroxham Station and over the roads in respect of which the claim arises, that is to say, the Wroxham and Stalham road and the Barton and Neatishead road. The principal claim is in respect of the Wroxham and Stalham road. The length of the road affected in each case was between two and three miles. In the statement of claim the length of the Stalham road is described as a little over three miles, but the part really affected was I think rather less, something under three miles. The quantity of timber hauled by the defendants between the early part of 1900 and March, 1902, was about 1,510 tons. The haulage was done partly by horses and partly by traction engines. As I understand, the total quantity of timber sold by the trustees produced a sum of about £5,000. The quantity sold to the defendants realised or produced a price of about £4,000. Those are approximately the figures, although I do not know that they are absolutely accurate. The roads in question were ordinary country roads constructed to bear ordinary country traffic. The usual traffic over the

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roads was agricultural traffic, and no doubt the roads were used to some extent by brewers' drays and occasionally by other traffic of a similar description, so far as weight is concerned.

I ought to mention here that the defendant Edward Green retired from partnership with his co-defendant Edward Harry Green in October, 1900, and is not responsible for what was done after that date.

A great deal of evidence was given as to the user of the roads by the defendants, and I have come to the conclusion undoubtedly that during the two years in question, from the early part of 1900 up to March 31, 1902, the traffic of the defendants over the roads in question was—I use the term advisedly—unusual and did unusual damage to the roads, so occasioning unusual expense to the plaintiffs. The question which I have to determine is whether the traffic was extraordinary traffic within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878.

There was evidence that the north-east part of Norfolk is well wooded, and that large quantities of timber are sometimes felled in that district and carried to railway stations, but I am satisfied that the two roads in question have not, so far as I have heard, been used for traffic of the kind put upon the roads by the defendants in the year 1900-1901, and to some extent in the early part of 1902, having regard to the quantity carried, the period within which it was carried, and the means by which it was carried. I do not think that in this district there is anything like a regular system of cultivation of timber for the purpose of sale, such as was proved in the case of the *Raglan Highway Board v. Monmouth Steam Co.* (1881) 46 J. P. 598. It may be, and probably is, the fact that in former years, and before the felling on the Beeston Estate began, loads of timber passed over these roads. Traction engines were sometimes used on these roads before 1900, but in my judgment only occasionally, and never to the extent to which the defendants' traction engine was used during the two years in question.

It is said that the timber was the natural product of the land just like grain—barley or wheat, or roots—potatoes or turnips, and that the carting of such produce to the railway station must be the ordinary traffic over the roads, heavier at some times than at others, heavier upon particular roads than upon others, but still, speaking broadly, the natural and ordinary use of the roads. I find that that contention was put forward in the case of *Williams v. Davies* (1880) 44 J. P. 347. In the judgment of the Court of Appeal in *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161, that case was discussed, and I think almost all the other cases of importance which had been decided

before 1893 were discussed, and with regard to *Williams v. Davies*,^{1904.} what Bowen L.J., who delivered the judgment of the Court of Appeal Norfolk County Council v. Green. in that case, said was this: "The first case to be noticed is that of *Williams v. Davies*. The defendant had bought timber near a railway station, which was conveyed in waggons in 67 loads between Christmas and March. The timber was purchased in the ordinary course of business, but the 67 loads of timber were a greater number of timber-loads than usually passed over the roads in question in three consecutive months, and the heavier loads were heavier than the loads of ordinary agricultural produce. The magistrates held that the 67 loads of timber were in the aggregate excessive weight and extraordinary traffic. The Court of Queen's Bench (Lush and Bowen JJ.) held that the justices were right. 'What the traffic was to be compared with,' said Lush J., 'was the ordinary traffic along the road,' and the fact that the timber was the natural produce of the land did not prevent the traffic being held as extraordinary." Another way of putting the same contention, or practically the same contention, is that the carting of timber, which is no doubt felled sometimes in small and sometimes in large quantities, is just one of the things that the roads were made for. That is a proposition which I think cannot be disputed. No one suggests that the use made by the defendants of these roads was not a lawful use. In that sense it was not an abuse of the roads. They had a right to use the roads, and to use them in the way in which they did use them. But the question is who has got to pay, and if they used them for the purposes of extraordinary traffic within the meaning of the statute and caused extraordinary expense, the defendants—although they were perfectly justified in using the roads, and although in that sense the roads were made for such use—still the defendants have got to pay the extraordinary cost of repairing the extraordinary damage which their extraordinary traffic did. I may again refer to what Bowen L.J. said in the case of *Hill v. Thomas* at the beginning of his judgment. He there gives that which I think is now always recognised as the true definition, the authoritative definition, of what extraordinary traffic is. He says: "The most important question we have to consider is the true meaning to be placed on the words 'damage caused by extraordinary traffic.' We may begin by observing that the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders, namely, upon those who caused the damage and to whose benefit it enured. The section in the second place distinguishes between 'excessive weight' and 'extraordinary traffic.' The damage done by 'extraordinary traffic' may therefore in the eyes of the Legislature differ from that

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done by 'excessive weight.' Traffic, thirdly, is a *nomen collectivum*—a collective term—a noun of multitude. It does not, like 'excessive weight,' apply merely to the cargo carried by a single vehicle; it is large enough to include the continuous or repeated user of the road by various vehicles belonging to one owner. Finally, extraordinary traffic, according to the plain use of language, is traffic which is not of the common order of traffic. And taking all these considerations together, and especially when we remember that the object of the section is to provide for the expense of such extraordinary traffic as does damage to a highway, we shall arrive at the following result, viz., that 'extraordinary traffic,' as distinct from 'excessive weight,' will include all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic and as may be calculated to damage the highway and increase the expenditure on its repair."

That is the test which I have to apply in this case, and, having regard to the weight carried, to the frequency of the loads, that is to say, to the total weight carried during this period, which is a period of two years, and having regard to the means by which it was carried, the vehicles and traction employed, I have come to the conclusion that the defendants' traffic was extraordinary traffic within the definition or description given by the Court of Appeal in the case of *Hill v. Thomas*.

But that does not dispose of the present case, because the defendants contend that the plaintiffs' claim is to a large extent barred by a limitation which is imposed by the Locomotives Act, 1898, s. 12 (1). The total claim is for the damage done during the two years which I have mentioned, that is to say, between the early part of 1900 and March 31, 1902. I am dealing, not with the formal claim made in the action, but with the facts as they came out at the trial, and at the trial it was proved that the traffic began early in 1900. It is difficult to say exactly when, but still early in 1900, and the claim of course extends only to March 31, 1902, and as the figures worked out at the trial—again I am not giving them as a finding by myself, but merely as I think they were put forward by Mr. Macmorran in his reply—the total claim in respect of both roads amounted to something under £450. But now the defendants say that a large part of that is barred by the limitation to which I have referred. Section 12 (1, b) of the Locomotives Act, 1898, reads as follows: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long

period, shall be commenced not later than six months after the completion of the contract or work." Now the writ was issued on August 4, 1902.

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The defendants contend that the claim by virtue of section 12 (1, b) must be confined to damage done during the 12 months prior to August 4, 1902, that is to say, it must be confined to the expense of repairing damage done after August 4, 1901, and *prima facie* that is so, unless the plaintiffs can bring themselves within the second part of the subsection, because the subsection says the proceedings must be commenced within 12 months of the time at which the damage has been done or—and this is the second part of the subsection—"where the damage is the consequence of any particular building contract, or work extending over a long period, (proceedings) shall be commenced not later than six months after the completion of the contract or work." The plaintiffs say that this was damage which was the consequence of particular work extending over a long period, and that they did commence their action not later than six months after the completion of such work. That is the contention of the plaintiffs. That depends upon whether the work in question, which I may describe as the felling and haulage of this timber from the Beeston Estate, was a particular work within the meaning of this subsection. Now, as I have said, the felling and hauling of this 1,510 tons was not done under any one single contract to begin with. That may not be a conclusive test, but in fact it was not. It really was the haulage of timber which, as it happened, had been bought from time to time by several separate contracts, contracts made in each of the years in question, and it appears to me clear that when one contract was made and the timber included in that contract was felled and hauled away, it was never certain that there would be another contract or that any more timber would be felled. Nobody could say when this work would finish, if it was a work within the meaning of the subsection; I do not know whether it is even finished now. It is a mere question of for how long it would be convenient and profitable for Messrs. Green to buy timber from the trustees of the Beeston Estate, and for how long it might be convenient and profitable for the trustees to sell to Messrs. Green, and not to sell to somebody else, or not to sell at all. I think that "particular work" here must be construed to some extent with reference to the other words of this part of the subsection. The words are: "Where the damage is the consequence of any particular building contract or work." I think "particular work" must be particular work—something in the nature of, something similar to, a building contract. Now I do not think that this was work within the meaning of that subsection,

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and therefore, although this was extraordinary traffic in my judgment, I do not think the plaintiffs can recover for any expense incurred in respect of damage done prior to August 4, 1901. There is a good deal of evidence to show that there was very little damage done after August, 1901. One of the plaintiffs' witnesses, the man who was in charge of this part of the road up to March, 1902, said he did not remember seeing the traction engine in the latter part of 1901. The expense in respect of which the claim is made was, as appears to me from the evidence, mainly incurred—substantially incurred—before the end of the year, 1901. There is other evidence which points to this, that after August, 1901, there was not a great deal of extraordinary traffic, or of expense incurred attributable to the extraordinary traffic. I think there was some. It is extremely difficult for me to say how much, but I think there was some, and I think I must give the plaintiffs something. I must assess it as well as I can. In making assessments of this kind one very often is obliged to do so by something very like guess work. I must do the best I can with the materials I have before me, because I believe there was some damage after August 4, 1901, and some expenses incurred in consequence of that, and I think that as far as I can judge I shall be at any rate doing no injustice to the defendants if I assess that at the sum of £75.

Now I have considered, having regard to my judgment, whether I ought to deal with the other question, about which there is a very great deal of evidence, namely, as to what expense the plaintiffs were put to during 1900 and 1901 and before August 4, 1901, as in respect of damage done before August 4, 1901, in repairing the roads and in repairing the extra damage to the roads caused by the extraordinary traffic. I have come to the conclusion that the plaintiffs can recover this £75 and no more. It is not necessary for me, if I am right, to consider this other question. It is a very troublesome and difficult question. If I had considered it, I do not think that I should have been ready to give judgment this morning, and as I have to go away on circuit immediately I thought it better not to deal with it, but to leave it over and simply to give judgment upon the points which I was obliged to consider, namely, whether there was any extraordinary traffic, whether there was any claim, and how much. My judgment is that the plaintiffs are entitled to recover £75 and to recover that only. If there be an appeal, and if the Court of Appeal should take a different view of the case from that which I do, and if it should be necessary to assess the amount of expense incurred in 1900 and 1901, I shall of course be quite prepared, if the parties desire it, to deal with that question upon the evidence which

I have got, and of which I have a note, but for the present I do not
deal with it.

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Solicitors for the plaintiffs—Sharpe, Parker, & Co., for Charles Foster,
Norwich.

Solicitors for the defendants—Trinder, Capron, & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

Feb. 22.

PARKER AND ANOTHER v. LONDON COUNTY COUNCIL.

Limitation of time—Action against public body—Negligence—Personal injuries—Tramways acquired and worked by local authority under statutory power—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

The provisions of the Public Authorities Protection Act, 1893, limiting to six months the time within which an action brought against any person for any act done in the execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, must be commenced, apply to an action, brought against a local authority carrying on a tramway undertaking under statutory powers, to recover damages in respect of personal injuries occasioned by the negligence of the drivers of their tramway cars.

The Ydun, 1899, P. 236; 68 L. J. P. 101, *followed*.

CASE set down in the special paper, pursuant to Order XXV. r. 2, for hearing upon a preliminary question of law, viz., whether section 1 of the Public Authorities Protection Act, 1893, was a defence to an action in which the plaintiffs claimed damages from the defendants owing to the alleged negligence of the defendants' servants in the control and management of a tramcar, but had not commenced proceedings within six months of the negligent act complained of.

The action was brought by Morris Parker, who sued by Morris W. F. Parker, his next friend, and Emily Parker, the wife of Morris W. F. Parker. The particulars of the occurrence and the alleged negligence were as follows:—

“The plaintiffs were riding for reward to the defendants on the top of one of the defendants' tramcars at Upper Tooting Road, and were proceeding from Tooting to Westminster on Monday, June 16, 1902, and another of the defendants' tramcars from Blackfriars to Tooting had at that time to pass, or be passed, by the tramcar upon which the plaintiffs were passengers, when the two cars were allowed or caused to come into violent collision with one another and to occasion serious personal injuries to the plaintiffs, owing to the negligence of the defendants' servants in charge of one or both of the cars in failing to keep a proper look out, or to stop, or moderate speed, or to take any due or proper precautions necessary to avoid arriving, or being simultaneously in progress, at a place or situation on their respective courses, where there was not sufficient room to pass, and in attempting

to proceed on their respective routes, and to pass each other when there was not sufficient room to do so without risk of collision and consequent injury to the passengers."

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The infant plaintiff sustained a severe injury by the crushing and bruising of his right foot which necessitated surgical treatment. It was feared that the injury was permanent and that he would never recover the use of his foot. The adult plaintiff's injury was not so serious, but she sustained a severe shock to her nervous system which necessitated medical attendance. The writ in the action was issued on January 12, 1903, which was more than six months after June 16, 1902, the date of the alleged neglect complained of.

The tramways on which the accident occurred had been acquired by the London County Council from the London Tramways Company under the London Tramways Company (Limited) Act, 1896 (59 & 60 Vict. c. clxxxix), s. 31, and were worked by the London County Council under the London County Tramways Act, 1896 (59 & 60 Vict. c. li.)

Section 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), is as follows:—

"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of the injury or damage, within six months next after the ceasing thereof:

* * * * *

Moyses for the plaintiffs. Upon the authority of *Carpue v. London and Brighton Railway* (1844), 5 Q. B. 747; 13 L. J. Q. B. 133, it is submitted that *qua* carriers of passengers the defendants are not entitled to set up this defence. Section 1 of the Public Authorities Protection Act, 1893, on which the defendants intend to rely, does not avail them as common law carriers. [CHANNELL J. The point is whether when a statute empowers a public body such as this to carry on what is really a trading enterprise, the empowering them to carry it on; and thereby preventing it from being *ultra vires*, makes the things they do, things specified to be done in execution of the Act or whether it does not.] In that view of the case *Carpue v. London and Brighton Railway* is in point, also *Palmer v. Grand Junction Railway* (1839) 4 M. & W. 749; 8 L. J. Exch. 129, in which a similar point was taken.

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Dalry for the defendants. The London County Council think they are bound to raise the point that the action is out of time, but they will, of course, be prepared to do what is right in the matter. The tramways on which the accident happened were acquired under statute, and are worked under statute; and the rates form the fund out of which they were acquired and equipped, and upon which the liability in respect of an accident of this kind will or, at all events, may fall. It is submitted, therefore, that the duty of the county council not to be negligent in the working the tramways, which is the duty in respect of the alleged breach of which this action is brought, is clearly a "public duty," and a duty "in the execution of an Act of Parliament" within the meaning of the Act of 1893. The point is, moreover, covered by authority. In the first place it is settled that where the action is brought against a local authority, the fact that the acts constituting the cause of action were done in the course of municipal trading does not prevent the Act from applying: *Ambler v. Bradford Corporation*, 1902, 2 Ch. 585; 71 L. J. Ch. 744; *Chamberlain v. Bradford Corporation* (1900) 83 L. T. 518; though the Act does not apply to a commercial body carrying on a similar business under statute: *Attorney-General v. Margate Pier and Harbour Co.*, 1900, 1 Ch. 749; 69 L. J. Ch. 331. *The Ydun*, 1899, P. 236; 68 L. J. P. 101, is on all fours with the present case. *Edwards v. St. Mary, Islington, Vestry* (1889) 22 Q. B. D. 338; 58 L. J. Q. B. 165; *Markey v. Tolworth Hospital Board*, 1900, 2 Q. B. 454; 69 L. J. Q. B. 738; *North Metropolitan Tramways v. London County Council*, 1898, 2 Ch. 145; 67 L. J. Ch. 449; *Smith v. North-leach Rural District Council*, 1902, 1 Ch. 197; 71 L. J. Ch. 8; and *Carey v. Bermondsey Borough Council* (1903) 2 L. G. R. 219, are all authorities in favour of the same view.

Moyses in reply. *The Ydun*, 1899, 1 P. 236; 68 L. J. P. 101, is distinguishable. The case of harbour commissioners and municipal bodies having shipping to look after is quite different from the case of the London County Council taking over the powers of a tramway company and working them for profit. That is the *ratio decidendi* upon which *Carpue v. London and Brighton Railway* (1844) 5 Q. B. 747; 13 L. J. Q. B. 133, and *Palmer v. Grand Junction Railway* (1839) 4 M. & W. 749; 8 L. J. Exch. 129, went.

CHANNELL J. For a considerable portion of this argument I was inclined to think that there were grounds upon which I could decide this point in favour of the plaintiffs, but I have now come to the conclusion that the matter is really concluded by authority; and that, whatever my personal opinion upon it may be, I am bound, on the

point that has been argued before me, to give judgment for the defendants. 1904.

The facts are these. The London County Council have obtained, under the combined operations of several Acts of Parliament, the power to work certain tramways, and in particular the tramway in Tooting, upon which this accident occurred; and the plaintiffs bring this action in respect of an accident occurring to them when passengers upon the tramway. The negligence is alleged against the drivers of two tramcars.

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The question is whether that is an action to which the protection of the Public Authorities Protection Act, 1893, applies. The case before Kekewich J., of the *Attorney-General v. Margate Pier and Harbour Co.*, 1900, 1 Ch. 749; 69 L. J. Ch. 331, shows, if it were necessary, and I think there are many other authorities which will show it also, that a tramway company would have no such protection. They would be a commercial company carrying on, just as a railway company do, a business in which in one sense the public are to a certain extent interested because it is a public business; but that does not make them persons acting in the execution of statutory or other public duties when they are carrying on that business, although the public are interested in it. Here it is what I may call a municipal body that is carrying on business, and the general principle in reference to matters that have to be paid for out of the rates is that each body of ratepayers for the time being should bear its own burden, and that they should not be borrowing money without authority and putting the burden unfairly on posterity, nor leaving their own things unpaid for in their own time in order that they may be paid for in after years. That may be the reason why the Legislature has given this sort of protection to those administering the rates; but I do not find anything of that sort in the words of the Act of Parliament, and although that may be a very good and practical reason why it should have been done, I myself do not go on that. In point of fact I think the Legislature, when they passed this Act of Parliament, was not contemplating the case of a municipal body carrying on a commercial enterprise at all. The question is, what is the effect of the words that they have used? Here the complaint is negligence in the course of working the tramway. I should have been inclined myself—but I think now I should have, no doubt, been wrong, because I find that the contrary has been laid down by other learned judges—to have said that although the municipal body might have the protection of this Act of Parliament in reference to matters which they did in the course of making a tramway, or of laying down pipes, or interfering with the road for the purpose of doing either of those things, they would not have the protection of the Act merely in carrying on the

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business itself afterwards ; and that the case would not be brought within the words "neglect or default in the execution of any such act, duty, or authority" merely because the act which they were doing was an act which would have been *ultra vires* unless there had been statutory authority for their doing it. As I have said, I thought there was a great deal in that argument myself ; but on looking at the cases I have come to the contrary conclusion. There is in particular the case of *The Ydun*, 1899, P. 236 ; 68 L. J. P. 101, though, of course, it was an Admiralty case. There the municipal corporation of Preston had become a harbour authority, and had acquired statutory power to take tolls, and their harbour master had been negligent, and his negligence had caused damage to a ship. The exact point that I have been considering was argued there, and Jeune P. in giving judgment said : "I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality. I think, further, that the point is covered by authority." Then he refers to *Harrop v. Ossett Corporation*, 1898, 1 Ch. 525 ; 67 L. J. Ch. 347 ; *North Metropolitan Tramways v. London County Council*, 1898, 2 Ch. 145 ; 67 L. J. Ch. 449 ; and *Fielden v. Morley Corporation*, 1899, 1 Ch. 1 ; 67 L. J. Ch. 611, which, he says, "are instances in which this Act was held to apply to municipal corporations carrying out works outside the scope of strictly municipal duties." He proceeds : "An endeavour was made before me to distinguish those decisions on the ground that they apply to the construction of works, and not to the carrying on of a business by contracts with private individuals. But I see no ground for this distinction. Whether a corporation is constructing a work or using it ; whether, for example, it is building an aqueduct and laying pipes from it, or supplying a consumer from the aqueduct by means of the piping, it appears to me to be equally engaged in executing the duties imposed upon it by Act of Parliament, and, though it may be asked why a corporation so acting should receive privileged advantages in litigation, I cannot doubt that the Act in question has conferred them." Now that is the exact point in this case, and it was so decided by the President of the Admiralty Division in that case. The case went to the Court of Appeal, and in that Court the same arguments were addressed to the Court by counsel for the plaintiffs, and their argument was to the effect that there was a distinction between the carrying on of works and the construction of them ; but the Court of Appeal decided against them. Their Lordships do not in their judgments go fully into that particular distinction that was taken ; but it must have been present to

their minds, because it is put forward clearly in the arguments, and they decided in that case that an action to recover damages for the negligence of the harbour master in admitting the ship into the harbour, when there was not sufficient water for her, was a matter in which the municipal corporation were entitled to the protection of the statute, and it seems to me that that is a decision on the only point in regard to the matter on which I had any real doubt. The authorities to which Mr. Moyses has referred me are rather old. There are, of course, some points of law with regard to which the older the authority is the better; but in regard to some other points that is not so, and with regard to these points about notice of action, statutes of limitation, and public duties, and so on, the law has been considerably altered within the last sixty years. I do not think anyone can doubt that, and consequently an authority sixty years old is not quite so reliable as one in 1899. In *Carpue v. London and Brighton Railway* (1844) 5 Q. B. 747; 13 L. J. Q. B. 133, the action was brought against what was undoubtedly a trading company, which according to the modern decisions would not have been within the protection of this Act of Parliament which was not in existence at that time. I think, therefore, that I cannot regard that as an authority which prevents my acting on, or justifies me in not acting on, the recent authority in the Court of Appeal, and on these grounds I think I must hold that the defendants are entitled to the protection of this statute.

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Judgment for the defendants.

Solicitor for the plaintiffs—Henry J. Sydney.

Solicitor for the defendants—W. A. Blaxland.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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CHANCERY DIVISION.

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Mar. 12. *Re* FARNHAM'S SETTLEMENT. THE LAW UNION AND CROWN INSURANCE COMPANY *v.* HARTOPP.

Tenant for life and remainderman—Costs of sanitary works—Notice served on "owner or occupier"—Works carried out by tenant for life held payable out of income—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 4, 5, (9), 121.

The cost of sanitary works executed by the tenant for life under the Public Health (London) Act, 1891, upon freehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and remaindermen, will not, in the absence of an application by the trustees under the Settled Land Acts, be held to be a charge upon the capital of the residuary estate.

In re Lever, Cordwell v. Lever, 1897, 1 Ch. 32; 66 L. J. Ch. 66, distinguished.

THIS was an adjourned summons raising the question whether a sum of £255 expended on certain sanitary work at premises in Foster Lane, in the City of London, as required by the Corporation of the City, as sanitary authority, should be borne by the capital of the trust estate including the property or by the tenants for life.

The houses in question were subject to the trusts of and formed part of the investments under a certain indenture of marriage settlement of personalty, and the plaintiffs, the Law Union and Crown Insurance Company, were mortgagees who had foreclosed of the interest of the first tenant for life under the settlement.

On the 25th November, 1902, the Corporation of the City of London served a notice addressed "to the owner or occupier" of the property under the provisions of section 4 of the Public Health (London) Act, 1891, requiring the abatement by necessary works of a nuisance arising from defective drains, soil pipes, water-closets, and rain-water and waste pipes being in such a state as to be a nuisance or injurious or dangerous to health.

The notice came to the hands of the defendants, the present trustees, and as a result of correspondence between them and the plaintiff company the latter took upon themselves the duty of completing the required works without prejudice to the question as to the liability for the same.

The work was done to the satisfaction of the sanitary authority at a cost of £255, which had not, in fact, been paid; and this summons was taken out by the plaintiffs, who submitted that it was payable by

the trustees out of capital moneys in their hands subject to the trusts of the settlement. It appeared that the work included (a) relaying the whole of the drains of the premises together with manholes, traps, &c., and connecting the same with the main, which cost £112, and (b) certain inside repairs and reconstruction of closets, which cost the balance, £143. There was no question as to the propriety of the amount.

The trustees had no capital moneys in hand.

Subsection (9) of section 5 of the Public Health (London) Act, 1891, provides that a person failing to comply with the provisions of a nuisance order served under section 4 shall be liable to a penalty, and section 121 provides that "any costs and expenses which are recoverable under this Act by a sanitary authority from an owner of premises may be recovered from the occupier for the time being of such premises; and the owner shall allow the occupier to deduct any money which he pays under this enactment out of the rent from time to time becoming due in respect of the premises, as if the same had been actually paid to the owner as part of the rent."

Warrington, K.C., and *E. S. Ford* for the plaintiffs. This work was in the nature of permanent improvements, and if the trustees had undertaken it, which the sanitary authority could require them to do, they would be entitled to be indemnified in respect of it as work payable out of the capital of the residuary estate: *In re Lever, Cordwell v. Lever*, 1897, 1 Ch. 32; 66 L. J. Ch. 66. A similar decision under the Public Health Act, 1848, was given in *In re Barney, Harrison v. Barney*, 1894, 3 Ch. 562; 63 L. J. Ch. 676. The question is not the same as in *In re Copland's Settlement*, 1900, 1 Ch. 326; 69 L. J. Ch. 240, where the tenant for life was liable under a covenant.

P. O. Lawrence, K.C., and *C. Church* for the remaindermen. The trustees have no capital moneys in hand, and they have not come to the Court to be indemnified. By an arrangement which does not bind the remaindermen the plaintiffs have incurred the liability. Neither have the plaintiffs, as tenants for life, brought in any scheme under the Settled Land Acts for the money to be paid as if for permanent improvements. Further, section 121 of the Public Health (London) Act, 1891, shows that the money is not a charge upon capital. [KEKEWICH J. That section only throws the question back a stage, being framed for the protection of the sanitary authority.] The work should be paid for as repairs by the tenant for life: *In re Thomas, Weatherall v. Thomas*, 1900, 1 Ch. 319; 69 L. J. Ch. 198.

Stamp for the trustees.

Warrington, K.C., in reply. The liability is on the owners of the

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Re Farnham's Settlement. The Law Union and Crown Insurance Company v. Hartopp. This is a question of substance, and there is no question of dissecting the work into improvements and repairs as under the Settled Land Acts.

KEKEWICH J. The plaintiffs do not and cannot rely on the provisions of the Settled Land Act for the payment of the cost of these repairs out of capital moneys, because, in fact, the trustees at the present moment have no such moneys in hand. But I am asked to make any order which I think fit to make, without prejudice to any future application under the Settled Land Act, in case money does come in. Therefore I must consider how the case stands under that Act, and it is a matter of practical importance, as these repairs and drainage improvements are being more and more insisted upon by the sanitary authorities.

I always deal with these applications on this principle, that the sanitary authority can insist upon the work being done, and the tenant for life does the repairs with the full concurrence of the trustees, and then comes to the Court to be indemnified out of capital moneys. The Court then says that any improvements which come within the meaning of that word in the Settled Land Act ought to be provided for out of capital moneys, and those that are not within the term should not be so provided for. Speaking for myself, I require the Masters in my Chambers to go through the schedule of work done and dissect it. I do not take the affidavit of any architect or surveyor upon the point. The question always is, "Are they within the Settled Land Act?" For instance, "drainage" is mentioned there, but drainage is seldom a permanent improvement; the requirements are constantly being altered, sometimes from year to year; and yet it is allowed. I shall deal with this matter in that way if, when some capital moneys come in, the plaintiffs come to me under the liberty to apply which I propose to grant in this case.

But the plaintiffs rely on the authority of *Re Lever, Cordwell v. Lever*, 1897, 1 Ch. 32; 66 L. J. 66, so as to ground their claim that these works should be paid for out of capital. There, however, the trustees did the work, and the learned judge put their right entirely on the footing of indemnity, the obligation being on the trustees who, according to a well-settled rule, were entitled to be indemnified out of the whole estate, having done that which it was their bounden duty to do. In this case the trustees have not done the work; they were too prudent or, as I might say, too "canny." They had no moneys in hand, and they could not make a bargain so as to bind the inheritance.

It seems to me that the plaintiffs cannot show that their case is within the authority of *Re Lever*, and that their application accordingly fails, but without prejudice to any application which they may at some future time be able to make under the Settled Land Act.

Application dismissed, with liberty to apply.

Solicitors for the plaintiffs—Robins, Hay, Waters, and Hay.

Solicitors for the Trustees and the Remaindermen—Church Adams and Prior.

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KING'S BENCH DIVISION.

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HEAVER AND OTHERS v. FULHAM BOROUGH COUNCIL.

Sewers—"Drain" or "Sewer"—Metropolis—Drainage by combined operation—Plan showing no details approved by local authority—Deviation from original plan—Stack pipe of one house receiving water from roof of adjoining house—Wrongful departure from authorized plan—Rights as between wrongdoer and local authority—Devolution of property—Drain found on inspection to be laid contrary to directions—Offending party—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 74, 76, 83, 250.

Where a plan for the drainage of a group of houses in London by a combined operation showing no details has been approved by the local authority, and the drainage has in fact been carried out in a particular manner under the supervision of the surveyor of the local authority, it may be inferred that the details were left by the local authority to be dealt with by the surveyor. And in that case the pipe conveying the drainage of the houses is a drain, as being a drain for draining the group of houses by a combined operation under an order of the local authority, although the separate drains of the two houses are connected in a manner differing from that indicated on the approved plan.

Greater London Property Co. v. Foot, 1899, 1 Q. B. 972; 68 L. J. Q. B. 628, and Gorringe v. Shoreditch Borough Council (1902) 86 L. T. 592, discussed.

Query whether the fact that a stack pipe of one house in fact conveys to the drain of that house the water from the roof of an adjoining house not ordered by the local authority to be drained in combination with it makes the drain a "sewer" below the point of connection.

Silles v. Fulham Borough Council, 1903, 1 K. B. 829; 1 L. G. R. 643; 72 L. J. K. B. 397, commented on.

Where a pipe for the drainage of two houses is unlawfully laid contrary to the order of the local authority, the wrongdoer himself cannot take advantage of his wrongful act by alleging as between himself and the local authority that the pipe is a sewer and not a drain. And a person claiming under the wrongdoer and owning both the houses is in the same position in this respect as the wrongdoer himself, though, semble, it is otherwise where the two houses have passed to separate owners.

Kershaw v. Taylor, 1895, 2 Q. B. 471; 64 L. J. M. C. 245 explained.

The provisions of section 83 of the Metropolis Management Act, 1855, under which where a drain is found on inspection to have been laid contrary to the directions of the local authority the offending party is liable in a penalty, and the local authority may require the person making the drain to reinstate it in accordance with their directions, are available against the original wrongdoer only and not against his successors in title.

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THIS was an action in which the plaintiffs claimed—

(1) An injunction to restrain the defendants, their servants, or agents from entering upon the premises of the plaintiffs and breaking open or in any way interfering with the drains or sewers (or any of them) of 29, Rosebury Road, the property of the plaintiffs, for the purpose of converting any sewer into a drain.

(2) A declaration that the said drain of No. 29, Rosebury Road, was a sewer within the Metropolis Managements Acts.

In 1889 a Mr. Alfred Heaver submitted to the Fulham Vestry, the predecessors of the defendants, a plan (called plan No. 1) for the drainage of a number of houses, which he was then about to build, in Rosebury Road, and an adjoining road. A sketch of so much of plan No. 1 as related to No. 29, Rosebury Road and the adjacent houses, will be found to the left of the copy of plan No. 2, hereinafter-mentioned, on page 673.

The plan, as will be seen from the sketch, contemplated the drainage of the houses in pairs, each pair by a "combined operation"; but gave no details as to the manner in which the drains were to be laid.

There was evidence, referred to in his judgment, on which Channell J. held that the plan was approved by the Vestry.

The houses were subsequently built; and the drainage of Nos. 27 and 29, Rosebury Road was carried out in the manner shown on another plan put in evidence at the trial (called plan No. 2), of which a copy will be found on page 673.

It will be seen from this plan that the main drain of No. 29 commenced at a gully (into which the waste water from a sink in No. 29 discharged) at the back of No. 29 close to the boundary between Nos. 29 and 27; and that a corresponding gully at the back of No. 27 was connected with the main drain of No. 29 at its commencement. Lower down the drain received the drainage of a w.c., &c., in No. 29. Lower down again it was joined by a length of pipe conveying water from a gully into which a stack pipe, affixed to the wall of No. 29, and bringing the water from the roofs of Nos. 29 and 31, discharged. It was then joined by the main drain of No. 27.

Alfred Heaver, in order to create ground rents, leased Nos. 27, 29, and 31, Rosebury Road, together with other houses, to his son, George Heaver, in trust for himself. Afterwards the ground rents were sold, and the beneficial interest in the lease was conveyed by a voluntary conveyance to George Heaver, and included by him in his marriage settlement. Subsequently Alfred Heaver died. And at the dates material to the present action the beneficial interest in the lease was vested in the trustees of George Heaver's marriage settlement, who were, in fact, two of the four executors of the will of Alfred Heaver.

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In 1903 a portion of the main drain of No. 29, Rosebury Road, at or about the point where it received the drainage from the water-closet of No. 29 was out of repair. And on February 20, 1903, a notice under sections 83 and 85 of the Metropolis Management Act, 1855, and section 64 of the Metropolis Management Amendment Act, 1862, was served on the executors of Alfred Heaver, who by a mistake which is explained by Channell J. in his judgment, were supposed to be the owners of the premises, requiring them within fourteen days to execute the necessary works to remedy the defect in the drain.

Against this notice the executors appealed to the London County Council on the ground, among others, that the alleged drain was a sewer repairable by the defendants.

When the appeal came before the London County Council it was adjourned *sine die* with a view to the parties obtaining a legal decision on the question whether the alleged drain was or was not a "sewer."

On July 31, 1902, after the appeal had been adjourned by the London County Council, the defendants served on the executors of Alfred Heaver a notice framed under section 83 of the Metropolis Management Act, 1855, calling upon them to alter and reinstate the drain in question in conformity with plan No. 1 by disconnecting the drain receiving the waste water from the sink of No. 29.

On October 26, 1903, the present action was commenced by the executors of Alfred Heaver as plaintiffs; and on the same day the plaintiffs obtained *ex parte* from a judge in chambers an interim injunction to restrain the defendants from entering upon No. 29, Rosebury Road and interfering with the drains, and took out a summons to continue the injunction until the trial. When the summons came on the defendants undertook not to proceed with their notice pending the trial.

Subsequently the error as to the ownership of the premises was discovered, and at the trial (the plaintiffs' solicitors having previously intimated to the defendants that the application would be made) application was made to substitute the trustees of George Heaver's marriage settlement as plaintiffs. This was refused, but leave was given to add the two plaintiffs who were trustees of the marriage settlement as plaintiffs in that capacity.

Boxall, K.C., and *Sylvain Mayer* for the plaintiffs. What the vestry did in 1889 did not amount to an order for the drainage for Nos. 27 and 29, Rosebury Road, by a combined operation. And even if the sanctioning of the plans amounted to such an order, there is no evidence that the order was ever notified to Mr. Heaver as required by section 76 of the Metropolis Management Act, 1855.

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Even if the sanctioning of the plans constituted an order for the combined drainage of Nos. 27 and 29, and it is to be assumed that the order was duly notified, the drainage was not carried out in accordance with that order. In the first place, the connection of the waste water pipe from No. 27 with the main drain of No. 29 at the rear of the premises is not in accordance with what was shown on the plans. And in any case the connection of the stack pipe bringing down the rain-water from the roof of No. 31 with the drain clearly prevents the drain below that connection from being laid under the order of the vestry; for below that point the pipe takes the drainage of a third house in addition to the two which were ordered to be drained in combination: *Silles v. Fulham Borough Council*, 1903, 1 K. B. 829; 1 L. G. R. 643; 72 L. J. K. B. 397.

Danckwerts, K.C., and *Courthope Munroe* for the defendants. There is ample evidence of an order sanctioning drainage of the two houses by a combined operation: *Bateman v. Poplar Board of Works* (1886) 33 Ch. D. 360; 56 L. J. Ch. 149; *Geen v. Newington Vestry*, 1898, 2 Q. B. 1; 67 L. J. Q. B. 557; *Greater London Property Co. v. Foot*, 1899, 1 Q. B. 972; 68 L. J. Q. B. 628.

When once an order for the drainage of a group or block of houses by a combined operation within the meaning of the Metropolis Management Act, 1855, has been made, such group or block of houses must be treated as one building for the purposes of drainage, and any deviation from the plan is immaterial provided that the burden of drainage is not increased by the addition of drainage coming from other buildings: *Greater London Property Co. v. Foot*, 1899, 1 Q. B. 972; 68 L. J. Q. B. 628; *Gorringe v. Shoreditch Borough Council* (1902) 86 L. T. 592.

If the deviation is such that the drain actually as existing cannot be said to have been laid under order of the vestry, the deviation was a wrongful act on the part of the plaintiffs' predecessors in title, and the plaintiffs are estopped from asserting that the pipe is a sewer. The plaintiffs are not purchasers for value without notice, and cannot take advantage of the wrongful act of their predecessors in title: *Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245; *Gorringe v. Shoreditch Borough Council* (1902) 86 L. T. 592; *Butt v. Snow* (1903) 2 L. G. R. 222; 89 L. T. 302; *Oliver v. Camberwell Borough Council* (1904) 2 L. G. R. 617.

CHANNELL J. In this case the substantial question between the parties is whether a certain structure—being a portion of the provision for drainage of two houses, but being upon one house, No. 29, in Rosebury Road, so far as it is out of repair—is repairable at the expense of

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the owners of the property or at the expense of the local authority, the present defendants. That is the question of substance ; there are several subordinate questions, in reference to the parties who can take proceedings, and in reference to a notice given by the defendants in the course of the dispute which had arisen in consequence of the want of repair or the condition in which this structure was found.

In order to determine the point of substance, I have to consider the old question whether this structure was a drain or a sewer ; and it is convenient, I think, to go through the story in the order of the events that happened. It is admitted that the structure was made substantially in its present form at the time the houses were built. It is not a case where a structure which at one time was a drain is alleged to have been converted into a sewer at a subsequent date by reason of alterations. Consequently the question does not arise under section 74 of the Metropolis Management Act, 1855, but the order, if an order was made, which makes this structure a drain and not a sewer, was made under section 76. When it was proposed to build these houses, the builder and owner of the property, one Mr. Alfred Heaver, who is now dead, by himself or by somebody acting for him, deposited a plan with the then local authority, which I have here. That plan was a plan for a large number of houses, and it obviously proposed to drain those houses in pairs. The plan gave no details as to the particular drainage, if I may use that expression, of each house ; and in all probability the local authority, if they had liked, might have sent back that plan and said it was not sufficient and that they wanted further details ; but they did not. The surveyor reported in favour of it ; it came before the works committee, and they passed it. There is a minute put in of the works committee approving of the plan ; the chairman of the works committee signed it, and the proceedings of the works committee subsequently came before the full body of the vestry, and there is a minute of the vestry put in either approving of the plan or adopting the resolution of the works committee. Now, according to the cases, that minute amounts to an order within the meaning of the Metropolis Management Act, 1855, for the drainage of a group or block of houses by a combined operation.

The first point that is made about this is that there is no proof that the order was notified to the owner. The latter part of section 76 of the Act of 1855 provides that "the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received within seven days* after the receipt of such notice, and in default of

* The period is extended by section 63 of the Metropolis Management Amendment Act, 1862.

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such notice, or if such house, building, or drain or branches thereto or other connected works and apparatus be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid . . . it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain . . . and other connected works and apparatus . . . to be relaid, amended, or remade, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner . . ." If it were a question of demolishing a house or recovering expenses, specific evidence of the notification having been given might be required; though even in that case, after the lapse of time, I think any tribunal would be entitled to draw its own inferences of fact as to whether the notification was given; and here the gentleman who might have given evidence that he never heard that this order, which he had asked for, was made, is dead, and his evidence is not available. The vestry did not, apparently, keep copies of their notices, and very likely notice was given verbally. Nobody is able at this distance of time to say positively that Mr. Heaver was told that his application had been sanctioned; but he went on with the work, and I consider that I am perfectly at liberty to infer that he did know that his application had been granted. He had made it; he went on with the work; he had no business to go on with the work without having an answer—and a favourable answer—to his application. I feel absolutely certain that he was informed, and I therefore draw the inference, from the facts which are placed before me, that he was informed that the application had been granted.

The next question that arises is, what is the effect of the order? The houses were built and drains were made, and the drains were made, as I have already said, in the form in which they are to be found now. There are two matters that require consideration. One is the way in which the sinks at the back of the premises were drained; another is with regard to a particular rain-water pipe. I will, in the meantime, disregard the rain-water pipe, with which I will deal separately later. The sinks at the back of both houses, Nos. 27 and 29, were drained through the structure which in other respects drained No. 29, and which is alleged to be a sewer. It was an obviously convenient arrangement. The two sinks were close together; by draining them in that way it was necessary only to have an additional three feet or so of pipe instead of some forty or fifty feet; and the forty or fifty feet of pipe that was to be laid through the back garden of No. 29 was made available for draining the two sinks which were close together instead of draining one only. Now, that is the principal thing—there is also the rain-water pipe, with which I will deal later—which is

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alleged to make the whole structure, which passes right through No. 29, and which takes nothing from No. 27 but the water from that particular sink, a sewer repairable by the local authority.

The evidence on the part of the plaintiffs is that the work was done under the superintendence of the surveyors or officials of the vestry. The plan that had been approved of the drainage had no details at all as to how the particular drains coming from each water-closet and each sink and so on were to be made; the details were left out altogether. There is no evidence that any subsequent plan was deposited or asked for or given. It may well be that the approval of the plan meant only, "We will approve it so far, but you must give us another plan about the details;" but there is no evidence of it, and I think that as a matter of fact details of that character—how the drain of a particular water-closet or a particular sink is to go—are commonly left to the surveyor to deal with; and it seems to me that the action of the vestry in approving in the way in which they did of a plan to drain two houses in combination, without any details of the way in which the particular drains from each water-closet and each sink were to be made, in itself amounted to an authority to the surveyor to deal with the matter. And if in fact what happened was that the builder said to the surveyor, "Now that I have got the authority of the vestry to drain these two houses in combination, is there any objection to my putting the drainage of this gully trap which is on No. 27 through to join the drain on No. 29; it will make 3 feet of piping instead of 30," and the surveyor said, "Yes, I think that comes within the order," or "I see no objection to it,"—if that happened either expressly in words or by the action of the parties having the same legal effect as if that happened in words—would it not be true to say that this construction had been made under the order of the vestry; because that is what is wanted under the definition section, section 250, which defines "drain" as including "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." I think that that would be sufficient. If so, this structure is a drain, within the definition section, and not a sewer.

It is suggested by Mr. Danckwerts that there is authority for saying that when an order has been made for combined drainage of two houses, then the two houses must be treated as one house, and the owners of them have the same right to cause alterations in the structure of the drains as they would have if it was one house. If that principle is correct, it also would prevent this structure from being converted into a sewer by the connection with the gully trap of No. 27. Unfortunately the authority quoted for that is a passage in a judgment of my own in *Greater London Property Co. v. Foot*, 1899, 1 Q. B. 972;

68 L. J. Q. B. 628, which I afterwards referred to in *Gorringe v. Shoreditch Borough Council* (1902) 86 L. T. 592. If it were a judgment of some other judge, I should treat it with respect and follow it, and throw upon him the responsibility if it was wrong; but unfortunately, being my own, the position is different, and, if I think that that was stated a little too widely, I think it is my duty to say so, and not to follow it. Now, I am not sure that it was not. For some purposes, and in reference to the facts of these cases, I have no doubt that what I said was right. In *Greater London Property Co. v. Foot* the alteration was a mere deviation of the drain in part in one house, not bringing in drainage from another house in any way different from that which had been sanctioned; so that there the thing was clear. In *Gorringe v. Shoreditch Borough Council* the alteration was the bringing in the drainage of another building, a building which did not exist at the time of the order, but which had been erected on the back garden or back yard of one of the premises which was authorised to be drained by the combined drainage. Therefore the case was slightly different from this. I am not quite sure, therefore, that the passage in my judgment ought not to be confined to facts similar to the facts that existed in those two cases, and I am a little doubtful whether it ought to be taken to go so far as to sanction what was done in this case, which was bringing in the drainage of No. 27 in a way that certainly had not been specifically authorised by the order of the vestry. The order of the vestry had authorised the two houses to be to a certain extent drained together, but it is a question, as it seems to me, of what the meaning of this plan with no details is. My view is that it was an order for the houses to be drained in pairs, and that as regards the details of the way in which the drains from the particular water-closets and the particular sinks, which they must have contemplated would be constructed, were to go, it was all left to be arranged by the surveyor, or arranged in the way in which the particular drains of one house usually are arranged, which I think is that the particular line which the water-closet drain and the sink drain take is left to the surveyor. It is on that ground that my judgment is based that this structure is a drain and not a sewer.

But there is another view of the case, and in my judgment an important view—a matter that is constantly turning up in these cases. Suppose that I am to assume the fact to be that the builder did not call the attention of the surveyor to this; that he did it to save himself the expense of the extra 40 feet or so of piping; that he did it behind the back of the surveyor, covered it up as quickly as he could, and never said anything about it. If those are the facts, how does the matter stand? A perfectly wrongful act was done, wrongful in every way, and contrary to a considerable number of provisions of the Act of

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Parliament. It is impossible to say that that turned the structure into a sewer then—that that wrongful act vested it in the vestry as a sewer and made it repairable at the expense of the ratepayers generally, and not of the owner and wrongdoer. It is quite impossible; I am sure there is no authority for it; I think there is some authority now the other way. Consequently, in the time of Mr. Alfred Heaver, if those were the facts—I do not myself think they were; I think in all probability what was done was taken to be covered by the sanction of the vestry, that nobody thought of doing a wrongful act, that they thought they were carrying out the order that really had been obtained from the vestry; that is what I think in fact happened—but assuming it was the other way, assuming it was a wrongful act in transgression of the order, how does the matter stand? I am clear that in the time of Mr. Alfred Heaver the structure remained a drain repairable by him, and did not become a sewer repairable by the vestry. Now Mr. Heaver is dead. Before he died he dealt with the property by making, in the first instance, a lease of the two houses and others to one of his sons in trust for himself, the lessor. That was done for the purpose of enabling him to sell the freehold, or, as it is commonly called, the freehold ground rent, and he did sell the freehold ground rent; he remained with a lease for 99 years, nominally to his son, but really for himself. Then at a later date he gave the beneficial interest in that lease to the son, to whom he had originally granted the lease as trustee; he gave it as a gift; it was not a purchase for valuable consideration or anything of that sort; and the most important part of it is that it included both properties. Then the son married, and when the son married it was included in his marriage settlement, and the term of 99 years, which makes ownership within the meaning of all the Acts, is now vested in the trustees of the marriage settlement. That is the title, and in my opinion there is nothing in it to alter the position of things or in any way to vest this construction in the local authority as a sewer. It is quite true that there have been cases which have arisen—*Kershaw v. Taylor*, 1895, 2 Q. B. 471; 64 L. J. M. C. 245, was, I think, the principal one, and the most difficult case—where a construction, originally made in the sort of way that the structure here in question was made, is found in the possession of a purchaser of one of the houses; the title of the two houses—which always must have been, when such a thing as this was constructed, in the same person—being divided, so that one house belongs to one and one belongs to another, and where the purchasers of the houses have been held not to be responsible for any original wrongdoing. In those cases the Courts have said you must take things as you find them. There are difficulties in the rights as between the two parties. The houses have been sold

with the construction there, with drainage *de facto* going from one through the other, no provision being made as to rights; so that you have got to deal with things as you find them; and the Court has said, as between the local authority, who, whether they were in fault or whether they were not, somehow or other have had the misfortune to have this thing happen, and the purchasers, the present owners of the houses, who are not responsible for the original wrongdoing if there was any, the construction must be treated as what it apparently is, namely, a sewer. That seems to me to be the extent to which the authorities go; and in this case the title to the two houses remains in the same persons, and has only devolved from the original wrongdoer by his distribution of his property among his own family. There has been no purchase, and the trustees possibly had notice or constructive notice, which may or may not affect the position; I do not think it does. At any rate the property has not been divided into two, which is the important matter that brings in the other equitable considerations. It remains the property of people who are claiming direct through the wrongdoer and in his right, and who have not got the property in such a way as, in my opinion, to give them any higher rights than he had himself; they are his children—at least, one is his son claiming through him, and there is no ground whatever for giving him any greater rights as against the public than the original owner had. Consequently, if I ought to find the fact to be that what was done was done contrary to the order of the vestry, then I think still that the structure remains a drain. Possibly it is by virtue of an estoppel; I do not care to say exactly how it is; I think it is by virtue of an estoppel; but anyhow, the wrongful act, if it was a wrongful act, of Mr. Heaver, the builder, cannot give either himself or anybody who claims through him a right to have this construction repaired at the cost of the local authority. That is my view of it. At the same time, I take the view in this particular case that it was not a wrongful act, but that it was an act intended to be done under the order of the vestry, which had sanctioned the combined drainage of these two houses, and had not sanctioned expressly any details of the way in which that was to be done. So far, therefore, as the gully trap at the back of No. 27 is concerned, I come to the conclusion that that does not make the structure a sewer.

Now I have to deal with the question as to the rain-water pipe or stack pipe, which comes down into the gully in front, and the water from which is taken along a drain under the forecourt which joins the structure in question in the case a little further on. Now, there is no real occasion to discuss that here, because there is no evidence that the portion of the structure below the point where the drain conveying the water from the rain-water pipe joins it is out

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of repair. I propose, with reference to the part of the structure going through the back gardens and under the house, and down to the point where the drain from the foot of the rain-water pipe joins into it, to make a declaration that that is a drain and not a sewer. But I think it best, having regard to the state of the authorities, about which I want to say a few words, not to make any declaration about the part of the structure below the point where the drain from the foot of the rain-water pipe joins it. The rain-water pipe goes down the wall of No. 29, and takes the water from the roof of No. 29. To all appearance it is a stack pipe belonging to No. 29. It empties over a gully in the forecourt, and the water goes down a drain under the forecourt, and so into the structure under consideration and then into the sewer. The stack pipe in fact, besides the water from No. 29, takes water from the roof of No. 31; and it is suggested that that makes the stack pipe—I think the argument must go that length—a thing vested in the local authority and repairable at the public expense. If so, the result is that there is not a house in London the roof of which slopes towards the roof of another house so that the water goes down into the gutter between the roofs, in which that gutter is not a sewer repairable by the local authority. On the ancient reasoning of Euclid one would say that that was a *reductio ad absurdum*, and that, being absurd, it cannot be so; and I think it is unreasonable and ridiculous to say that, because houses are so built that the water from the roof of one goes down on to the roof of the other and thence passes down the stack pipe of the latter, that makes the stack pipe a drain taking the drainage of two houses, vested in the local authority, and repairable at the public expense. But unfortunately there is a decision—I am sure not intended—but a decision of the Court of Appeal in *Silles v. Fulham Borough Council*, 1903, 1 K. B. 829; 1 L. G. R. 643; 72 L. J. K. B. 397, which, when you look at the facts, appears to be some sort of authority for that proposition. There is not a syllable in the judgment of the Court, however, to show that they dealt with the case as if the facts were those. The case was argued as an appeal from a previous case of *Holland v. Lazarus* (1897) 66 L. J. Q. B. 285, and the decision of the Court really is no more than a decision that *Holland v. Lazarus* was right, and that the case before them was governed by *Holland v. Lazarus*. There is not a word to show that they noticed that the stack pipe in question was a stack pipe on the wall of one house and part of the structure in the ordinary sense of that house, which merely took the drainage from the other house because it happened to come off the roof of the other house.

The Court of Appeal really dealt with the case as if the facts were the same as in *Holland v. Lazarus*. In *Holland v. Lazarus* there were

four houses which under the order of the local authority were drained in combination, and at a subsequent time the water drainage from the roof of another house coming down the stack pipe of that house in the ordinary way and getting into a drain at the bottom was connected through that drain at the bottom with the drain which drained the other four houses. The only question there was whether rain-water drainage from another building is on the same footing as ordinary sewage drainage, and whether the taking of the rain-water drainage from another building, not authorised by the original order for combined drainage, prevents the structure conveying the drainage of the five houses in that way from being authorised. *Holland v. Lazarus* said it did, and the Court of Appeal in *Silles v. Fulham Borough Council* said it did, and that *Holland v. Lazarus* was right. But they never, from beginning to end so far as I can see, by a word in the judgment dealt with the point that causes the difficulty, in my opinion, namely, that the rain-water drainage of the other house only came into the joint construction, if it may be so called—if it is a joint construction at all—because it happened to flow down the roof of the one house and into the gutter of the other house, where as I think it became the drainage of the other house, and was properly taken down through the stack pipe of the other house. They did not deal with that at all. This is the statement of the facts in *Silles v. Fulham Borough Council*—I read from page 829 of the Law Reports: "An underground pipe or drain carried sewage from house A into the main sewer. A gutter ran along under the eaves at the backs of both houses, by which rain-water falling on their roofs was carried into a pipe passing down the wall of house A. This down-pipe discharged by means of a gully into the underground pipe or drain draining that house as aforesaid. From house B only rain-water was carried by this drain. A nuisance having been occasioned in this drain, the defendants gave notice to the plaintiff under section 85," and so on. So that the facts are stated exactly as they are here. Now, under those circumstances, there is a difficulty about this matter. Personally, I think that the Court of Appeal did not apprehend the difference, but there is the case reported, and I should have a difficulty in not following it, but it seems to me that it is unimportant in this case for the reason that I gave just now, that it only affects a portion of this structure which at present is not out of repair, and which is not a part that is particularly likely to get out of repair; and I do not think it is necessary to make any declaration about it. When I come to deal with the question of parties, which I must deal with in this case, there is an additional reason for not making any declaration.

Now I come to another point altogether. When the dispute arose as to this matter, an appeal was taken to the London County Council,

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and on its turning out that the question really was the legal question whether the structure was a sewer or a drain, the London County Council said they could not properly deal with that question—in which I think they were quite right—and they adjourned the matter and said the parties had better take legal proceedings in order to get that question settled. In that state of things, the local authority, desiring to be defendants rather than plaintiffs in the proceedings that had to be taken, to force the matter on, gave a notice under section 83 of the Act of 1855. Now section 83 is a section dealing with cases of drains being improperly constructed, contrary to directions, and so forth, and it mentions the “offending” party; it says that the party “offending” is to forfeit and pay a sum not exceeding ten pounds, and then gives power, if the thing is not remedied within fourteen days, for the local authority to do the work themselves and to charge the expenses. That section, as it seems to me, is a section applicable to a case where the offending party can be found. If Mr. Alfred Heaver had been alive, and if it is true that he did this work wrongfully, and not under the sanction that had been given, he would have been a party “offending,” and a summons could have been taken out against him; he could have been fined the £10, and also the notice could have been given to him, and thereupon if he did not do the work the local authority could have done it and recovered the expenses; the section would have applied. But I think that the plaintiffs are right in saying that it does not apply unless notice can be served on the offending party, and that this particular machinery for dealing with the unauthorised act only applies if the offending party can be found. Consequently, I think that that notice was wrong.

The notice was addressed to “the executors of Alfred Heaver and to all others whom it may concern”; and the result of it was that the present action was commenced in the name of the executors of the late Alfred Heaver. It was not until the action had proceeded a considerable distance that the solicitors who were conducting the proceedings discovered that there was a mistake about the title, and that the executors of the late Alfred Heaver were not possessed of the term in this property, but that the term was vested in two of them as trustees of the marriage settlement of Mr. George Heaver, another of them. It was a mistake. The notice was not addressed to the parties to whom the property belonged. The mistake in the address of the notice was occasioned by a previous mistake of the same solicitors in giving those names as the names of the people concerned before this action had begun; but the notice was addressed to the executors, and the action was commenced in the name of the executors. Then, after the proceedings had gone some considerable way, the matter was found

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out, and a letter was written to the defendants stating that at the trial the plaintiffs would apply for an amendment. At the trial yesterday they did apply for an amendment, and I said it had better be done, and that the two plaintiffs who were trustees of the marriage settlement should be added as plaintiffs in that capacity, for the purpose of having all questions decided, and without prejudice to the question of costs, which I was to deal with afterwards.

That being so, how does the matter stand? The action was for two purposes; first, to get an injunction against this notice being acted upon, and, secondly, to get a declaration upon the real point in dispute between the parties, which affected a considerable amount of money, I suppose, in this and other houses of similar construction. It was an action to get a decision on that substantial point, whether this structure was a drain or a sewer; that is the point of substance. But it is also said that at any rate the defendants were wrong in this notice, and I think they were wrong. The plaintiffs in the action got from a judge in Chambers an interlocutory injunction *ex parte*, and then, on the summons coming on as to the continuance of that *ex parte* injunction the defendants gave an undertaking not to act on the notice, and thereupon the matter stood till the trial, and the costs were reserved. That being the state of things, I have got to consider what is to be done. At the date of the action the borough council had given this notice. I suppose they must be considered to have been threatening to act upon it, but of course it is perfectly clear that it only was given as a step in the proceedings, in the dispute that was going on as to whether this structure was a sewer or a drain, as a notice which they considered themselves entitled to give as a means of forcing the thing to a head. If they had actually committed any trespass under it, the thing would be different; there would be substantial damage; but as it is there is no substantial damage. However, I think that the true owners of the property would have been justified in coming for an injunction, and that, if they had come for the injunction and an undertaking had not been given, as a matter of form the injunction might have been granted. I do not know whether it would, because there would have been no necessity for it; the local authority upon getting the other point decided of course would not want to proceed with this notice; and I think the matter might have been met sufficiently by a declaration. Further, as it was in point of fact the wrong people who brought the action—people who had really got no title—by mistake no doubt—the one mistake should be set against the other. And, long before the real people who were entitled to complain of any threatened trespass, if there had been any threatened trespass, came into the proceedings at all, or claimed to come into the proceedings, the borough

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council said that they did not propose to act on the notice, and that it was a mere step to bring these proceedings to a head.

That being so, the question is how I should deal with the costs; that is the only remaining question, I think, that I have to deal with. My view of it is that this is an action in which the defendants have succeeded upon all the main points in the action. I think that the defendants must have the costs of the action; but I think that they were wrong with reference to this particular step of the proceedings, and that the proper way of dealing with the matter is to say that the defendants must pay any costs arising out of that interlocutory injunction. I think that that will be sufficient to meet what I have called the subsidiary point in reference to the notice which they wrongly gave, which caused nobody any harm, and as to which the people who were entitled to complain of it never came forward to complain until the thing had been practically withdrawn. That is what I think will meet the case. I propose therefore to make a declaration that this structure, down to the point where the rain-water pipe comes into it is a drain and not a sewer. I say nothing one way or the other in the declaration as to the portion following on to that towards the sewer; I leave that out, because it is not out of repair, and because I have a little doubt as to whether the Court of Appeal's decision applies to it. And because I have some little doubt as to how to deal with it, I do not think fit to make any declaration with reference to that part. Then I also make a declaration that the notice of the 31st July was a bad notice. That is quite sufficient apart from any injunction, because it shows the way I deal with it. I make a declaration that that was a bad notice. I leave all the parties to the action in it, the executors as well as the added plaintiffs, because it is desirable that a declaration if made should bind as many people as possible. The defendants will have the costs of the action, but the defendants will pay to the plaintiffs their costs of the application for and obtaining the interlocutory injunction and of the summons for continuing it. That, I think, disposes of the case.

Judgment accordingly.

Solicitors for the plaintiffs—W. W. Young, Son, and Ward.

Solicitor for the defendants—R. M. Prescott, Town Clerk, Fulham.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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GRAND JUNCTION WATERWORKS CO. v. RODOCANACHI.

Feb 29;

Mar. 1, 28.

Water—Supply—Leak in communication pipe—Duty of owner or occupier to repair—Right of water company to cut off water supply—Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 43—Metropolis Water Act, 1871 (34 & 35 Vict. c. 118), ss. 3, 26-32.

The duty to repair a leak, causing waste of water, in a communication pipe between the main of a metropolitan water company and the consumer's premises, where the company provide a constant supply and the prescribed fittings have been provided pursuant to notice from the company under section 27 of the Metropolis Water Act, 1871, is, by section 28 of that Act, cast upon the owner or occupier of the premises; and an owner or occupier who is in a position to repair the defect without committing any unlawful act, and who, after notice, permits the pipe to remain in its defective condition, has wrongfully failed to prevent waste of water within section 32 of the Act, so that the water company are entitled to cut off the water and cease to supply it as long as the injury to the pipe remains unremedied. The fact that the water company could, if so minded, have repaired the pipe after 24 hours' notice under section 29 does not disentitle them from exercising their rights under section 32; and an owner or occupier who under such circumstances will not repair the pipe is not a person entitled to receive a supply of water under section 43 of the Waterworks Clauses Act, 1847.

It is no answer in such a case for the owner or occupier to show that he has no power to break up the street for the purpose of repairing the communication pipe, if the necessary breaking up of the street has been effected by the water company so that the owner or occupier can, in fact, repair the pipe without himself breaking up the street.

CASE stated by a metropolitan police magistrate:—

An information and complaint had been preferred by the respondent against the appellants—the water company—under section 43 of the Waterworks Clauses Act, 1847, for refusing, on June 6, 1903, to furnish to the respondent a supply of water for 113, Eastbourne Mews. Upon the hearing the magistrate convicted the appellants, and imposed a penalty of £6, being 40s. a day for three days, and awarded the respondent £12 12s. costs. It was proved or admitted at the hearing that the respondent was the lessee of 113, Eastbourne Mews under a lease, by the terms of which the lessor was liable for all internal repairs. No. 113, Eastbourne Mews was a stable with a dwelling-house above, and the dwelling-house was inhabited by two grooms in

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the complainant's service. Eastbourne Mews was a public street repairable by the local authority, and was within the district of the appellants. The supply to the premises in question was a supply for domestic purposes, and was a constant supply under the provisions of the Metropolis Water Acts, 1852 and 1871. The notices under section 27 of the Act of 1871 were duly served, and the prescribed fittings were duly provided. The water rate for the period from June 6 to 10, 1903, is to be taken to have been paid.

Before Saturday, June 6, 1903, there were indications in the roadway opposite 113, Eastbourne Mews of the existence of a small leak. Upon that day it became evident from the subsidence of the cobble-stones in the roadway (which was thereby rendered dangerous to vehicles) that the leak was serious; and on an investigation being made by a ganger in the employment of the appellants it was discovered that there was a leak in the communication pipe (which was the property of the respondent) supplying 113, Eastbourne Mews close to the junction of the said pipe with the appellants' main under the roadway.

The leak was at the rate of about 1,500 gallons in 24 hours. The ganger who opened the ground thereupon served upon the respondent's coachman, who was on the premises, a notice requiring the repair of the said communication pipe to be forthwith undertaken by the respondent, and intimating that otherwise the water would be cut off.

The notice was addressed to the occupier of 113, Eastbourne Mews, and was in these terms:—"Sir,—Upon opening the ground opposite No. 113, Eastbourne Mews a leakage of water was found to exist from the defective state of your communication pipe, and unless you forthwith repair the same it will be the duty of the company to disconnect such pipe from their main. Immediately after the repair, rendered easy by the ground being now open, the company will reconnect the pipe with their works, and will undertake to fill in and make good the ground upon payment of the expenses incurred thereby, amounting to 15s."

The coachman took the notice immediately to the respondent's house, but found that the respondent had left for the City and would not return for some hours. The coachman then returned and explained this fact to the ganger, and in answer to a suggestion by the latter that he would request the plumber usually employed by the respondent to do the necessary work of repair, stated that he had no authority to order any repairs to be executed to the said pipe.

Beyond communicating with his landlady the respondent at no time took any step to have the communication pipe repaired or the waste stopped. The water was thereupon cut off by the company, and it

remained cut off till Wednesday, June 10, when the repairs were executed by order of the respondent's landlady, and the water was thereupon restored. The soil removed was too wet to be replaced, but the ground was refilled with dry earth by the company by 11.30 on the morning of Saturday, June 6, and it remained filled in until Wednesday, June 10, when, at the request of the respondent's landlady, the roadway was again broken up by the appellants and the repairs were executed by her order.

The time occupied in executing the repairs was stated to be about two hours. It would be necessary to disconnect the supply during the repairs.

On the afternoon of Saturday, June 6, the respondent wrote the following letter to the appellants complaining of the cutting off of the water:—"Dear Sir,—113, Eastbourne Mews.—I am informed that your men have cut the water off at these stables without notice. As this is illegal, if the water is not on at 10 a.m. on Monday morning my solicitor will take proceedings. I am also writing to the borough authorities. These stables, I may add, belong to 113, Westbourne Terrace, and the owner of that house keeps them in repair.—Yours, &c."

That letter was received by the appellants on June 8, and their secretary replied as follows on the same day:—"Dear Sir,—113, Eastbourne Mews.—In reply to your letter of the 6th inst. I have to inform you that the company's men opened to a leakage in the above mews opposite No. 113 and found that the 1¼ in. lead pipe supplying these premises was broken. The defective pipe was shown to your coachman, and a notice was also handed to him stating that the company would have no alternative but to disconnect the pipe from their main unless the repair was taken in hand forthwith. This was not done, and accordingly the pipe was disconnected from the company's main. The company cannot permit the pipe to be reconnected to their main until the necessary repairs have been carried out by your plumber.—I am, &c."

It was contended by the appellants (1) that the appellants ought not to be convicted because the respondent was not entitled to a supply of water at the time of the alleged refusal of the appellants to give a supply; (2) that upon the true construction of the Acts of Parliament governing the matter the appellants were entitled to cut off the supply, and were under no obligation to supply water after the communication pipe had been severed until the same had been restored; (3) that the appellants were entitled to disconnect the defective communication pipe from their main and prevent the waste of water, the respondent having wrongfully failed to keep the said pipe in proper repair, and

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to do what ought to have been done to prevent waste; (4) that the appellants did not on June 6, 1903, or on any other day refuse to furnish a supply of water within the meaning of section 43 of the Waterworks Clauses Act, 1847; (5) that even if they did refuse they were within the exemptions mentioned or referred to in sections 42 and 43 of the Waterworks Clauses Act, 1847, in that the supply was not given only during necessary repairs; (6) that even assuming the appellants could be properly convicted the *maximum* penalty which could be imposed was not £6, but only £4, being at the rate of 40s. for the two days which elapsed between the receipt of the respondent's letter of June 6, 1903, demanding a supply and the time when the supply was restored.

On behalf of the respondent it was contended (1) that there was neglect or refusal on the part of the appellants to furnish a supply of water to 113, Eastbourne Mews within the meaning of section 43 of the Waterworks Clauses Act, 1847; (2) that the severing of the pipe was a wrongful act on the part of the appellants, and that the respondent did not by reason of such severance cease to be entitled to a supply of water for his premises; (3) that section 42 of the Waterworks Clauses Act, 1847, had no application, and that in any event "necessary repairs" only continued for about two hours on the morning of Wednesday, June 10; (4) that there was no power in the respondent to dig up the public highway, and no liability on the respondent to repair this pipe; (5) that upon the true construction of the Acts of Parliament the appellants could only justify cutting off the supply of water if the conduct of the respondent in failing to repair was either wilful or negligent; (6) that there was no evidence of any wilful wrong or of any negligence on the part of the respondent; (7) that the penalty of £6 was rightly imposed.

The magistrate was of opinion that the respondent's contention was correct, and, as above stated, convicted and fined the appellants.

The questions for the opinion of the Court were (1) whether, upon the facts stated, the magistrate had properly convicted the appellants; and (2) whether the magistrate was justified in imposing a penalty of £6.

Macmorran, K.C., and *Acland, K.C.*, for the appellants. This is a conviction against a water company under section 43 of the Waterworks Clauses Act, 1847, for refusing to supply water; and the submission is that the appellants were lawfully entitled to cut off the water as they did, and that the respondent had disentitled himself to a supply of water for his premises until he had repaired the communication pipe. That the appellants cannot be made liable to the penal-

ties imposed by section 43 until the respondent has restored the communication pipe is clear from the decision in *Sheffield Waterworks Co. v. Wilkinson* (1879) 4 C. P. D. 410; 48 L. J. M. C. 145. A communication pipe of this kind falls within the term "fittings" as defined by section 3 of the Metropolis Water Act, 1871, and section 28 of that Act makes it obligatory upon every owner or occupier of premises upon whom notice to that effect has been served, within two months after the date of the service of such notice, not only to provide the prescribed fittings, including a communication pipe, but from time to time to keep the same in proper repair. The respondent to the present appeal has wholly failed to comply with the obligation cast upon him by this section, which forms one of a group of sections—26-32—empowering water companies to prescribe fittings and to cut off a supply of water so long as a cause of injury to a communication pipe is allowed to remain or is not remedied.

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W. Finlay for the respondent. It is the appellants themselves who alone possess the power to break up a street or roadway for the purpose of repairing this communication pipe, and there is no statute which confers upon the respondent, either as owner or occupier of premises, such a right. The appellants might have given 24 hours' notice under section 29 of the Metropolis Water Act, 1871, and done the work themselves. That the respondent can do nothing of the sort is clear from the decision of the Court of Appeal in *Chapman v. Fylde Waterworks Co.*, 1894, 2 Q. B. 599; 64 L. J. Q. B. 15. Here the respondent is not in default, for he could not break up the street, and had he done so would have performed a wrongful and illegal act. The appellants can only refuse him a supply of water if they themselves have rightfully cut off the water under the powers conferred on them by section 32 of the Metropolis Water Act, 1871; but the section only empowers them to cut off the supply of water if and so long as the respondent wrongfully fails to do something which causes the injury to the pipe to remain or wrongfully fails to remedy it.

The respondent here has committed no such wrongful act, for he cannot legally break up the street; therefore the appellants were not justified in cutting off his water supply, and the conviction was perfectly right. Again, if there be a duty on anyone besides the appellants to repair the pipe, it would fall upon the landlord and not upon the respondent, who is a mere tenant of the premises. The case of *Sheffield Waterworks Co. v. Wilkinson* (1879) 4 C. P. D. 410; 48 L. J. M. C. 145, which had been quoted by the appellants in support of a very far-reaching proposition, hardly goes the length contended for, since the judgments impliedly negative the point they have endeavoured to make on the section.

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*Macmorran, K.C., replied.**Cur. adv. vult.*

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March 28, 1904. LORD ALVERSTONE C.J. read the judgment of the Court (consisting of himself and WILLS and KENNEDY JJ.) as follows:—This was an appeal from a special case stated by Mr. d'Eyncourt, police magistrate, on a complaint preferred by the respondent against the appellants for refusing to furnish a supply of water, contrary to section 43 of the Waterworks Clauses Act, 1847. The case was extremely well argued by Mr. Macmorran on behalf of the appellants, and Mr. Finlay on behalf of the respondent, and raises a point of general importance. It is not necessary to refer to the facts in detail, as to which there was no dispute and which are clearly set out in the special case; it is sufficient to say that on Saturday, June 6, 1903, a leak having occurred under the roadway opposite 113, Eastbourne Mews, the road was opened and the leak was found to be in the communication pipe, the property of the consumer. Notice was thereupon given to the respondent's coachman, who was occupying the premises which were supplied with water, to repair the pipe, and the notice stated that it would be the duty of the company to disconnect if the pipe was not repaired. The respondent took no steps to repair it, and the water was then cut off by the company. The pipe was subsequently repaired by the appellants at the request of the respondent's landlady. The magistrate convicted the appellants, the water company, and fined them a penalty of £6 for neglecting, or refusing, to supply water in accordance with section 43. The question we have to consider is whether there was any evidence upon which this conviction can be supported. It must, we think, be taken upon these facts, and, in fact, it was so stated in the course of the argument, that the only refusal to supply the water was by the company's cutting it off upon June 6, and continuing to keep the water cut off until it was again supplied on the 10th.

The questions we have to decide are whether, in the Metropolis, if a leak is found in a pipe belonging to a consumer, the company is entitled to cut off the water until the pipe is restored; and, secondly, does a refusal to supply under the circumstances of the present case constitute an offence under section 43? It is found as a fact in the case, and for reasons which we will state later on it must be the fact, that the pipe was the property of the consumer—*i.e.*, the owner of the premises let to the respondent. Under section 43 of the Waterworks Clauses Act, 1847, if the undertakers, except when prevented, as provided in an earlier section, neglect or refuse to furnish to any owner or occupier entitled under the Waterworks Clauses Act, or the special Act, to receive a supply of water during any part of the time during

which the rates for such supply shall have been settled, or tendered, they shall be liable to a penalty. The exception referred to in the earlier words of that section is to be found in the provisions of section 42, and does not, in our opinion, apply. Under section 28 powers are given to the undertakers to open the streets and lay down service pipes and other works for the supply of water; under section 29 they may not enter private property without consent, except in a case which does not apply here, and by section 31, before breaking up the street, they must give certain notices. By section 48 the owner or occupier of any dwelling-house who wishes to have water brought into his premises may open the ground between the pipes of the undertakers and his premises and lay communication pipes, and section 52 empowers such owner or occupier to open or break up the street for such purpose. There are also provisions in sections 44-47 as to the laying of communication pipes by the undertakers which are only material as supporting the view that communication pipes are, under ordinary circumstances, the property of the consumer. The Metropolis Water Act, 1871, contains a group of sections—sections 26-32—which were referred to in argument and require consideration. Under these sections the company may prescribe fittings, which by the interpretation clause, section 3 of the same Act, include communication pipes, and section 28 provides that in the case of a constant supply the owner or occupier of the premises shall provide all supply fittings, and from time to time keep the same in proper repair. Section 29 enables the company, if the fittings are out of order, to give notice requiring the owner or occupier within 24 hours to cause the same to be repaired so as to prevent any waste of water, and, if any person fails to comply with the terms of such notice, the company may repair the fittings of such person and may recover the expenses incurred. Section 32 provides that if any person wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used that the water supplied to him is likely to be wasted, he shall be liable to a penalty, and the second paragraph of the same section provides that, if any person supplied with water wrongfully fails to do anything which ought to be done for the prevention of waste, the company may cut off any pipes by or through which the water is supplied to such consumer, and may cease to supply him with water as long as the cause of injury remains or is not remedied. It will have been observed that neither the Waterworks Clauses Act, 1847, nor the Metropolis Water Act, 1871, nor any other Act to which our attention has been called, contains any express provision giving the consumer the right to open the street for the purpose of repairing the pipe, and this we gather from the statement in the special case and from the judgment of the learned police

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magistrate to be one of the grounds on which he decided against the appellants. It is true that Lord Justice Bramwell, sitting in the Court of Queen's Bench, expressed the opinion, in the case of the *Sheffield Waterworks v. Wilkinson* (1879) 4 C. P. D. 410, at p. 421; 48 L. J. M. C. 145, that the right to break up the soil followed from the right which the consumer had to lay down fresh pipes for the purpose of obtaining a supply, and it may be that the obligation imposed upon the owner and occupier by section 28 of the Metropolis Water Act, 1871, to keep the prescribed fittings, which include communication pipes, in proper repair may give the consumer a right to open the road for the purpose of repair. On the other hand, the Court of Appeal, in the case of *Chapman v. Fylde Waterworks*, 1894, 2 Q. B. 599, at p. 607; 64 L. J. Q. B. 15, expressly decided that the Waterworks Clauses Act gave the consumer no power to open streets for the purpose of repair. In the view, however, we take, this does not seem to us to be conclusive of the case. The question still remains—Is the consumer who, having the opportunity of doing so without opening the street, does not choose to repair his own communication pipe a person entitled to demand a supply of water under section 43? We do not think for the purpose of this question that any distinction can be drawn between owner and occupier. It was contended on behalf of the respondent that the duty of repairing the pipe rested with his landlord. The water company have no means of knowing what the contractual relations between the occupier and his landlord are, and, in our opinion, the liability of the company in respect of an offence under section 43 cannot depend upon the relations between the owner and occupier of the premises. No question in this case arises as to the opening of the street. The street was opened by the company; notice was given, and the company offered to reconnect the pipe upon payment of the expenses; they at the same time gave notice that if the pipe were not repaired the water would be cut off. In our opinion the duty to repair the defect in the communication pipe is by section 28 of the Act of 1871 cast upon the owner or occupier. We think that the owner or occupier who, after notice to him that the communication pipe belonging to him is out of repair, permits the pipe to remain in a condition in which it would cause waste of water, has wrongfully failed to do something to prevent the waste within the meaning of the second paragraph of section 32 of the Act of 1871, and that under these circumstances the company were entitled to cut off the water and to cease to supply him as long as the injury to the pipe remained unremedied. It might be that the owner or occupier of a house did not wish to continue the supply, or preferred to put in a better, larger, or different communication pipe. The fact that the company

could, if they were so minded, have repaired the pipe after 24 hours' notice under section 29 does not disentitle them from exercising their rights under section 32, and we therefore think that the owner or occupier who, under such circumstances as the present, will not repair the pipe which causes the waste is not a person entitled to receive a supply of water under section 43. We think the true view to be taken of the facts is that indicated by the Court in *Young v. Southwork and Vauxhall Water Co.* (1893) 69 L. T. 144; and, although no doubt in one sense it may be said that the question is one of fact, we think that the magistrate ought as a matter of law, upon the evidence in this case, to draw the conclusion which we have indicated upon the facts as stated. The appeal will therefore be allowed, with costs.

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Appeal allowed.

Solicitors for the appellants—Bircham & Co.

Solicitors for the respondent—Markley, Stewart, & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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CHANCERY DIVISION.

Feb. 10, 11,
12, 13, 15, and
17.

ATTORNEY-GENERAL *v.* NOTTINGHAM CORPORATION.

Nuisance—Smallpox hospital—Infectious area—Apprehended danger—Aerial convection—Empirical opinions—Evidence—Admissibility—Local Government Board—Production of reports—Evidence of officials.

In a quia timet action to restrain the use of a building as a smallpox hospital, the plaintiffs attempted to establish as a general affirmation the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51 feet. They called expert witnesses to support the theory of aerial convection and to give empirical opinions based upon other cases of smallpox hospitals. The defendants, on the other hand, called a number of expert witnesses to disprove the theory and give opinions opposed to those of the plaintiffs' witnesses.

Held, that the plaintiffs had failed to make out their case inasmuch as, in the circumstances, the theory of aerial convection which, if proved, would have afforded them a strong case as showing a reason why danger should exist, must be considered as not proven, and the inference which they desired to be drawn from the cases of other hospitals, depended upon a premiss the universality of which the defendants had disproved.

Quære whether the admission of evidence in chief of what had happened in the case of other hospitals, although allowed in deference to the opinions expressed in Hill v. Metropolitan Asylum District (1879, 1882) 42 L. T. 212; 47 L. T. 29, is not wrong in principle as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties.

The attitude of the Local Government Board in respect of the production of their reports, and of the evidence of their inspectors, commented upon.

THIS was an action by the Attorney-General on the relation of William English Robinson, Thomas Askew Loweth, and the Bestwood Coal and Iron Company, Limited, and by the said relators, for an injunction to restrain the Nottingham Corporation from using a building erected by them in the parish of Bulwell, in the city of Nottingham, and known as the Nottingham (Bulwell) Smallpox Hospital, as a hospital for the reception of persons suffering from smallpox so as to cause a nuisance to the inhabitants of the neighbourhood or to persons passing along the highways in the neighbourhood or to the relators.

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The plaintiff Robinson was the master of the parish schools of the parish of Bestwood, in the county of Nottingham, and resided at the school-house attached to the said schools. The plaintiff Loweth was a farmer and miller, and tenant of cornmills in the parish of Papplewick, Nottingham, and of an adjoining house and cottages, the former inhabited by himself and his family, and the latter occupied by his workpeople. The plaintiff company were the owners and occupiers of a colliery, mines, and ironworks in the parish of Bestwood, and employed there a large number of workpeople.

In the early part of 1903 the defendants erected in the parish of Bulwell the building in question for the reception and treatment of persons suffering from smallpox. It accommodated from 30 to 40 patients, and was surrounded by grounds for the use of such persons when convalescent, and of their nurses and attendants. The defendants were maintaining and using the said building and grounds for the purposes mentioned.

The hospital stood on a piece of ground containing about $4\frac{1}{2}$ acres and nearly triangular in shape. The base of the triangle was about 350 yards long, and abutted on the public road from Bulwell to Papplewick. The hospital building was about 17 yards from the said road, and the hospital grounds were enclosed on all sides except one with a close wooden fence 6 ft. 6 in. high, with barbed wire on the top, and having an inside fence of barbed wire 20 feet distant. On the side where there was no fence there was a stream nearly 20 feet wide, with a steep bank 15 feet or 20 feet high sloping to the stream. Across the stream were allotments, where considerable numbers of people were frequently at work.

The hospital premises were within half a mile of the village of Bestwood and of the schools where the plaintiff Robinson resided. They were within 200 yards of the premises occupied by the plaintiff Loweth, his family, and workpeople, and they were within half a mile of the plaintiff company's colliery and mines, and within a quarter of a mile of their ironworks. They immediately adjoined a house owned by the plaintiff company and occupied by Barrow, one of their servants.

The road from Bulwell to Papplewick was much used by members of the public on foot and in vehicles, and large numbers of workmen employed by the plaintiff company passed and repassed daily along it.

The hospital building was within 152 yards of the main line of the Midland Railway; within 27 yards of the Leen Valley branch line of the Great Northern Railway; and within 67 yards of the Bestwood Park branch line of the Midland Railway.

The plaintiffs alleged that by reason of the facts above stated, the maintenance and use of the hospital by the defendants caused grave

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danger of the spread of infection of smallpox not only to the plaintiffs Robinson and Loweth and their families, and the persons employed by them and the plaintiff company, but also to the inhabitants of the neighbourhood and the public generally.

The defendants, on the other hand, alleged that the site in question had after careful consideration been selected as suitable for the purpose, and that although no application to the Local Government Board was necessary inasmuch as the defendants did not require to raise a loan for the purposes of the said hospital, care was taken in selecting the site and erecting the hospital buildings and in preparing the grounds round such buildings to comply with the conditions upon which the Local Government Board usually insisted before sanctioning a loan for the purposes of a smallpox hospital. They further alleged that the hospital was managed in the most approved manner, and every precaution against the spread of infection was taken in connection therewith; that the hospital was absolutely necessary for the welfare of the city of Nottingham, and there was no other equally suitable site available; and that the hospital had not caused any nuisance to the plaintiffs or any of them, and had not occasioned the spread of infection.

At the trial, the Court, at the request of both the plaintiffs and defendants, accepted the evidence of a considerable number of expert witnesses testifying to what had happened in the case of other hospitals. Among them were Doctors Thresh, Reid, Hope, and Boobbyer, medical officers of health respectively for the Essex County Council, the Staffordshire County Council, the city and port of Liverpool, and the city of Nottingham, and Dr. McVail, President of the Sanitary Association of Scotland and of the Study of Medicine Section of the British Medical Association.

The plaintiffs proposed to call Dr. Fletcher, one of the Inspectors of the Local Government Board, who inspected and reported upon the hospital in question in June, 1903, but upon entering the witness-box Dr. Fletcher obtained permission from the Court to read the instructions which he had received from the Local Government Board, which were as follows:—"Local Government Board, Whitehall, S.W., 11th February, 1904.—Sir,—I am directed by the Local Government Board to furnish the following instructions for your guidance when attending upon subpoena to give evidence in proceedings before the High Court in the case of *Attorney-General and Others against the Mayor, Aldermen, and Citizens of the City of Nottingham* :—(1) You should claim, subject to the directions of the Court, to confine your evidence to statements of actual fact, and to refuse to answer questions directed to eliciting your opinion upon any of the points involved.

(2) You should claim, subject to the direction of the Court, that your report is a privileged document, and that it was made solely for the information of the Board in the discharge of their duties, and you should state that you are instructed by the Board to object to its production on the ground that such production would be prejudicial and injurious to the public service of His Majesty." The witness also produced and read a letter from the President of the Local Government Board to the following effect:—"With regard to the subpoena *duces tecum* served by the plaintiffs' solicitor on Dr. W. W. E. Fletcher, one of the medical inspectors of the Local Government Board, that in the proceedings taken by the plaintiffs against the Mayor, Aldermen, and Citizens of the City of Nottingham, the report made to the Local Government Board by Dr. Fletcher on his inspection of the smallpox hospital and site at Bestwood, Notts, in or about June, 1903, should be produced, I direct that it be represented to the Court that I object to the production of the report on the ground that its production would be injurious to the service of His Majesty.—WALTER LONG, President of the Local Government Board."

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[FARWELL J. I do not see why those instructions should be prejudicial to any case being heard here. I have to ascertain whether this is dangerous to the public health or not, and I think that I should be assisted by representatives of the Local Government Board, who are sent to make out the reports. I cannot conceive why they should not be given. I cannot instruct the Local Government Board. If they say it is detrimental to the public service I must abide by it, but I must confess I should like to have had the opinion. I do not think I can possibly put pressure on this gentleman in view of what he has said, but I respectfully protest that it is rather hard that I should be denied a sight of the documents by the gentleman in charge of them, and that I should not be allowed to know what their own report is, and what their opinion is. I protest that I am not to have all the best material that is available for me.]

Dr. Fletcher then left the box without being asked to give any evidence whatever, either as to facts or otherwise.

Upjohn, K.C., and *A. Llewelyn Davies* for the plaintiffs. The erection of a smallpox hospital to the danger of the public health is both a public and private nuisance, and may be restrained by injunction: *Rex v. Vantandillo* (1815) 4 M. & S. 73; *Rex v. Burnett* (1815) 4 M. & S. 272; *Metropolitan Asylum District v. Hill* (1881) 6 App. Cas. 193; 50 L. J. Q. B. 353. Proof that the hospital is a menace to the public health is sufficient to entitle the Attorney-General to obtain an injunction, and it is not necessary to show that as a

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matter of fact any injury to the public health has so far actually been caused. This is a *quia timet* action: *Reg. v. Lister* (1857) 26 L. J. M. C. 196; *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.* (1882) 21 Ch. D. 752; 51 L. J. Ch. 746. In order to show that this hospital is a danger to the public health, evidence of what has happened in other similar cases is admissible: *Hill v. Metropolitan Asylum District* (1879) 42 L. T. 212; and in the House of Lords (1882) 47 L. T. 29.

Asquith, K.C., Macmorran, K.C., and R. J. Parker for the defendant corporation. If the plaintiffs' contention be correct, it will be practically impossible ever to erect these hospitals anywhere, notwithstanding section 131 of the Public Health Act, 1875. The site and construction of this hospital satisfy the requirements insisted upon by the Local Government Board in cases where the Board sanctions loans for the purposes of such hospitals. The evidence in this case shows that there is no danger of aerial convection. To obtain an injunction the plaintiffs must show that there is a strong probability of danger to health or property: *Attorney-General v. Manchester Corporation*, 1893, 2 Ch. 87; 62 L. J. Ch. 459. Thus in *Bendelow v. Wortley Union* (1887) 57 L. J. Ch. 762, an interim injunction was granted on the Court being satisfied that there was a real appreciable injury, although not a great one, to the plaintiff's property. There is no convincing evidence here of probable injury either to property or individuals. On the other hand, injunctions have often been refused in cases similar to this: *Fleet v. Metropolitan Asylums Board* (1886) 2 Times L. R. 361; *Attorney-General v. Guildford, Godalming, and Woking Joint Hospital Board* (1895) 12 Times L. R. 54; *Harrop v. Ossett Corporation* (1898) 14 Times L. R. 308.

[They referred also to the Irish case of *Attorney-General v. Rathmines and Pembroke Joint Hospital Board*, 1904, 1 Ir. R. 161.]

Upjohn, K.C., in reply. In *Fleet v. Metropolitan Asylums Board* (*supra*), the hospital had been established for a long time, and in *Attorney-General v. Guildford, &c., Hospital Board* (*supra*) the hospital was only a small cottage hospital. The evidence shows that there is a strong probability of danger to health and property.

Cur. adv. vult.

Feb. 17. FARWELL J. This is an action by the Attorney-General on the relation of several owners and occupiers of land and collieries in the parish of Bestwood, and by the same owners and occupiers as plaintiffs against the mayor and corporation of Nottingham to restrain them from using a building lately erected and for the last six months used as a smallpox hospital from so using it, on the ground

that it is a nuisance, necessarily causing serious danger to the public health and causing special damage to the relator plaintiffs. No actual case of injury has arisen; and the action is *quia timet*. In order to succeed in such an action the plaintiffs must show a strong case of probability that the apprehended mischief will in fact arise: *Attorney-General v. Manchester Corporation*, 1893, 2 Ch. 87; 62 L. J. Ch. 459, or to quote Lord Justice FitzGibbon in *Attorney-General v. Rathmines and Pembroke Joint Hospital Board*, 1904, 1 Ir. R. 161, "to sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury—proof of actual and real danger—a strong probability, almost amounting to moral certainty, that if the hospital be established, it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justifiable—certainty that the hospital will be disagreeable or inconvenient—proof that it will abridge a man's pleasure, or make him anxious—the inability of the Court to say that no danger will arise—none of these, even accompanied by depreciation of property, will discharge the burden of proof which rests on the plaintiff, or can justify a precautionary injunction restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours." Further, the defendants are entitled in my opinion to ask the Court to assume that the hospital will be properly managed, and that all the precautions that scientific skill and knowledge usually require will be taken, and they are entitled in the present case to the benefit of the observation that the hospital has been open and has received patients for the last six months, during the last half of which it has been full, and that no mischief has at present arisen therefrom.

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The hospital stands on a piece of ground $4\frac{1}{2}$ acres in extent, roughly triangular in shape, the base of the triangle being about 350 yards long and abutting on the high road. It is enclosed on all sides except one with a close wooden fence 6 ft. 6 in. high, with barbed wire on the top, and there is an inside fence of barbed wire 20 feet distant. The hospital building is 51 feet from the high road. On the side where there is no fence there is a stream nearly 20 feet wide with a steep bank 15 feet or 20 feet high sloping abruptly from the hospital grounds down to the river. There are 204 residents within a quarter-mile radius from the building and 510 within the half-mile radius. There are 230 men employed on the Bestwood ironworks, part of which is within the quarter-mile radius, and 1,280 on the colliery, which is without the quarter-mile radius but within the half-mile radius; but the majority of the latter work underground, and some 45 men work at the bleach works outside the quarter-mile radius and within the half-mile radius. The hospital is some miles from the populous

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parts of Nottingham, and has access to the city by means of a road which has few houses on either side and is not much used for general traffic. The nearest residence is Barrow's cottage, with five inmates, 48 yards distant, and the next nearest are six cottages, with 23 inmates, 157 yards distant.

The plaintiffs' allegation that the hospital is a nuisance rests on the establishment as a general affirmation of the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51 feet. This is obviously a very serious question. Having regard to the impossibility of stamping out smallpox under the existing laws and to the practical impossibility of isolating an outbreak in crowded areas, the Court ought not to come to any conclusion that would result in closing the majority of the smallpox hospitals in the kingdom unless the expert testimony is really conclusive. Now it is clear from the evidence that I have heard in this case that the medical profession are divided into two camps on this question, each containing persons of eminence and experience. The first point of difference is on the theory of aerial convection for any considerable distance—say, for more than 50 feet. This is a purely scientific question, and I gratefully adopt Lord Bowen's statement in *Fleet v. Metropolitan Asylums Board* (1886) 2 *Times* L. R. 361, that "it would be most dangerous to form an independent opinion on a scientific question from the smatterings of science that might be picked up during the hearing of a case." The plaintiffs do not contend that there is a consensus of expert opinion on the point, and it is enough for me to say that it is therefore not proven, and that I am not competent to form an opinion of my own on the question. If the plaintiffs could have established aerial convection for the requisite distance, they would have had a strong case in that they would have shown the reason why danger should exist; but, failing this, they are driven to the empirical opinions of the experts. This is, of course, a legitimate and usual mode of proof; and the Court in the case of a conflict of experts may either say that the onus is on the plaintiff and has not been discharged, or it may examine the facts and the reasoning given by the experts as the ground of their opinion; and, if and so far as that reasoning can be tested by ordinary rules independent of special scientific knowledge, I feel bound to test it and not to state simply that the conflict is such that the plaintiffs have not discharged the burden cast upon them. I will take Dr. Thresh, who is the protagonist on the plaintiffs' side, as an example of the reasoning of the plaintiffs' witnesses. His opinion is based on his experience and knowledge of a large number of cases of smallpox

and of several hospitals, and is a conclusion of logic, not of medical science. His train of reasoning seeks to extend an induction founded on cases observed by or known to him to all other cases; but the induction fails, for the conclusion that all hospitals are sources of danger does not necessarily follow from the premiss that some hospitals are such; or, in other words, his cases are not sufficiently exhaustive, and his reasoning is a mere instance of the method of ancients described by Bacon as *inductio per enumerationem simplicem, ubi non reperitur instantia contradictoria*. It is a mere ascription of the character of a general truth to all hospitals, because in all hospitals known to the witness the fact is found to exist. There is the further difficulty that the cases are complicated by so many varying circumstances that the application of the methods of agreement and difference is impracticable. If the case had rested on the plaintiffs' evidence alone, I should have had great difficulty in adopting the conclusions as sufficiently proved; but the Court is in possession of a number of other cases in which smallpox hospitals have been full during outbreaks of the disease, and no case has occurred within the quarter-mile radius which could not be accounted for by some means other than the hospital. Mr. Upjohn attempted to minimise the force of this evidence by criticising some of the witnesses and suggesting that Dr. Reid's instances only were trustworthy and asking me to treat the plaintiffs' affirmative cases as outweighing these. But this is a fallacy. The plaintiffs' case depends on the inference to be drawn from an unbroken series of facts. In all cases where A has occurred, B has followed, therefore A causes B. But the conclusion depends on the universality of the premiss, and a negative instance unexplained spoils the chain. The defendants' case does not, however, rest on Dr. Reid alone. It would serve no useful purpose for me to go through the evidence in detail, but with regard to the plaintiffs' historical instances, if I may so call them, they have already figured in former actions, and very recently in the Irish Court of Appeal in *Attorney-General v. Rathmines and Pembroke Joint Hospital Board*, 1904, 1 Ir. R. 161, and have never been accepted as sufficient. It is important to remember that the Compulsory Notification of Diseases Act came into force only in 1899, and that before that it must obviously have been far more difficult, if not impracticable, to obtain trustworthy and sufficient data from which to generalise; and, indeed, I may well adopt Lord Justice Fitzgibbon's comment in the *Rathmines* case on them: "Cases such as Fulham, Sheffield, Bradford, Nottingham, and Dublin may be explained by reason of the character of the neighbourhood and their other circumstances." The defendants' evidence is very strong. It is not for them to prove the negative, but their instances—espe-

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cially Dr. Reid with his large experience in Staffordshire, Dr. Hope with his three hospitals in Liverpool, and Dr. Boobyer in Nottingham—are amply sufficient to break the chain of the plaintiffs' affirmative cases, even if I were satisfied that they had proved them. There is, of course, some risk of infection wherever there is smallpox owing partly to the folly of bystanders and of friends and relations of the patients and partly to the human fallibility of doctors and attendants, however careful. But, in considering the question from the point of view of a public nuisance, one must bear in mind that it is necessary for the public safety that some provision should be made for isolation, that the difficulties in the way of isolating in the case of the poor living in one or two rooms or crowded together in a single cottage are very great, and that it is (as Dr. McVail put it) a choice of evils. This consideration is mentioned by Mr. Justice Chitty in *Attorney-General v. Manchester Corporation*, 1893, 2 Ch. 87, 92; 62 L. J. Ch. 459: "The apprehended future danger in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the Court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shows that the maintenance of a smallpox hospital is, on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord Hardwicke is rightly reported in the case of *Coldbathfields Smallpox Hospital—Baines v. Baker* (1752) Amb. 158, he appears to have entertained some such question when he stated his opinion that the hospital was a 'charity like to prove of great advantage to mankind.' " And the same consideration applies, though perhaps not to the same extent, to the private nuisance alleged by the plaintiffs. If the fact of a public nuisance were established, it would of course be no answer to the private owners to say that the hospital must be placed somewhere (see per Lord Blackburn in *Metropolitan Asylum District v. Hill* (1881) 6 App. Cas. 193; 50 L. J. Q. B. 353), but where the question is whether the nuisance in fact exists or not, all the circumstances must be taken into consideration; and, after all, the owners

and occupiers of the adjacent lands have a far more effective prophylactic provided for them by medical science than any injunction of any Court. I respectfully agree with the following passage in Lord Justice FitzGibbon's judgment in *Attorney-General v. Rathmines and Pembroke Joint Hospital Board*, 1904, 1 Ir. R. 161: "It seems probable that the dread of smallpox is to a great extent the result of tradition. That scourge of the 18th century retains its terrors for those who do not realise that it has been deprived of most of its dangers. Vaccination is not only a preventive—it also modifies the disease. The evidence even of Dr. Thresh is that vaccination and revaccination at proper intervals confers 'practical immunity.' In applying the maxim *sic utere tuo ut alienum non laedas*, the duty of reasonable precaution for one's own protection is not to be ignored. An isolation hospital reduces the risk for every inhabitant of the district,—it is, in fact, a necessity, and although the individual must be protected, the public advantage should not be forbidden unless the danger and injury to the individual are clearly proved." In the present case I find as the result of the evidence that the site of the defendants' hospital was carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to the relator plaintiffs' property.

As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking me to accept evidence in chief of what had happened with other hospitals, and I acceded to the request in deference to the opinion expressed in *Hill v. Metropolitan Asylum District* (1879, 1882) 42 L. T. 212; 47 L. T. 29, and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to smallpox hospitals. The result is that the case has taken a week to try; and I venture to suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties—*e.g.*, how can I rely on the case of the hospital ships as a proved fact in the present case without injustice to them? In *Hill's* case Pollock B. rejected the evidence as to the facts of the Stockwell and Homerton Hospitals, and Lord Justice Bramwell said he was wrong in so doing, and Lord Justice Cotton agreed with him; but it is not easy to see how the point arose, as the plaintiffs who succeeded had tendered the rejected evidence. If the assumption in Lord Justice Cotton's judgment were correct in fact, the evidence would be valuable; he says: "They might have shown what in fact

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was the effect in the neighbourhood of the only other hospitals under the same conditions." But now there are numbers of such hospitals, and their conditions are infinitely various, and the extent and value of such differences are exceedingly difficult to estimate. In the House of Lords Lord Selborne appears to agree with Lord Justice Cotton; Lord O'Hagan dissents for reasons with which I respectfully agree. He says: "I am not prepared to say that the learned judge was wrong in rejecting the evidence, especially because of the non-fulfilment of the conditions on which he offered to receive it. Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inferences drawn from a comparison of their operation with that of the Hampstead Asylum might have been quite fallacious and deceptive. But, even without regard to this, I am not quite satisfied that the evidence was admissible, whether such conditions were or were not fulfilled. It was not pertinent to the issue tried as to Hampstead only. No notice had been given, in the pleadings or otherwise, that it would be offered. It would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them; and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limits, and secure promptitude, precision, and satisfaction in the administration of justice, it seems to me that Courts should be very jealous of the admission of such proof. If it had been admitted here, an inquiry as prolonged, as difficult, and probably as abortive as that which was applied for so many days to the Hampstead Asylum, might have been equally applied to each of the others, and to as many more, though numbering hundreds, as might have been alleged to have like characteristics, and to offer in their action on their neighbourhoods the same statistical results. I do not see how judicial inquiries at *Nisi Prius* can be restrained within a practicable and manageable compass, in many cases, if the admissibility of such evidence be declared." Lord Blackburn thought it unnecessary to decide the point. Lord Watson's opinion is stated later on, and would certainly rule out all the history that I have heard in the present case. He says: "In order to entitle him"—that is the party tendering evidence of facts collateral to the main issue—"to give such evidence, he must, in the first instance, satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and I am disposed to hold that he is also bound to satisfy the Court that the evidence which he is prepared to adduce will be reasonably conclusive, and will not raise a difficult and doubtful controversy of precisely the same kind

as that which the jury have to determine. It appears to me that it might lead to unfortunate results if the Court had not the power to reject evidence of collateral fact which does not satisfy both of the conditions which I have endeavoured to indicate." As Lord Bowen has pointed out in *Fleet v. Metropolitan Asylums Board* (1886) 2 Times L. R. 361, it is no part of the functions of the Court to qualify itself as an expert in science. The Court acts on the opinion of experts whose qualifications can be tested by cross-examination, and weighs the evidence so given and tested.

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The result is that the action fails, and is dismissed with costs.

Injunction refused.

Solicitors for the plaintiffs—Hind and Robinson, for Wells and Hind, Nottingham.

Solicitors for the defendants—Sharpe, Parker, Pritchards, Barham, and Lawford, for Sir S. G. Johnson, Town Clerk, Nottingham.

High Court of Justice.

KING'S BENCH DIVISION.

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Mar. 4.

BEARDSLEY v. PIKE AND ANOTHER.

Weights and measures—Coal sold in bulk—Tare weight of vehicle—Entry of tare weight on delivery ticket—Incorrect weight entered—Weight and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 22.

Coal merchants were summoned under section 22 of the Weights and Measures Act, 1889, for failing to insert on the delivery ticket the correct tare weight of a wagon in which coal exceeding 2 cwt. was conveyed for delivery on sale in bulk. The tare weight of the wagon was inserted on the delivery ticket as 10½ cwt., but there was evidence that the actual weight was after delivery found to be 11 cwt. The justices found that the vehicle had not been weighed on the day in question, but on the occasion of a delivery three days previously had weighed 10½ cwt., and dismissed the summons on the ground that the weight need not be taken previous to each delivery of coal, but only at reasonable intervals.

Held, without laying down any rule that such wagons must be weighed before each delivery, that the requirements of the statute had not been fulfilled, and that the case must be remitted to the justices.

CASE stated by justices of the county of Wilts as follows:—

1. On the 31st day of October, 1903, an information was laid before one of His Majesty's justices of the peace for the county of Wilts by the appellant Frank Beardsley, who is an inspector under the Weights and Measures Acts, duly appointed by the county council of Wilts, against the respondents, who are coal dealers residing at Heytesbury, in the said county of Wilts. The information charged the respondents that on the 23rd day of October, 1903, at the parish of Heytesbury, in the county aforesaid, they did unlawfully fail to insert or cause to be inserted on a ticket, required by section 21 of the Weights and Measures Act, 1889, to be given by them, a statement of the correct weight of the vehicle in which a quantity of coal sold by them exceeding 2 cwt. was conveyed for delivery on sale in bulk, and of the coal contained in such vehicle, contrary to the form of the statute in that case made and provided.

2. A summons was issued upon such information signed by William Frank Morgan, Esquire, a justice of the peace for the said county, and was returnable at the petty sessions held for the Warminster Division of the said county on the 5th day of November, 1903.

3. The section 22 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), under which the said summons was issued, is as follows:—

(1) Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approve.

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(2) In any such case the seller of the coal shall insert or cause to be inserted in the ticket required by this Act to be given by him a statement of the correct weight of the vehicle, or of the vehicle and of the animal drawing it where both are weighed together with the load, as well as of the correct weight of the coal contained in the vehicle.

(3) If any person fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five pounds.

4. At the hearing of the summons there was evidence on behalf of the appellant of the delivery of a load of coal to one Kate Hurdle on Friday, the 23rd day of October, 1903, and that on the ticket delivered with the said coal in accordance with the provisions of the Weights and Measures Act, 1889, the tare weight of the wagon was entered as $10\frac{1}{2}$ cwt. The appellant and his assistant also gave evidence to the effect that after the delivery of the coal on the said 23rd day of October, 1903, the wagon was weighed by the appellant and the actual weight was then 11 cwt. Neither of the respondents was present at the weighing, and there was some contradictory evidence between the appellant and the keeper of the weighbridge, who was present at the weighing, as to the exact weight of the vehicle; but having regard to the decision of this Honourable Court in the case of *Knowles v. Sinclair*, 1898, 1 Q. B. 170; 67 L. J. Q. B. 67, that the correct weight to be inserted in the ticket was the weight as ascertained previous to the delivery, we did not consider it necessary to find as a fact what the correct weight of the vehicle was after the coal had been delivered.

5. The respondents contended through their solicitor that the wagon having been weighed as recently as Tuesday, the 20th day of October last, and found them to scale only $10\frac{1}{2}$ cwt., there was no obligation on the part of the respondents to have the same weighed previous to the delivery of the coal on the following Friday, the said 23rd day of October. Evidence was given on behalf of the respondents of the weighing of the wagon on Tuesday, the 20th day of October, 1903, and that the weight then was only $10\frac{1}{2}$ cwt., and that the same vehicle had been weighed on many previous occasions and never weighed more than $10\frac{1}{2}$ cwt.

6. The appellant, however, contended that the provisions of the Weights and Measures Act, 1889, had not been complied with, that the weight of the wagon was liable to vary from day to day, and

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that it was obligatory upon the seller of the coal to cause the weight of the vehicle, as well as of the coal it contained, to be ascertained by a weighing machine previous to each delivery of coal.

7. We thought it desirable to obtain the ruling of this Honourable Court upon such an important point, and in order to raise the question we found as a fact—

(1) That the vehicle was not weighed on the 23rd day of October, 1903, previous to the delivery of coal on that day.

(2) That the said vehicle was last weighed on Tuesday, the 20th day of October, 1903, on the occasion of a previous delivery of coal by the respondents, and then weighed only 10½ cwt.

We held, however, that the respondents were not obliged to take the weight of the wagon previous to each delivery of coal, but only at reasonable intervals, and that they had complied with the requirements of the Act, and we therefore dismissed the summons.

8. The appellant, being dissatisfied with our determination upon the hearing as being erroneous in point of law, hath duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this Honourable Court, and we have agreed to do so in order to clearly raise the point whether under section 22 (1) of the Weights and Measures Act, 1889, hereinbefore set forth, the word "previously" means that the weight of the vehicle as well as of the coal it contains shall be ascertained previously to the delivery of each load of coal. The appellant hath duly entered into a recognisance as required by the statute in that behalf.

9. If the Court shall be of opinion that our interpretation of the law was correct, and that it was only necessary for the seller to ascertain the weight of the vehicle from time to time at reasonable intervals, and not on each occasion of delivery of coal, then the order of dismissal is to stand; but if the Court shall be of a contrary opinion, then the said order of dismissal is to be annulled and the case remitted to us for re-hearing.

Randolph for the appellant. The justices were mistaken in dismissing this summons as they did on the ground that it was only necessary for the respondents to ascertain the weight of the vehicle from time to time at reasonable intervals. The statute provides that the seller must ascertain the weight of his vehicle before he takes the coal out. Moreover, here there was no explanation offered to account for the variation of the weight of this wagon in the space of three days. It is not enough for the justices to find that it weighed 10½ cwt. on the Tuesday and 11 cwt. on the Friday, and then dismiss

the summons without being possessed of some explanation of this variation. 1904.

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No counsel appeared for the respondents.

LORD ALVERSTONE C.J. We are of opinion that this case must go back to the justices for rehearing on its merits. They have, according to the case as stated, said, in effect, that the seller of coal need only ascertain the weight of his vehicle from time to time, and that in the present case the wagon having been weighed on Tuesday, the 20th, the respondents could not reasonably be considered liable to weigh it again on Friday, the 23rd of October; and that they thought it was only necessary to have it weighed at reasonable intervals. Although we do not desire to lay down any rule that each wagon must be weighed before each delivery, we do not consider that the provisions of the statute have been fulfilled in this particular case, where no explanation has been offered as to the variation in the weight of the vehicle. When any question as to unexplained variation of weight arises, as it did here, we think that the case always ought to be dealt with, unless there be reasonable ground for supposing that there had been no change in the condition of the vehicle.

Case remitted.

Solicitors for the appellants—R. B. Wheatly, Son, and Daniel, for Cruttwell, Daniel, and Cruttwells, Frome.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Mar. 2.

KING'S BENCH DIVISION.

WING v. EPSOM URBAN DISTRICT COUNCIL.

Nuisance—Practice—Abatement order—Signature of order—Order signed by one justice alone out of those present—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 96, 251, Sched. IV., Form C.—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

An order made under section 96 of the Public Health Act, 1875, by two or more justices sitting in petty sessions requiring a person to abate a nuisance must, when drawn up, be signed by two at least of the justices present. Such an order, signed by one justice alone out of those who formed the court, is invalid.

CASE stated by the court of quarter sessions for the county of Surrey, who had overruled an objection by the appellant that certain orders to abate nuisances under section 96 of the Public Health Act, 1875, were bad on the face of them, inasmuch as they were signed by one justice only, whereas they should have been signed by two or more justices.

The appellant had been summoned under the Public Health Act, 1875, before the justices in petty sessions at Epsom, sitting as a court of summary jurisdiction, upon three informations laid against him by the inspector of nuisances alleging the existence of nuisances on premises of which he was the owner.

These complaints had been heard by three justices sitting in petty sessions, who, having satisfied themselves that the nuisance existed, made orders upon the appellant requiring him to abate the nuisances within a specified time in each of the three instances.

The facts of the case were as follows:—

1. The appellant was the owner within the meaning of the Public Health Act, 1875, and lessee of certain premises situate at Nos. 1 to 20, Garden Cottages, Epsom, within the district of the respondents, of which 14 years of the term of the appellant's lease were still unexpired.

2. In or about the months of March and April, 1903, the respondents relaid the sewer with which the drains of the said premises were connected, and the respondents served three notices upon the appellant alleging a nuisance existing in respect of the said drains, and requiring the same to be abated and certain works to be executed.

3. The appellant did not comply with the said notices or any of them, and three complaints relating to the alleged nuisance were thereupon made to a justice of the peace, and such justice issued

three summonses requiring the appellant to appear before the court of summary jurisdiction sitting at Epsom. On the hearing of the summonses on April 20, 1903, both parties being then present, the said orders were made by the court of summary jurisdiction, three justices being then present and taking part in the hearing and determination, and subsequently, on April 27, 1903, the appellant served the respondents with notice of appeal against each of the said orders as having been made by His Majesty's justices of the peace acting in and for the division of Epsom, and setting forth in each such notice, amongst other grounds of appeal, that the order appealed from was bad on the face of it, and on the said April 27, 1903, the appellant duly entered into three several recognisances as required by law for the prosecution of his said appeals, copies whereof are hereto annexed, and are to be taken as part of this case. The said orders were on June 2, 1903, served on the appellant by the respondents, and each of the said original orders was duly delivered to the clerk of the peace prior to the hearing of these appeals. The following is an exact copy of one of the said original orders, and is in the same terms in all respects as the order served on the appellant:—

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“In the County of Surrey.

Petty Sessional Division of Epsom.

Before the Court of Summary Jurisdiction sitting at Epsom the 20th day of April 1903 complaint was made on the 9th day of April 1903 by Edward Robert Capon of Bromley Hurst, Church Street, Epsom, Inspector of Nuisances to the Epsom Urban District Council that in or on certain premises situated at 15, 14, 13, 12 and 11 Garden Cottages Epsom aforesaid in the District under ‘The Public Health Act, 1875’ of the Epsom Urban District Council the following nuisance then existed viz.—a nuisance arising from want of or defective construction of structural conveniences that is to say arising from leaky drains, also drains not being intercepted from sewer, the discharge of sink wastes into closet pans, the absence of ventilation to drains, defective flushing cistern in each closet and rain-water pipe connected directly with sewer, and that Walter James Wing (hereinafter called ‘the Defendant’) is the owner of the premises on which the said nuisance arises. On hearing the said complaint it is Ordered that the Defendant within six weeks from the service of this Order or a true copy thereof according to the said Act do take out the existing branch drains and construct new drains with stoneware pipes with watertight cement joints laid to proper falls in beds of cement concrete properly intercepted from sewer, provided with efficient ventilation with cast iron pipes of a diameter not less than four inches, disconnect sink wastes from closet pans and cause same to discharge

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into the open over a trapped stoneware gully which shall be connected with the sewer so that the same shall no longer be a nuisance or injurious to health as aforesaid.

Dated the 20th day of April 1903.

(Signed) WILLIAM R. G. FARMER, (L.S.)

Justice of the Peace for the County aforesaid."

4. Each of the other of the original orders was in exactly the same terms and was under the hand and seal of the said William R. G. Farmer as the order hereinbefore set out, and each of the other of the said orders served on the appellant as aforesaid was in exactly the same terms and was under the hand and seal of the said William R. G. Farmer as the order hereinbefore set out, save that each of the orders referred to different premises in the same street.

5. It was contended for the appellant that each of the orders was bad and ought to be quashed, inasmuch as each order was made under the hand and seal of one justice of the peace only.

6. It was contended for the respondents that each of the said orders was valid. We were of opinion that each of the orders was valid, and overruled the appellant's contention, and we afterwards heard the said appeals together by consent upon the merits and dismissed them, with costs.

If the Court should be of opinion upon the facts stated that we were right in overruling the appellant's contention and in holding that the orders were valid, our order is to stand; but if not, each of the said orders is to be quashed, and each of the said appeals is to be allowed, with costs.

Low, K.C., and W. Mackenzie for the appellant. This is a perfectly good objection, and the court of quarter sessions were wrong in overruling it, for these orders, signed as they were by one justice only, were clearly invalid. By section 251 of the Public Health Act, 1875, it is expressly enacted that any complaint under the Act must be heard by two or more justices; and by section 96 the justices, when satisfied that the complaint is well founded, must make an order. This order made by two or more justices must be signed by two at least of those who have heard the case, and cannot be valid if signed by one alone. Section 14 of the Summary Jurisdiction Act, 1848, provides that justices shall in petty sessions make orders which shall be drawn up under their hands and seals to be lodged with the clerk of the peace. Schedule IV., Form C, of the Public Health Act, 1875, contains a form of such an order as has been made here, which concludes with the signatures of two justices opposite their seals. Therefore to be valid such orders as are here before the Court must be signed by two justices.

Avory, K.C., S. G. Lushington, and Swinburne Hanham for the

respondents. The appeal was from verbal orders of justices in petty sessions, and the appellant gave notice of appeal long before those orders were reduced into writing or drawn up. It is the verbal order against which he appeals, and such an order is perfectly good under the Public Health Act, 1875, s. 251, if made by two or more justices. The only effect of section 14 of the Summary Jurisdiction Act, 1848, is to call upon justices to draw up, as a record of their verbal order, an order which can be filed by the clerk of the peace, and it is quite sufficient if this order be signed by one justice alone for the purpose of verification. This is shown by Forms K 2 and K 3 in the schedule to the Act. By section 262 of the Public Health Act, 1875, orders such as these are not to be quashed for want of form; and as a verification of the verbal order of justices in petty sessions it is sufficient if the order in writing subsequently drawn up be signed by one of the justices who made it. A person may be summoned for disobeying an order made by justices before any written order has been drawn up, or even where no such written order has been drawn up at all. Upon these grounds it is submitted that these orders upon the appellant are valid, and that the appeal fails.

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LORD ALVERSTONE C.J. I should have been glad, if we could have seen our way to it, to dismiss this appeal, for I entirely fail to see any merits on the part of the appellant. The case, however, involves a legal principle of importance which we must decide according to the law as it stands and to the principle as it has been laid down by statute. For my own part I have always understood that the object of drawing up orders of justices was that if there subsequently appeared to be any objection to such orders, the objection might be taken; and the original order would be bad if signed by only one justice in a case where it was required to be made by two or more. Had Mr. Avory been able to satisfy me that the justice's signature to the order had been merely for the purpose of verification, or that the order had not to be drawn up and served, I should certainly have arrived at a decision in favour of the respondents. But I think the words of the statute are too strong, and lay down this important principle—that the order must be definite, and drawn up and completed in accordance with well-known principles. The words of section 96 of the Public Health Act, 1875, are these: "If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance

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and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance. The court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance." Then section 251 provides that "all offences under this Act, and all penalties forfeitures costs and expenses under this Act directed to be recovered in a summary manner, or the recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction. The court of summary jurisdiction, when hearing and determining an information or complaint under this Act, shall be constituted of two or more justices of the peace in petty sessions. . . ." Then the form of order for abatement or prohibition of a nuisance—Form C of Schedule IV.—specifies the work to be done within a certain time, and expresses that the order is "given under the hands and seals of us," and that it is signed by two justices who append their names to the order opposite the lawful seal of each. Mr. Ivory contends that the effect of section 14 of the Summary Jurisdiction Act, 1848, is to compel justices to draw up an order, so that this may be a record of the verbal order they have made, and that it suffices if this order is signed by one justice merely for verification; but I am by no means satisfied that we should accede to this contention.

It seems to me that it is an objection to these proceedings that this order was signed by one justice of the peace alone, and not by two justices out of the three sitting in petty sessions, and that upon this ground the appeal must be allowed.

WILLS J. I am of the same opinion. When we look at the forms given for these orders in Schedule IV. of the Public Health Act, 1875, it is clear that orders must be drawn up and served. This being so, they must show on the face of them that they are good orders. When I turn to Form C, I am satisfied that the signatures of the two justices are to be appended to the order not for verification only, and that upon reading the sections of the Act, the intention was that the orders were to be signed by two of the justices present at the petty sessions at which they were made.

KENNEDY J. I agree.

Appeal allowed.

Solicitors for the appellant—Spencer, Gibson, and Son.

Solicitors for the respondents—Lyell and Betenson, for E. G. Wilson, Epsom.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

BEARDSLEY v. GIDDINGS.

1904.

Mar. 3.

Adulteration—Prosecution—Time for proceeding—"Institution" of prosecution—Summons issued within 28 days, but served after the expiry of that period—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19.

It is sufficient in cases where section 19 (1) of the Sale of Food and Drugs Act, 1899, requires the prosecution to be instituted within 28 days of the purchase of the article, if the information is laid and the summons issued within that period though the summons is not served until after the expiration of the 28 days.

CASE stated by justices for the county of Wilts as follows:—

1. On the 18th day of July, 1903, an information was laid before one of His Majesty's justices of the peace for the county of Wilts by the appellant Frank Beardsley, who is an inspector under the Sale of Food and Drugs Act duly appointed by the county council of Wilts, against the respondent, who is a farmer residing at Urchfont, in the said county of Wilts, where he carries on the business amongst other things of a milk seller. The information charged the respondent that on the 23rd day of June, 1903, at the parish of Urchfont, in the county aforesaid, he, the said appellant, did demand of the said respondent as and for a sale by the said respondent to him, the said appellant, a certain article of food, to wit milk, and that he, the said respondent, then and there did unlawfully sell to him, the said appellant, and to his prejudice as and for such article of food a certain article of food which was not of the nature, substance and quality of the article of food so demanded by him, the said appellant, as such purchaser as aforesaid, but was deficient in milk fat to the extent of at least 15 per cent. of the normal quantity present in natural milk of even poor quality, contrary to the statute in such case made and provided.

2. The information was laid by the appellant as aforesaid on the 18th day of July, 1903, and the summons was issued and signed by William Rose, Esquire, a justice of the peace for the said county, and left by the appellant with the police for service on the same day. The summons, however, was not served upon the respondent until the 22nd day of July, 1903. The summons was returnable at the petty sessions held for the Devizes Division of the said county on the 18th day of August, 1903.

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3. Section 19 (1) of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), is as follows :—

(1) When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect thereof, notwithstanding anything contained in section 20 of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase.

4. At the hearing of the summons the solicitor for the respondent took the preliminary objection that the proceedings had not been instituted within the time specified under the section aforesaid, the alleged offence having been committed on the 23rd day of June, 1903, and the summons not served until the 22nd day of July following, the summons therefore being served after the expiration of 28 days from the date of the alleged offence. The respondent's solicitor contended that the laying of the information and issue of a summons was not the institution of the prosecution, and that the prosecution was not instituted until the service of the summons, and that as the summons had not been served until after the expiration of 28 days it must be dismissed.

5. The appellant contended that the date when he laid the information was the date from which the commencement of the prosecution was to be calculated, and as the information was laid and summons issued within the 28 days the prosecution was instituted within the time limit.

6. We were of opinion that the time from which the institution of the prosecution was to be calculated was the date of the service of the summons and not the date of the laying of the information, and we therefore held that the proceedings had not been instituted within the 28 days from the date of the alleged offence. We therefore held the objection made by the respondent's solicitor to be good, and dismissed the summons and granted the respondent his costs.

7. The appellant, being dissatisfied with our determination upon the hearing as being erroneous in point of law, hath duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this Honourable Court, and hath duly entered into a recognisance as required by the statute in that behalf.

8. If the Court shall be of opinion that our interpretation of the law was correct, and that the 28 days run from the date of the service of the summons, and not from the date of the laying of the information, then the order of dismissal is to stand; but if the Court be of the contrary opinion, then the said order of dismissal is to be annulled, and the case remitted to us for hearing on its merits.

Randolph for the appellant. The laying of the information and the issue of the summons constitute the institution of summary proceedings: *Thorpe v. Priestnall*, 1897, 1 Q. B. 159; 66 L. J. Q. B. 248. And there is no reason for giving a special construction to the words in section 19 of the Act of 1899 referring to the institution of the prosecution. *Cowling v. Taylor's Drug Co.* (1901) 66 J. P. 11, is distinguishable, for there the summons had in the first instance been improperly served, and a fortnight after a fresh summons was issued pursuant to the same information.

Simon for the respondent. *Thorpe v. Priestnall* is not in point. What was there decided was that the consent of the chief officer of police to proceedings under the Sunday Observance Prosecution Act, 1871, must be given before the information is laid. The object of section 19 (1) of the Sale of Food and Drugs Act, 1899, is that the seller shall have prompt warning whether a prosecution is intended in order that he may have an opportunity of submitting the portion of the sample he retains to his own analyst before the sample has undergone a change which would prevent the making of a satisfactory analysis. This object will be defeated if the appellant's contention is to prevail. Section 19 is in substitution for section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, which provided that in prosecutions under the Act of 1875 the summons was to be served within a reasonable time, and in the case of a perishable article within 28 days. And section 19 of the Act of 1899 in limiting the time for the institution of the prosecution must have been intended to do what section 10 of the Act of 1879 expressly did, namely, limit the time for the service of the summons.

[He cited *Ditcher v. Denison* (1857) 11 Moore P. C. 324; *Yates v. Reg.* (1885) 14 Q. B. D. 648; 54 L. J. Q. B. 258.]

Randolph, in reply, was stopped by the Court.

LORD ALVERSTONE C.J. Counsel for the respondent in this case has very ably said all that can be advanced in support of the contention that these proceedings had not been instituted in time. I am, however, of opinion that the very fact that the Legislature has repealed section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, and replaced it by section 19 of the Act of 1899, which contains no directions as to service, is in itself *prima facie* evidence of an intention to depart from previous forms of procedure and return to the ordinary and accepted practice that the laying of the information and the issue of the summons shall be the institution of the prosecution. Section 19 (1) of the Sale of Food and Drugs Act, 1899, provides in quite general terms that when any article of food or drug has been purchased for

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test purposes, "any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof . . . shall not be instituted after the expiration of twenty-eight days from the time of the purchase." I am clearly of opinion that the laying of the information and the issue of the summons constitute the well-known commencement of proceedings by way of prosecution by information and summons; and it would certainly require a very strong case of necessity to induce me to hold that the Act of 1899 required a contrary interpretation. Had the Legislature in passing the later Act intended to alter the usual rule of procedure and enact that the service of the summons should be the commencement of the prosecution, I am of opinion that words to that effect would have been used. As it is, in my view, the laying of this information on July 18, 1903, was the institution of the prosecution for the offence alleged to have been committed on the previous 23rd of June, and the service of the summons on the following 22nd of July was not out of time, for although the summons was not served within the 28 days prescribed by the section, yet the information had been laid and the summons issued well within that period. We must therefore allow the appeal, and remit the case to the justices to deal with it on its merits.

WILLS J. I am entirely of the same opinion. I think that the institution of the prosecution spoken of in section 19 must bear the ordinary interpretation, and that the ordinary meaning of instituting a prosecution must be taken to be the laying of the information and the issue of the summons. The words of the section are clear that this must be within 28 days, and here the information was laid and the summons issued within that period.

KENNEDY J. I agree for the reasons already expressed by my Lord and my brother Wills. The authorities are all in favour of the appellant. The case will therefore be remitted to the justices in the terms of paragraph 8 of the case.

Appeal allowed.

Solicitors for the appellant—R. W. Wheatly, Son, and Daniel, for Cruttwell, Daniel, and Cruttwells, Frome.

Solicitor for the respondent—J. T. Rossiter, for C. B. Titley, Bath.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

Since the above case it has been held, in *Brooks v. Bagshaw*, which will be reported in due course, that it is sufficient if the information is laid within the 28 days, although the summons is not issued till after the expiration of that period.

Supreme Court of Judicature.

COURT OF APPEAL.

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FRANK WARR & CO. (LIMITED) v. LONDON COUNTY COUNCIL.

Mar. 9.

Land—Acquisition—Compensation—Interest in land—Exclusive licence and right to sell refreshments at theatre—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) s. 68.

By an agreement in writing the lessee of a theatre granted and let to the plaintiffs the free and exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment rooms and bars, cloak rooms, and wine cellars, together with the right of free access for the plaintiffs and their servants to and from all parts of the premises as might be necessary and usual for exercising the rights thereby granted, and also the free and exclusive right to supply to the visitors refreshments and of providing cloak rooms, and the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak rooms and on all programmes.

Held, that the agreement did not confer on the plaintiffs any interest in land which could be a subject matter for compensation under section 68 of the Lands Clauses Consolidation Act, 1845.

Decision of Wright J. affirmed.

Edwards v. Barrington (1901) 85 L. T. 650, followed.

APPEAL from the judgment of Wright J., sitting without a jury, at the trial of the action.

The action was brought to recover the sum of £2,568 9s. and interest thereon claimed under an award made in the following circumstances :—

In May, 1900, the Countess of Kilmorey let the Globe Theatre, Strand, to William Greet and E. C. Engelbach for 21 years.

On June 16, 1900, an agreement in writing was entered into between Greet and Engelbach, therein described as the landlords, and Frank Warr & Co., Ltd., the plaintiffs, therein described as the tenants, of which the material provisions were as follows :—

“ The landlords hereby grant and let, and the tenants hereby take for the term of the landlords’ lease commencing the 1st day of September, 1900, the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle Street, Strand, London, together with the necessary use of the refreshment rooms and bars, and the cloak rooms and wine cellars of the said theatre, together with the free right, during the usual hours of the tenants, their servants, and agents, of free access to and from all parts of the house, including the front of the theatre and premises as may be necessary and is usual and proper according to the

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custom of the theatres for the purpose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to visitors and other people attending the theatre wines, spirits, liqueurs, cigars, cigarettes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses, and all other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak rooms and on all programmes used and offered for sale at the said theatre."

The rent was to be £35 per week and £2 for each matinee, subject to deduction in cases when there was no performance.

The tenants were to supply at their own expense suitable programmes to be approved by the landlords, and the advertisements were to be confined to the refreshment bars and rooms and cloak rooms, and were to be of such a nature as would not injure the character of the theatre and as were usually found in first-class theatres.

The tenants were to provide and maintain a proper and sufficient staff of attendants for the service of the refreshment bars and rooms and cloak rooms and for the sale of programmes, &c. If from any cause whatever no performance should be given in the theatre on any day or days other than a Sunday in any week, the tenants were to be entitled in respect of each such day or days on which no performance should be given to a remittance of one-sixth part of the week's rent, such remittance to be deducted and allowed from the next payment of rent.

The plaintiffs acted on this agreement from the 1st of September, 1900.

The Globe Theatre was included in the lands which the London County Council were empowered to acquire compulsorily for the purpose of certain street improvements by the London County Council (Improvements) Act, 1899 (62 & 63 Vict. c. cclxvi.), which incorporated the Lands Clauses Acts, subject to provisions not material to the present report.

Notice to treat, dated February 17, 1902, was served on the plaintiffs, and they by a notice of March 4, 1902, claimed compensation in respect of their exclusive right to sell refreshments with the necessary use of the refreshment rooms, &c., and on account of the fittings, &c.

On April 1, 1902, the defendants took possession of the premises. And on April 16 Mr. Boydell Houghton was appointed arbitrator to determine the amount of purchase-money and compensation to be

paid to the plaintiffs for the interest (if any) of the plaintiffs in the lands and hereditaments, or the interest (if any) therein which the plaintiffs were enabled to sell under the London County Council (Improvements) Act, 1899, and the Acts incorporated therewith, and also the amount of damage (if any) for disturbance or loss of value in furniture and fixtures or expenses of removal or other loss incidental to the taking of the land.

The defendants did not admit that the plaintiffs had any interest in the lands and hereditaments, but concurred in the appointment of the arbitrator without prejudice to their right to dispute their liability to pay any compensation awarded.

The arbitrator awarded the sum of £2,568 9s. as purchase-money and compensation for the plaintiffs' interest (if any) in the lands and hereditaments.

The plaintiffs having brought this action on the award, the defendants pleaded that no purchase-money or compensation was payable on the ground that the plaintiffs had no interest in the lands and hereditaments within the meaning of section 68 of the Lands Clauses Consolidation Act, 1845.

Wright J. held that the agreement created merely a licence and not an interest in land within the section, and that the action therefore failed. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

Witt, K.C., and *J. D. Crawford* for the appellants.

Dickens, K.C., *Morten*, and *H. M. Sturges*, for the respondents, were not called upon to argue.

The following cases were cited in the course of the argument:—*Muskett v. Hill* (1839) 5 Bing N. C. 694; 9 L. J. C. P. 201; *Wickham v. Hawker* (1840) 7 M. & W. 63; 10 L. J. Ex. 153; *Temple Pier Co. v. Metropolitan Board of Works* (1865) 34 L. J. Ch. 262; *Bird v. Great Eastern Railway* (1865) 19 C. B. (n.s.) 268; 34 L. J. C. P. 366; *Webber v. Lee* (1882) 9 Q. B. D. 315; 51 L. J. Q. B. 485; *Re Masters and Great Western Railway*. 1901, 2 K. B. 84; 70 L. J. K. B. 516; *Edwardes v. Barrington* (1901) 85 L. T. 650; *Westminster City Council v. Johnson*, 1904, 1 K. B. 19; 2 L. G. R. 193; 73 L. J. K. B. 8.

COLLINS M.R. This is an appeal from a decision of Wright J. in an action on an award made upon a claim of the plaintiffs to compensation under section 68 of the Lands Clauses Consolidation Act, 1845, in respect of lands or an interest in land taken or injuriously affected. It is clear law that the function of the arbitrator in matters of this kind is not to decide upon the legal rights of the parties, but,

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upon the assumption that the claimant has a right, to assess the damage occasioned by the interference with it. In the ordinary course, which has been followed in this case, if there is a question as to whether the claimant has sustained any injury for which he is entitled to compensation under the section, an action is brought upon the award, and the point is then taken that there was no jurisdiction to award compensation.

It is perfectly clear from the language of the section itself, and it has not been controverted in the case, that the foundation of the plaintiffs' rights must be an interest in land, to put it at the lowest. The words of the section are: "If any party shall be entitled to any compensation in respect of lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works." The plaintiffs say that they have or had an interest in certain lands, namely, in the Globe Theatre, which have been taken by the London County Council for public improvement purposes. The interest which they say they had arises under an agreement whereby they acquired a right to supply refreshments and other incidental privileges at the Globe Theatre, and the question is whether, having regard to the purpose of that agreement and the language used, the result was to confer upon them an interest in land or not.

Counsel for the appellants have pressed upon us that upon the true construction of that agreement the plaintiffs took something more than a mere licence or privilege; that they took an interest in land. There is, as it happens, a decision of the House of Lords in *Edwardes v. Barrington* (1901) 85 L. T. 650, which was regarded by Wright J. as conclusive in this case, and, notwithstanding the able argument addressed to us, I can see no escape from the conclusion to which he came. As I have said, the whole question in this case is whether the plaintiffs took under their agreement an interest in land, and it seems to me that the question in *Edwardes v. Barrington* was the same. There is, however, this difference: the agreement in the present case is much more artificially drawn than that in question in *Edwardes v. Barrington*. There, as the Lord Chancellor pointed out, the chief difficulty arose from the fact that the person who drew the agreement obviously did not really understand the meaning of the terms he used; and that created a very considerable difficulty. It was held, however, notwithstanding the use of certain words appropriate to transfer an interest in land that, upon the whole of the agreement taken together, no interest in land was transferred to the so-called tenant. The point was whether the transaction, which the House of Lords held was not a demise, but the giving of a privilege to the grantee, was a breach of a covenant on the part of the lessee of a

theatre, "not at any time during the term hereby granted to assign demise or otherwise part with this indenture"—which, of course, means that which is comprised in the indenture—"or any estate or interest therein for all or any part of the said term." Therefore the question was whether what had been done under the agreement in question was a parting with an interest in the premises. That is the same point as the point that we have to consider here. No doubt, as has been pointed out, it arose on a question whether there had been a breach of covenant resulting in the forfeiture of a lease; but, at the bottom of it, was the question whether the particular agreement passed an interest in land or not; and unless the House of Lords had come to the conclusion that it did not pass an interest in land, they could not have held that there was no breach of the covenant. So that the real point here is whether there is any substantial difference between the contract we have to construe and the contract in that case. It seems to me that, so far as there is any difference, the contract in this case is of the two the more clearly expressed in terms limited to a privilege as distinguished from a demise. It is carefully drawn so as to exclude the inference that anything in the nature of a demise was intended. The words are:—"The landlords hereby grant and let and the tenants hereby take for the term of the landlords' lease commencing the first day of September, 1900, the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle Street, Strand, London, with the necessary use of the refreshment rooms and bars and the cloak rooms and wine cellars of the said theatre, together with the free right, during the usual hours of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre, and premises, as may be necessary and is usual and proper according to the custom of the theatres, for the purpose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre, wines, spirits, liqueurs, cigars, cigarettes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses, and all other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak rooms, and on all programmes used and offered for sale at the said theatre." The tenants were to pay to the landlords the weekly rental of £35. Then follow other clauses, of which I think the eighth is the only one that I need read: "If from any cause whatever no per-

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formance shall be given in the theatre on any day or days other than a Sunday in any week the tenants shall be entitled in respect of each such day or days on which no performance shall be given to a remittance of one-sixth part of the week's rent, such remittance to be deducted and allowed from the next payment of rent." It seems to me from that, though the word "let" is used, that the subject matter of the letting is most carefully defined so as to exclude any interest in the land. Instead of letting the cellars the agreement provides for the use of the cellars; instead of letting the refreshment rooms it provides for the privilege of using them, and so on. So far as the words go any implication of a grant of any interest in the land seems to be carefully avoided. And taking the whole agreement together (and I think we ought to take it together, because we ought to read it so as to get at what the object of the parties was), although there are special clauses to which counsel have particularly called our attention, such as those with respect to the advertisements, which it is suggested might involve the right to the exclusive use of particular parts of the walls covered by the advertisements, I think that, even if those clauses could be thought *prima facie* to involve a demise of any part of the land itself, they must be read in their context with all the other provisions; and it seems to me that the conclusion is inevitable when the whole thing is taken together, that what was intended and accomplished by this agreement was to convey only a privilege and not an interest in the land. The agreement in *Edwardes v. Barrington* was an agreement for the same class of privilege, namely, that of selling refreshments in a theatre, and certainly if the two agreements differ they differ in this only, that there was in the agreement in *Edwardes v. Barrington* more indication of an intention, by the use of words, to grant an ordinary lease and demise of the premises themselves than there is in the agreement in the present case. But, nevertheless, the House of Lords came clearly to the conclusion that it was a grant of a privilege, and not the grant of an interest in land. In the Court of Appeal, where the case is reported *sub. nom. Daly v. Edwardes*, 83 L. T. 548, Rigby L.J., in giving judgment, says: "On the whole I think that the proper conclusion is that Frank Warr & Co. took no estate or interest in land, but that they were entitled, for all reasonable purposes, to consider themselves as having an exclusive licence to provide refreshments and all that follows from that privilege, and nothing else at all." Then Vaughan Williams L.J. says: "No one has contended, so far as I can understand, that the grant of a licence and right to the use of all the refreshment rooms, bars, smoke rooms, &c., during the term of this agreement would amount to an assignment or demise of any

estate or interest in the subject matter of the principle indenture if in truth and in fact such grant of a licence and right was a grant upon the basis that the landlord should in fact retain dominion and control over the whole of the premises. In my judgment, although the lawyers have chosen to dress up this grant of a licence, or this grant of a privilege, in the dress of a lease of land, yet when one comes to look closely at the provisions of the document it is plain that it is really a grant of a privilege and licence merely masquerading as a lease." That applies to the agreement in this case, except that it does not, in my judgment, even masquerade as a lease. It does not suggest on its face that it is a demise of an interest in land. That judgment was approved and adopted in the House of Lords, and it seems to me that the case is indistinguishable in any sense favourable to the appellants from this case, and that therefore we are concluded by that authority, and that it decides this case.

That relieves me from discussing in any detail the arguments of counsel for the appellants as to the distinction between a mere licence to go on land and a licence to take a profit out of that land; the distinction between a *profit à prendre* and an ordinary licence. It is not necessary to decide the point, but it seems to me that the principle proposition of counsel for the plaintiffs upon that matter breaks down. They were obliged to contend that a licence to make a profit on the land by trading on the land was in itself equivalent to a right to a *profit à prendre*. It does not seem to me that it is. I think that to amount to a *profit à prendre* the profit must be a profit arising out of the land itself, and that it is because it is something arising out of the land itself that an agreement as to a *profit à prendre* has been held to be within the Statute of Frauds as being an agreement as to an interest in land. That is the case where there is a right to take animals *fera natura* on the land, for they are deemed to be part of the land. I am not aware of any authority which shows that a right of making a profit by carrying on a trade on land stands on the same footing as a right to a *profit à prendre*.

For these reasons I am of opinion that this appeal fails.

ROMER L.J. I am of the same opinion. On the question of the construction of the document under which the plaintiffs claim, I think that that document, like that in the case of *Edwardes v. Barrington* (1901) 85 L. T. 650. really only gave a licence strictly and properly so called to the persons claiming under it, and did not create any estate or interest in the land in their favour. The document that we have to construe did not, in my opinion, amount to a demise in favour of the plaintiffs, nor to parting with the possession which the lessees of the land had at the time they made the agreement. The possession

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of the theatre, and of every part of the theatre, to my mind, remained with the lessees, subject only to such rights to use certain parts of the theatre for certain purposes as were conferred upon the plaintiffs by the agreement. In the next place there was no easement properly so called created over the land in favour of the plaintiffs; nor was there any grant of any *profit à prendre* out of the land; nor was any incorporeal hereditament of any kind in equity created which would constitute a known estate or interest in the land. The true object and effect of such an agreement was very clearly pointed out by Rigby L.J. in the case of *Edwardes v. Barrington* in the passage which my Lord has already read and which I need not repeat.

In arriving at that conclusion I have not forgotten the argument that was based by counsel for the appellants on the use of the words "necessary use of the refreshment rooms," &c. It would not, to my mind, have made any real difference even if the words "exclusive use" had been used instead of "necessary use"; for the words "exclusive right to the use" were used in the agreement in *Edwardes v. Barrington*. The words "necessary use" only mean use so far as is necessary for the purpose of enabling the plaintiffs to supply refreshments in the theatre on proper occasions when the theatre is being used for its ordinary purposes, and certainly in this document those words cannot be said to imply an absolute parting with the possession of the refreshment rooms, &c., by the lessees to the plaintiffs. The fact that the plaintiffs may have had confided to them a key for the purpose of preventing strangers coming in does not, to my mind, make the slightest difference. It appears, so far as the construction of the document is concerned, to have been a voluntary act on the part of the lessees, and certainly could not amount to the creation of any estate or interest in the land in favour of the plaintiffs which was not conferred by the document itself.

As there has been a good deal of discussion as to the nature of a licence in the course of the case, I should like to refer to what was said by Vaughan C.J. in *Thomas v. Sorrell* (1674) Vaugh. 330, at p. 351, as to the general effect of a licence properly so called. He there said that "a dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful." Then he gives instances, and proceeds to point out how there may be, in addition to a licence, a right to take something out of the land, in which case there is something more than a mere licence; and he instances, *inter alia*, a licence to hunt in a park and carry away the deer killed, or to cut down a tree in the man's grounds and carry it away. Those, he says, "are licences as to the acts of hunting and cutting down the

tree, but as to the carrying away of the deer killed and tree cut down, they are grants." That is to say, in those two cases the person not only has a licence properly so called, but he has a right to a *profit à prendre*, that is to say, a right to take something out of the soil.

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In the present case let me see shortly if the licence extends at all beyond what I have called a licence strictly and properly so called. The only parts of the document which can be referred to as supporting the contention that there was something more created than a licence properly so called are those dealing with the right to use the cellars and to put up advertisements in certain rooms. Do those parts of the agreement create a licence properly so called or do they grant an interest in the land, or rights to something arising out of the land? To my mind it is clear that they create nothing more than a licence properly so called. The right to use the cellars, the possession of the cellars not being parted with, could be exercised without any grant of any right or interest in the cellars. The right to put up advertisements in parts of the theatre could be enjoyed as a licence without any grant of any part of the walls of the rooms. It is not necessary under this document in order to give full effect to such rights as were conferred on the plaintiffs to imply any grant or creation of any estate or interest in land, or of any *profit à prendre* out of the land, in favour of the plaintiffs.

But it is said that, admitting that licences, generally speaking, create no interest in land, a distinction ought to be drawn between licences which are merely for the purpose of pleasure and those which are for the purpose of profit. There is a difference between those two kinds of licences undoubtedly in two respects. A licence to go on land for the purposes of pleasure, in the absence of a sufficient context, will not be held to confer anything but a personal licence, that is to say, it will not extend to the licensee's servants or agents. But it is otherwise where it was the intention that the licensee should do something which might result in profit. In those cases the licence will be construed as extending not only to the licensee (I am, of course, excepting special cases), but also to his servants, and possibly also to his agents. There is another distinction which depends upon what is meant by "profit." There is an undoubted distinction between a licence to go on land for pleasure and a licence to go on land for the purpose of profit, if profit is read to mean a profit to be obtained out of the land. But if the profits are to be obtained merely by something which the licensee may do in the exercise of the licence, and nothing has to come out of the land, then I cannot, either on principle or on authority, see any distinction that can be drawn, or that ought to be drawn, between a licence for pleasure and a licence for purposes which may result in

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profits, and I think that the attempt to draw a distinction between them by the appellants for the purposes of this case entirely fails. It could not be, for example, that whereas a licence to certain persons to come on a field to play cricket is a licence creating no interest in land, a licence to a person also to come on the cricket field and sell refreshments to those engaged in the game is a licence which creates an interest in land.

That decides this case. But although there is no interest in land within the meaning of section 68 of the Lands Clauses Act which the defendants are bound to compensate the plaintiffs for, it does not follow, of necessity, that there may not be breaches of contract with the plaintiffs in respect of which they may have some right against someone. That may be so; I do not say that it is, and certainly nothing that I am saying here must be held to encourage the plaintiffs in bringing any action against any body. One reason why I should think, to say the least of it, that it is doubtful whether any such action could be successfully brought is that, as far as I can see, although it is not necessary to decide the point, there is nothing which compelled the lessee who entered into the agreement with the plaintiffs to keep the theatre open as a theatre, or to use it as a theatre during any defined portion of their term.

With these observations I leave the case, and I agree that the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. The document of the 16th June, 1900, only created privileges and licences to do certain things, and did not amount to a demise. The case of *Edwardes v. Barrington* (1901) 85 L. T. 650, in the House of Lords offered an awkward obstacle to the argument of counsel for the appellants. They argued, however, that a contract granting certain privileges over land from which profits could be made was enough to create an interest within the meaning of section 68 of the Lands Clauses Consolidation Act, 1845, which would be a subject matter for compensation. No single authority was cited in support of the proposition, but it was said it was only necessary to look at the language of the Act in order to see that such an interest as was conferred on the plaintiffs by the contract was intended to be protected by the 68th section. The section runs: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein"—that is, of any interest in land—"which shall have been taken"—the word "taken" indicates possession that somebody had and which somebody has lost—"for or injuriously affected by the execution of the works," and so on, compensation shall be awarded. It is impossible to read that section without seeing that what was intended to be dealt with was an interest

in land, and that a mere contract out of which profits might come from the use of the land is not within the language of the section. Then supposing that to be so, the argument was that there is in the agreement in question in the case sufficient to show that there was a demise or sufficient certainly to show that there was an intention to create a lease; but in my opinion nothing could be farther from that purpose in the language used. The agreement, as has been pointed out, has in it the words, "The necessary use of the refreshment rooms and bars and cloak rooms and wine cellars." It is said that even though no interest in land was created as regards the refreshment rooms, bars, and cloak rooms, it was otherwise as regards the cellars, and that they were demised. But in my opinion there was clearly no grant or demise of the cellars, because all that is given is the "necessary use" of the cellars. The words "necessary use" cut down any interests created under the deed to what is wanted for the subordinate purpose of enabling the agreement in other respects to be carried out. The use of the word "necessary" prevents, it seems to me, absolutely the implication that there is any demise of the space occupied by the cellars; and it cannot be doubted that if the plaintiffs in this case had used the cellars for purposes other than the purposes of this theatre they would have violated their agreement, and practically have been trespassers. Then there was another argument of the same character with reference to the privilege of advertising on the open spaces. Now the right to advertise, a right which is described as a "privilege," excludes the notion of any demise of the walls of the refreshment rooms that are to be used for advertising, and the whole agreement appears to me to be properly and consistently construed if this particular privilege is treated as subordinate and subsidiary to the main purpose of the agreement. The case of *Edwardes v. Barrington* (1901) 85 L. T. 650, was a more favourable case than this, that is to say, it was more difficult there than in the present case to avoid the conclusion that there was a demise, particularly in view of the covenant for quiet enjoyment; but the House of Lords had no hesitation in saying that the whole scope of the agreement was obvious, and all the clauses must be treated as subordinate to that paramount purpose. That being so, it seems to me that the authority in the House of Lords is conclusive, and for these reasons, and also for the reasons that have been given by my learned brethren, I agree that the appeal must be dismissed.

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Appeal dismissed.

Solicitors for the plaintiffs—Hannay and Reynolds.

Solicitor for the defendants—W. A. Blaxland.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

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Feb. 6.

Poor Law—School district—Dissolution—Board of Management—Property vested in—Consols—Transfer—Acting Managers—Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 42, 43, 44, 45—Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 1—Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), ss. 1, 12—National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 22—Local Government Board—Powers—Validity of Orders.

Upon the dissolution of a school district by the Local Government Board under the powers conferred by section 1 of the Metropolitan Poor Amendment Act, 1869, the incorporated board of management of such school district does not ipso facto become dissolved, and section 12 of the Dissolved Boards of Management and Guardians Act, 1870, which provides that upon the dissolution of any district the real and personal estate vested in the managers of such district "shall be transferred to and vested in" the persons who were acting as managers at the time of such dissolution, does not automatically vest the property of the incorporated board of management of the district in the acting managers at the date of such dissolution so as to obviate the necessity of the execution by the incorporated board of formal acts of transfer appropriate to the nature of the property held by it.

Quære, whether the Local Government Board, having once issued an order dissolving a district as from a certain day, have power by subsequent orders to revive it again and postpone the date of dissolution from time to time.

Quære also, whether the Local Government Board have power under section 1 of the Dissolved Boards of Management and Guardians Act, 1870, by their order to authorise acting managers to continue to act after the expiration of twelve months from the date of the dissolution of the district, unless for some definitely expressed special purpose. An order empowering the acting managers "to act in all matters lawfully entrusted to them" would seem not to be for a "special purpose" within the meaning of the section.

ACTION.

The plaintiffs were the last acting managers of the South Metropolitan School District (dissolved), which was originally constituted under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), by order of the Poor Law Board, dated March 12, 1849, and as so constituted comprised St. Olave's Union, and the parishes of St. Mary Magdalen, Bermondsey, St. Giles, Camberwell, and St. Mary, Rotherhithe, all in the county of Surrey.

The provisions of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), which are material for the purposes of this report, are as follows :—

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Section 40. It shall be lawful for the said commissioners [The Poor Law Commissioners], as and when they may see fit, by order under their hands and seal, to combine unions, or parishes not in union, or such parishes and unions, into school districts, for the management of any class or classes of infant poor not above the age of sixteen years . . . who are orphans, or are deserted by their parents, or whose parents or surviving parent or guardians are consenting to the placing of such children in the school of such district ; . . .

Section 41 deals with the provision of asylums for houseless poor.

Section 42. A board shall be constituted for every district formed under this Act for the maintenance of a school or of an asylum ; and every district board so constituted shall respectively consist of members to be elected from amongst the persons rated within the district to the relief of the poor ; and the said commissioners shall fix the qualification of such members, such qualification to consist in being rated within the district to the relief of poor, but not so as to require a qualification exceeding the net annual value of forty pounds ; and such members shall be elected at such periods, not exceeding three years, and in such proportions and in such manner, as the said commissioners may from time to time direct, by the guardians of every parish or union governed by a board of guardians under the provisions of the said first recited Act [The Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76)] or of any local Act, and if there be no such guardians then by the overseers of a parish not governed by such guardians ; and the chairman of every board of guardians constituted under the provisions of the said first recited Act shall, if he consent thereto, be *ex officio* a member of any district board constituted under the provisions of this Act.

Section 43. Every such district board shall have such of the powers of guardians for the relief and management of the poor within any school or asylum, and for the appointment, payment, and control of paid officers, as the said commissioners may direct ; . . . and it shall be lawful for the said commissioners, with the consent in writing of a majority of any district board, to direct such district board to purchase or hire or build, and to fit up and furnish, a building or buildings, of such size and description, and according to such plan, and in such manner as the said commissioners may deem most proper, for the purpose of being used or rendered suitable for the relief and management of the poor to be received into such school or asylum ; and the said commissioners may, with the like consent, alter the district for which such district board was originally constituted, by adding thereto or taking therefrom any parish or parishes, union or unions as aforesaid . . .

Section 45. Every such district board shall be enabled to accept, take, and hold, on behalf of the district for which they act, any lands, buildings, goods, effects, or other property, as a corporation, and in all cases to sue and be sued as a corporation, by the name of the board of management of the district school or asylum, as the case may be.

The corporate name of the district board of the South Metropolitan School District, so constituted as above mentioned, became, by virtue of the provisions of section 45 above set out, "The Board of Management of the South Metropolitan District School."

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By further orders, dated respectively October 10, 1849, July 3, 1854, June 8, 1868, August 27, 1869, January 13, 1870, March 11, 1873, and April 17, 1873, issued respectively by the Poor Law Board and their successors, the Local Government Board, the constitution of the said school district was altered, and on March 30, 1898, the said school district comprised the Greenwich, St. Olave's, Stepney, and Woolwich Unions, and the parish of St. Giles, Camberwell.

By section 1 of the Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), the Poor Law Board were empowered to dissolve metropolitan asylum and school districts, and to make provision for the distribution of their property. The section provides as follows:—

The Poor Law Board, as and when they shall see fit, may dissolve any asylum or school district contained wholly or partly in the Metropolis, and upon such dissolution shall [*adjust the rights and liabilities of parishes and unions comprised therein respectively*] . . . and prior to issuing any order dissolving such district, the said Board may by their order empower the managers of such district to sell and dispose of any land, buildings, or other property belonging to them, and to apply the produce thereof in discharge of the debts and liabilities then outstanding against such managers, and to distribute any surplus which may remain among the parishes or unions comprised therein according to their original proportions, and if the said district shall be dissolved before the same shall be sold, the said Board may by their order empower the persons who were the managers of the district at the time of its dissolution, or the major part of them, to make such sale, and to convey the land to the purchaser thereof, and to apply and distribute the produce accordingly.

The words in italics are now repealed by the Poor Law (Dissolution of School Districts and Adjustments) Act, 1903 (3 Edw. VII. c. 19), by which Act the section is extended to school and asylum districts outside the Metropolis.

By the Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), after reciting that it was expedient that better provision should be made for the proceedings of boards of management and boards of guardians when the districts or unions for which they have acted respectively are dissolved, it is enacted by sections 1 and 12 as follows:—

Section 1. When the Poor Law Board shall have dissolved or shall dissolve any district the component parts whereof shall not have been formed into one union . . . the persons who were acting as managers . . . at the time of the dissolution . . . and the survivors of them, shall continue in office for the purpose of paying and discharging the debts and liabilities of such district . . . and of receiving and recovering moneys or other property due to the said district . . . in like manner as the board of management . . . could have done if no dissolution . . . had taken place . . . and provided that no such managers . . . shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution . . . unless the Poor Law Board by their order shall authorise them to continue to act for some special purpose.

Section 12. Upon the dissolution of any district the real and personal property vested in the managers of such district shall be transferred to and vested in the persons who were acting as managers at the time of such dissolution to be held by them as joint tenants, according to the nature of such property, in trust for the parishes comprised in such district until the same shall be sold, let, or otherwise disposed of under the authority of the third section of the Union and Parish Property Act, 1835, and any Act extending the same

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On March 30, 1898, an order of the Local Government Board, in whom the powers of the Poor Law Board are now vested, was made dissolving the South Metropolitan School District from and after September 30, 1899. By an order of the Board dated the previous day, March 29, 1898, made under the provisions of the same Act, and with a view to the coming dissolution, the managers were empowered to sell the property belonging to them, and to deal with the proceeds subject to the direction of the Board. The property was duly sold and realised £16,010 10s. 10d., which was subsequently invested under an order of the Local Government Board of October 27, 1898, in £2 15s. per cent. consolidated stock, in the name of the South Metropolitan District School Board, a corporate stock account being opened, and a true impression of the corporate seal of the South Metropolitan District School Board being supplied to the Bank. By the order of the Local Government Board of October 27, 1898, it was ordered and declared as follows:—"And we declare that the said board of management shall stand possessed of the said stock when purchased upon trust to transfer and dispose of the same and the principal moneys thereby secured in such manner for the permanent advantage of the South Metropolitan School District as we by an order under our seal of office may direct." Orders were subsequently issued by the Local Government Board, dated respectively September 1, 1899, September 20, 1900, March 22, 1901, and August 23, 1901, extending the date of dissolution of the said school district, which finally, under an order of March 21, 1902, was dissolved as from the 29th day of September, 1902. By an order of March 22, 1902, the parish of St. Giles, Camberwell, and the Woolwich Union were separated from the said school district previous to the date of the said dissolution.

At the date of the dissolution there was standing in the books of the Bank of England in the name of the South Metropolitan District School Board the sum of £14,485 os. 5d. £2 10s. per cent. consolidated stock, which represented part of the said sum of £16,010 10s. 10d. invested in £2 15s. per cent. consolidated stock. Subsequently a further sum of £844 13s. £2 10s. per cent. consolidated stock was transferred to the above-mentioned account under an order dated November 28, 1902, made by Byrne J. in the matter of the

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London, Brighton, and South Coast Railway Additional Powers Act, 1864, and in the matter of the Lands Clauses Consolidation Act, 1845, whereby it was ordered—"That the funds in Court" (*i.e.*, the said sum of £844 13s. consols) "be dealt with as directed in the schedule thereto to be dealt with by the Local Government Board by means of an order under section 1 of the Metropolitan Poor Amendment Act, 1869." Dividends on the total sum of £15,329 13s. 5d. consols down to March 25, 1903, were paid by the Bank to the managers of the South Metropolitan School District.

By an order of the Local Government Board of August 10, 1903, expressed to be made "in pursuance of the powers given to us by the statutes in that behalf," the plaintiffs, as the last acting managers of the said school district, were ordered to transfer the said consols to the several Poor Law guardians below mentioned, in the sums and proportions following :—

To the Guardians of the Poor of St. Giles, Cam-	£	s.	d.
berwell, Parish	8,284	19	0
To the Guardians of the Poor of Greenwich Union	2,294	4	7
To the Guardians of the Poor of St. Olave's Union	2,523	4	11
To the Guardians of the Poor of Stepney Union ...	957	14	0
To the Guardians of the Poor of Woolwich Union	1,269	0	11

TOTAL ... £15,329 13 5

The twelve months allowed to the acting managers under section 1 of the Dissolved Boards of Management and Guardians Act, 1870, above set out, for winding up the affairs of the school district, proved insufficient for that purpose, and accordingly, on September 22, 1903, the Local Government Board issued an order that the last acting managers "or the survivors of them shall be empowered to act in all matters lawfully entrusted to them for a further period not extending beyond December 25, 1903." Subsequently, by a later order the period was further extended to June 25, 1904.

The plaintiffs, in pursuance of the order of August 10, 1903, applied to the Bank to transfer the consols as directed, but the Bank did not admit the title of the plaintiffs to transfer the stock or receive the dividends due in July and October, 1903, on the ground that the Local Government Board had no power to make the order of August 10, 1903, and that if the South Metropolitan District School Board were an undissolved corporation, they and they alone had power to transfer the consols and were entitled to receive the dividends, and that if they had been dissolved, then the consols could only be transferred and the dividends received upon an appointment of new trustees and a vesting

order under the Trustee Act, 1893, vesting the right to transfer the said consols and to receive the dividends thereon in some person or persons to be named in such order. 1904.
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The plaintiffs, as the last acting managers of the South Metropolitan School District (dissolved), accordingly brought this action, claiming (1) a declaration that they were entitled as joint tenants to the said consols, and that they were entitled to require the Bank to transfer the said consols into their joint names; (2) alternatively, a declaration that they were entitled as the last acting managers of the said school district to transfer the said consols in the books of the Bank into the names of the several sets of Poor Law guardians mentioned in the order of the Local Government Board of August 10, 1902, in the shares and proportions respectively mentioned in the said order; (3) payment of the dividends which accrued due in respect of the said consols in July and October, 1903; and (4) a declaration that until the plaintiffs should have transferred the said consols they would be entitled to receive all future dividends which should become payable in respect of the same.

Bramwell Davis, K.C., and *J. B. Matthews* for the plaintiffs. The Poor Law Amendment Act, 1844, provides by sections 42, 43, 44, and 45 for the constitution, incorporation, and powers of boards of management for every district formed under that Act. In the present case there was a corporation incorporated under that Act which we submit has been dissolved under the provisions of the Metropolitan Poor Amendment Act, 1869, s. 1, for, according to our contention, the school district was the corporation by virtue of section 45 of the former Act, and it is to such an incorporated school district that section 1 of the latter Act refers. Under section 12 of the Dissolved Boards of Management and Guardians Act, 1870, upon the dissolution of the district, the property theretofore vested in the dissolved board of management becomes vested in the acting managers at the date of dissolution until the same shall have been disposed of. The word "district" must mean the corporation. The school district and the school district board are the same thing, and the section contemplates that on the dissolution of the school district, the whole thing—both the district and the board—becomes dissolved, and it provides for the vesting of the property of the board in the acting managers at the date of dissolution. If the incorporated board continued after the dissolution of the district, there would not have been any need for such a provision. Moreover, the existence of the corporation after the district is dissolved is inconsistent with section 1 of the Dissolved Boards of Management and Guardians Act, 1870, for unless the corporation itself was dissolved there would be no necessity for the

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acting managers to be continued in office. The intention of the Act clearly was to destroy the corporation on the dissolution of the district. Section 12 of the Act acts automatically: *Hyde Corporation v. Bank of England* (1882) 21 Ch. D. 176; 51 L. J. Ch. 747. On the dissolution, the property vests automatically in the acting managers for the purpose of getting in and dealing with the property. Under the National Debt Act, 1870, a transfer of consols can only be made either by the transferee personally or by his attorney, and the Act provides that "except as otherwise provided by Act of Parliament no other mode of transferring stock shall be good in law." Section 12 of the Dissolved Boards of Management and Guardians Act, 1870, does in the present case "otherwise provide" within the meaning of the National Debt Act, and the plaintiffs are entitled to the relief they claim.

Upjohn, K.C., and *Howard Wright* for the defendant Bank. These consols are standing in the name of a corporation—the statutory corporation under the Acts that have been referred to. That corporation is still existing, and the consols, on the true construction of the Dissolved Boards of Management and Guardians Act, 1870, have not been passed away from the corporation to the plaintiffs. Section 12 of that Act does not apply to the corporation, but even if it did, the words are "shall be transferred," that is, by some act to be done; the section does not mean that there is to be a statutory automatic vesting. Cases which were decided upon words such as "shall by the provisions of this Act be vested" have no application to a case like this. A corporation ceases when the corporators cease, and section 1 of the Act provides, not that the corporation shall cease but that those managers acting at the time of the dissolution of the district are to continue as corporators for the purpose of realising the property, for a period of 12 months unless extended. That section cannot be said to authorise the Local Government Board to dissolve the corporation. There is also a further difficulty arising from the heterogeneous character of the class who are the acting managers. These are members elected by the guardians of every parish or union and *ex officio* members; and it is difficult to get evidence for the purpose of ascertaining who were the acting managers at any one particular time. Moreover, the Local Government Board have created further difficulty with regard to the validity of their orders. Their first order of March 30, 1898, dissolved the school district from and after September 30, 1899. They subsequently purported to postpone the period of dissolution from time to time, but, having once dissolved the district, there is no Act or section enabling them to keep the district alive in that fashion. There is power for them to extend the period during which the acting managers may act, but the Local Government Board have not even exercised this power validly. Section

1 of the Dissolved Boards of Management and Guardians Act, 1870, ^{1904.} limits that period to twelve months from the date of dissolution "unless ^{Morton v.} the Poor Law Board by their order shall authorise them to continue to ^{Bank of England.} act for some special purpose." Here the words in the order extending the period are "to act in all matters lawfully entrusted to them." That is not a "special purpose" within the section.

Bramwell Davis, K.C., replied.

FARWELL J. It is by no means easy to find one's way through the maze of these Acts of Parliament, but I have come to a clear conclusion upon the particular one before me, which is the only one with which I am concerned. Under the provisions of the Poor Law Amendment Act, 1844, the Poor Law Commissioners formed school districts. It is provided by section 42 that a board shall be constituted for every district. Now those are obviously two different and distinct things. The district is one thing, the board for the district is another. By section 45 every such district board is incorporated for the purpose of holding the property and suing and being sued. Then the Metropolitan Poor Amendment Act, 1869, authorises the Poor Law Board as and when they shall see fit to dissolve any school district. Now that is obviously the district, and not the board, or the incorporated entity. Then the Dissolved Boards of Management and Guardians Act, 1870, contains a preamble, "Whereas it is expedient that better provision should be made for the proceedings of boards of management and boards of guardians when the districts or unions for which they have acted respectively are dissolved." That again clearly treats the board as existing after the dissolution of the district. It provides that when the Poor Law Board shall have dissolved any district the persons who were acting as managers at the time of the dissolution shall continue in office for the purpose of practically winding up the affairs of the district and paying its debts and receiving and recovering its property, with a proviso that "No such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution or addition, unless the Poor Law Board by their order shall authorise them to continue to act for some special purpose." Then by section 12 of that Act—down to this point the district being dissolved but the corporate board remaining—it is provided that upon the dissolution of any district the real and personal estate vested in the managers shall be transferred to and vested in the persons who were acting as managers at the time of such dissolution, to be held by them as joint tenants in trust for the parishes comprised in such district. Now obviously the meaning of that is that the district is dissolved, and thereupon split into its various component parts, all

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of which would have some share in the property which had formerly been held by the corporate body in trust for the district. Then the provision is that the real and personal estate vested in the managers shall be transferred to the persons who were acting as managers at the time of the dissolution. The phrase is a little unfortunate because it is not strictly accurate to say that it is vested in the managers. It is vested in the board of management, which has been incorporated, but I think that inasmuch as there may be cases in which the managers are not incorporated—because this extends to various other districts, asylums, and unions—the reasonable construction is that the property vested in the managers, whether it be vested in them as individuals or as a corporation, shall be transferred to and vested in the persons who were acting as managers at the time of such dissolution. Now in my opinion that is not, as has been argued, an automatic vesting order, the phraseology of which we are familiar with. In such an order the words are “shall vest in.” We all understand that; but here the words are, “shall be transferred to and vested in”—not “vest in,” but “vested in,” and that points to an act to be done by the persons who are ordered to do the acts necessary for that purpose. That appears to me to be a simple and reasonable solution of the matter. It has been suggested that it is absurd to leave this corporate body still existing. I do not see the absurdity. It is obvious that the property on the dissolution of the district must be somewhere or other, and if *ipso facto* both district and board are dissolved at the same moment the title to the real estate in land would, I suppose, vest in the Crown, and the title to the consols in the Bank would vest, I suppose also in the Crown as *bonâ vacantia*. However that may be, the Legislature appears to me to have adopted a much more convenient course by keeping the corporate body in existence, either by implication from the first section of the Act of 1870, for so long a period as there remains anything to be done, or, according to the Common Law rule, so long as any one of the corporators remain alive. If it were necessary for me to determine the point, speaking for myself, I should prefer the former alternative. I do not think, however, that it is necessary for me on this particular occasion to determine to whom the property is to be transferred. On the face of it, it is to be to the persons who were acting as managers at the date of the dissolution. The order of dissolution in this case was dated March 29, 1898, directing the dissolution to take effect as from September 30, 1898.* A question has been raised which is one of very considerable importance as to the power of the Local Government Board to undo that dissolution and set up the

* See the note at the end of the case.

district again, and then dissolve it again, or to continue the managers for a period of more than twelve months except for a special purpose specified on the face of the order. I do not think it is necessary for me to determine that, because I think it is sufficient for me to declare that the plaintiffs are not entitled to claim, as they do, that the property is vested in them under this particular section, but that it will be necessary for the transfer to be executed under the corporate seal of the board. Thereupon, when that transfer is presented to the Bank of England, the Bank will, no doubt, with their usual care and skill, consider whether the persons to whom the transfer is proposed to be made are the right and proper persons. I think that is the proper thing to do. The action must be dismissed with costs.

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With regard to the validity of the orders, perhaps I might venture to suggest that it would be as well if the Local Government Board would look into these matters. I rather doubt whether the provisions of the Act of 1870, permitting the extension of the time during which the acting managers may act means that such extension may be made simply for any purpose the Board like, or whether the extension must not be only for some special purpose. I should also suggest that the Local Government Board should satisfy themselves whether, having once dissolved a school district, they have the power to go on in the sort of way in which they have been doing here. I do not say whether they have or have not such power, but I would suggest that the matter should be looked into before the question arises again. I, of course, express no final opinion upon the point.

Action dismissed.

Solicitors for the plaintiffs—B. Avery & Co.

Solicitors for the defendants—Freshfields.

Note.

Farwell J., it will be observed, erroneously speaks of the original order for the dissolution of the district as directing the dissolution to take effect as from September 30, 1898. It is not clear from the context whether the error was a mere slip of the tongue, or whether the learned judge was under the mistaken impression that the first order postponing the dissolution was not made until after the date originally fixed for the dissolution had come and gone.

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Mar. 22, 23,
24, 25.

SHERINGHAM URBAN DISTRICT COUNCIL *v.* HOLSEY.

Highways—Dedication—Footway appointed under inclosure award—Subsequent use for wheeled traffic—Nuisance caused by wheeled traffic—Post erected by local authority pulled down in assertion of right of way—Action by local authority—Non-joinder of Attorney-General—Local Government Act, 1894 (56 & 57 Vict. c. 78), s. 26.

The plaintiff council, with the object of preventing the use of a narrow passage between buildings in their district, which they alleged was a highway for foot-passengers only, from being used by horses and wheeled vehicles, erected a post in the passage. The defendant who contended that the way was a highway for all kinds of traffic, pulled down the post, whereupon the plaintiff council brought an action claiming a declaration that the passage was a highway for foot passengers only, an injunction, and damages.

The passage was originally appointed as a public footpath of the width of 6 feet by an inclosure award of 1811. It was subsequently encroached on in places by buildings, and so reduced to 4 ft. 4 in. in width at the narrowest point. There was evidence that for the past forty years it had been used to a considerable extent by fishermen with small carts drawn by ponies and donkeys; and that the lord of the manor in whom the soil was vested had long regarded it as a highway for all kinds of traffic.

Held—1. That the action being in substance an action for interference with the plaintiffs' property was maintainable, though the Attorney-General was not joined.

2. That the use of the passage for wheeled traffic had all along been a public nuisance in view of the obstruction caused to foot-passengers; and that there could not, therefore, have been any dedication of the way as a highway for wheeled traffic, and that it remained a highway for foot-passengers only.

ACTION with witnesses.

The plaintiffs, the Sheringham Urban District Council, sued the defendant, Charles Holsey, landlord of the Crown Inn and fish merchant, of Sheringham, in respect of a post which they had erected in assertion of their contention as to a footpath, and which the defendant had removed on the ground that there was either a common and public highway at the place in question or a right for all the inhabitants or (alternatively) the fishermen of Sheringham to pass over the way at all times with animals and vehicles at their free will and pleasure.

The way was a passage leading from the High Street of the town

to the West Cliff above the beach, and was some 40 feet in length, with a width varying from 6 feet to 4 feet 4 inches in its narrowest part, where the houses abutting on it had encroached upon the way as originally laid out. The subsoil of the way was vested in the lord of the manor of Sheringham, and it appeared that in 1811, under the authority of the Sheringham Inclosure Act of 1809, an award was made by Commissioners setting out and appointing this strip of land as one of certain "public footpaths." According to the plaintiffs the footpath was thenceforth adopted and used by the public at large as a public footpath for foot-passengers, and having become a highway repairable by the inhabitants at large, was now vested in and under the control of the plaintiffs.

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In February, 1903, owing to the inconvenience caused to inhabitants and visitors wishing to pass over the way on foot by reason of certain fishermen taking fishing tackle and fish and whelks along the passage on barrows, the plaintiffs erected a wooden post in the narrow part, which was shortly afterwards sawn off to the ground.

In June, 1903, they erected an iron post for the better protection and convenience of foot-passengers, and to prevent the obstruction of the footpath by wheeled vehicles. On the same day the defendant pulled down this post with a rope and placed it on the footpath so as to be an obstruction to the use thereof. He claimed that he was entitled so to act, by reason of the alleged more extensive rights above referred to, and contended that, although the *minimum* of the rights of the public might have been fixed by the inclosure award, there was nothing to prevent the public by dedication acquiring larger rights. He alleged that since the award there had been dedication of the way as a cart road. Alternatively, he contended that before or since the award there had been a private right for the class consisting of the owners and occupiers of Sheringham to use the way for carts; if before the award, the rights of the public under the award were subject to the pre-existing private rights; if since, then the two sets of rights were co-existent.

At the trial, the defendant took a preliminary objection that the plaintiffs were not entitled to maintain the action without the Attorney-General.

Younger, K.C. (*C. A. McCurdy* with him), for the plaintiffs. The footpath in question is a street vested in the plaintiffs as the local authority by virtue of section 149 of the Public Health Act, 1875; and section 26 of the Local Government Act, 1894, imposes on them the duty of protecting public rights of way, and by subsection (3) of section 26 they are authorised to institute any proceedings for the purpose of carrying the section into effect. As to the vesting of the street

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in the local authority, see *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128, and *Rolls v. St. George the Martyr, Southwark, Vestry* (1880) 14 Ch. D. 785, 795; 49 L. J. Ch. 691.

W. H. Cozens-Hardy for the defendant. Subsection (3) of section 26 of the Local Government Act, 1894, gives the plaintiffs no larger rights than a private individual would have. This being framed as an action for alleged nuisance, the plaintiffs cannot sue without joining the Attorney-General: *Bermondsey Vestry v. Brown* (1865) 1 Eq. 204, 209; 35 Beav. 226; *Wallasey Local Board v. Gracey* (1887) 36 Ch. D. 593; 56 L. J. Ch. 739, approved in *Tottenham Urban District Council v. Williamson*, 1896, 2 Q. B. 353; 65 L. J. Q. B. 591, and *Stoke Parish Council v. Price*, 1899, 2 Ch. 277; 68 L. J. Ch. 447.

Younger, K.C., in reply. This is in effect an action for trespass and for removing the plaintiffs' post, and is not in substance or in form an action for nuisance. The plaintiffs may sue in respect of this post just as a local authority was properly sued in *Lamley v. East Retford Corporation* (1891) 55 J. P. 133.

Joyce J. I do not think that the preliminary objection is well founded. I do not desire to restrict the powers conferred on local authorities by section 26 of the Local Government Act, 1894. It is true that a declaration of rights is asked for by the claim of the plaintiffs, but their action is, in substance, for damages for interference with their property. I think the case is entirely different from the authorities cited on behalf of the defendant.

The hearing of the action was accordingly proceeded with, and the evidence adduced on behalf of the plaintiffs was to the effect that when carts were driven through the lane, the foot-passengers were obstructed, and had to wait until the carts had passed through. A large number of witnesses were called for the defendant, whose evidence went to show that for more than 40 years past barrow carts, specially made for the purpose, and sometimes drawn by donkeys and ponies, had been continuously used in the lane right down to the time when the post was erected by the plaintiffs. The present lord of the manor who was seized in fee of the property abutting on either side of the lane, himself deposed that he and his father before him had always regarded it as a highway for the public to use with vehicles.

Younger, K.C., for the plaintiffs, relied on the award of 1811, and submitted that the defendant had not discharged the onus of proving such a user as to convert the footway into a public highway for all purposes, or of proving dedication of it as such a highway.

Cozens-Hardy for the defendant. There is no evidence that the

public ever accepted the title which the award gave them, and there must in the case of such an award be an offer and acceptance by user: *Sheringham Urban District Council v. Holsey*, 1904. *Dovaston v. Payne* (1795) 2 H. Bl. 527; *Fisher v. Prowse* (1862) 2 B. & S. 770; 31 L. J. Q. B. 212; *Cubitt v. Maxse* (1873) L. R. 8 C. P. 704; 42 L. J. C. P. 278. The evidence is all the other way, that the public have since the award acquired rights to use this either as a public cartway or as cartway for a special class, viz., the boatmen and fishermen. User by carts with at least two ponies and three donkeys has been proved, and horsemen have used it during a period of 70 years; there was never a time when it was exclusively a footway. [JOYCE J. The question is whether the user which there has been is sufficient to constitute it a carriage-way.] The rights under the award have been supplanted or at any rate extended by a dedication to the public entitling them to use the lane with carts and horses, and the proved user is only compatible with dedication since the award: *Reg. v. East Mark Inhabitants* (1848) 11 Q. B. 877; 17 L. J. Q. B. 177; *Reg. v. Bradfield Inhabitants* (1874) L. R. 9 Q. B. 552; 43 L. J. M. C. 155. Similar cases in which dedication was held to be established are *Abercromby v. Fermoy Town Commissioners*, 1900, 1 I. R. 302, and *Attorney-General v. Esher Linoleum Co.* (1901) 66 J. P. 71. The mere fact of the award is not evidence of the character of the way, where the user is proved contrary to the award: *Reg. v. Haslingfield Inhabitants* (1814) 2 M. & S. 558.

If the Court cannot find that this is a public cartway, then on the evidence it is a private way for a class limited to fishermen and others who are owners or occupiers of houses in Sheringham.

If the complaint of the plaintiffs is that user as a cartway is a nuisance affecting the footpath, the onus is on them to prove that it is or will become an actual and substantial nuisance affecting the legitimate user by foot-passengers, and no witness has even been called to say that there has been an obstruction amounting to a nuisance at law. Therefore, the plaintiffs have not laid the foundation of their case for erecting this post, and the defendant was justified in removing it.

Younger, K.C., was not called on to reply.

JOYCE J. The origin of the way in question in quite plain. It originated from the award in 1811, which was an award of a strip of land 6 feet in width for the purposes of a footway. That footway was enclosed, and the plans which have been put in show the condition of it years ago and also at the present time. It appears that buildings have been allowed to encroach upon the lane in places, so

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that the width of it now varies, and is at one point not more than 4 feet 4 inches. Obviously it would be highly inconvenient, if not positively dangerous, to allow a lane of that width to be used for wheeled traffic. If it were only a footway any user of it for wheeled traffic must be a public nuisance. Sheringham has grown from a fishing village into a considerable seaside watering-place, and there is now an urban district council, who are entrusted with the duty of preserving the rights of the public. They have recently made up the lane with tar paving, and in order to prevent its being used for wheeled traffic they have erected a post, which they were entitled to do. In June, 1903, the defendant took the law into his own hands, and, with other men, pulled down the post. How is his action sought to be justified? It is said that a right to use the lane for wheeled traffic has been acquired by a user. Upon the evidence I do not see my way to hold that there has been any such user as to convert the footway into a public highway for all purposes. The user for wheeled traffic was in its inception and has all along been a public nuisance, and no length of time can legalise it. It has not been shown that there has been any dedication as a public highway for all purposes. It is clear that no one had any power to dedicate. After the award the lord of the manor himself, in whom the soil was vested, would not have been entitled to ride or drive along the lane, and if he could not, he could not authorise anyone else to do so. He had, therefore, no power to dedicate. It could not be done even if the local authority consented to it.

The result is that the lane was originally a footway and is so still. The plaintiffs were justified in erecting the post for the protection of foot-passengers, and there must be an injunction against the defendant to restrain him from overthrowing or interfering with it. There will also be judgment for the plaintiffs for 20s. damages, and the defendant must pay the costs of the action.

Judgment accordingly.

Solicitors for the plaintiffs—Collisson, Prichard, and Barnes, for C. Morton Baker, Sheringham.

Solicitors for the defendant—Crowders, Vizard, and Oldham, for Mills and Reeve, Norwich.

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CHANCERY DIVISION.

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Feb. 26 ;
Mar. 1.

Municipal Corporation—Mayor—Mayor as *ex officio* justice—Precedence of mayor—County business—Borough business—Borough without separate commission of the peace—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155.

The precedence given by subsection (2) of section 155 of the Municipal Corporations Act, 1882, to mayors of boroughs when acting in relation to the business of the borough, is magisterial as well as social.

The hearing of a summons issued by a county justice in respect of an offence committed in a borough, with no separate court of quarter sessions and no separate commission of the peace, is, however, not "business of the borough" within the meaning of the subsection, and the mayor has, therefore, no right to preside at the hearing of the summons, though, semble, it would be otherwise if the summons were issued by the mayor or ex-mayor.

Rex *v.* Sainsbury (1791) 4 T. R. 451 ; 2 R. R. 433, *applied*.

THIS was an action by the plaintiff, the Mayor of Hornsey, in the county of Middlesex, claiming a declaration that he was entitled by virtue of section 155 of the Municipal Corporations Act, 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough.

The borough of Hornsey, which is in the county of Middlesex, was on August 17, 1903, granted a charter of incorporation under the provisions of the Municipal Corporations Act, 1882. There was no non-intromittant clause inserted in the charter prohibiting the county justices from acting within the borough.

On November 9, 1903, the plaintiff was duly elected mayor of the borough, and thereupon took the oath of allegiance and the judicial oaths required to be taken by a justice of the peace for the borough, and also by a justice of the peace for the county.

The borough of Hornsey had not a separate court of quarter sessions, nor a separate commission of the peace.

Before the incorporation, Hornsey formed part of the Highgate petty sessional division of the county of Middlesex, and the county justices used to sit at Hornsey in petty sessions, and after the incorporation they continued to hold petty sessional courts at Hornsey in

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exactly the same way as theretofore, and their jurisdiction was not in any way abridged or affected by the incorporation.

On December 9, 1903, the county justices for the petty sessional division of Highgate were sitting at Hornsey in petty sessions, when the business before the court included a summons, granted and signed by a justice of the peace for the county of Middlesex, issued against one Gerald Herman upon an information charging him with throwing stones at a place within the borough of Hornsey. The summons was as follows :—

“ In the County of Middlesex.

Petty Sessional Division of Highgate.

Middlesex, to wit.—To Gerald Herman, of 11, Hanbury Road, Hornsey, in the county of Middlesex.

Information has been laid this day by Thomas Twigg for that you, on the 24th day of November, in the year of our Lord One thousand nine hundred and three, at the parish of Hornsey, in the county aforesaid, did unlawfully throw stones to the damage or danger of persons at Spencer Road, Hornsey, there situate, contrary to the form of the statute in such case made and provided.

You are therefore hereby summoned to appear before the court of summary jurisdiction, sitting at the Court House, Bishop's Road, Archway Road, Highgate, in the said county, on Wednesday, the 9th day of December next, at 10 o'clock in the forenoon, to answer to the said information.

Dated the 28th day of November, in the year of our Lord One thousand nine hundred and three.

(Signed) ALFRED J. REYNOLDS,
Justice of the Peace for the County aforesaid.”

When the case was called on, the plaintiff, as mayor, claimed the right to take the chair *virtute officii*, on the ground that he was entitled so to do in all cases in which the offence had been committed within the borough. The county justices then present did not admit the plaintiff's right to take the chair in the circumstances, and this present action was brought by the plaintiff to establish such right; the defendants being the justices who had disputed his right on the occasion in question.

Section 155 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), provides as follows :—

(1) The mayor shall, by virtue of his office, be a justice of the peace for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor.

(2) The mayor shall have precedence over all other justices acting in and for the borough, and be entitled to take the chair at all meetings of justices held in the

borough at which he is present by virtue of his office as mayor; except that he shall not by virtue of this section have precedence over the justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough, or over any stipendiary magistrate engaged in administering justice.

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Macmorran, K.C., and *E. Beaumont* for the plaintiff. The justices on the occasion in question were acting in relation to the business of the borough, for the offence was committed within the borough, and consequently the plaintiff, as mayor, by virtue of subsection (2) of section 155 of the Municipal Corporations Act, 1882, was entitled to take the chair. The words "shall have precedence" occurred in section 57 of the Municipal Corporations Act, 1835, and were held in *Birmingham (Mayor), Ex parte* (1860) 3 E. & E. 222; 30 L. J. Q. B. 2, to refer to social precedence only, but by section 2 of the Municipal Corporations Act Amendment Act, 1861, it was expressly provided that this precedence should be magisterial, and the words of that section are similar to the words of subsection (2) of section 155 of the Municipal Corporations Act, 1882. Further, there being no separate court of quarter sessions for the borough and no non-intromittant clause in the charter, the plaintiff is not merely a borough justice, but must be considered as a county justice, with his powers limited to a special locality: *Reigate Corporation v. Hart* (1868) L. R. 3 Q. B. 244; 37 L. J. M. C. 70; 9 B. & S. 129, and it does not make any difference that the borough has not a separate commission of the peace: *Wilson v. Strugnell* (1881) 7 Q. B. D. 548; 50 L. J. M. C. 145. This offence was committed within the borough, and the borough justices, if there were a mayor and ex-mayor so as to form a quorum, could have granted and heard this summons: *Reg. v. Whittles* (1849) 13 Q. B. 248; 18 L. J. M. C. 96, and the business was in fact borough business within the meaning of subsection (2) of section 155.

Warmington, K.C., *Danckwerts, K.C.*, and *Eustace Hills* for the defendants. We contend that section 155 deals only with "borough justices," and that in subsection (2) the words "meetings of justices" must be construed as meetings of "such" justices. At any rate, the section does not give the mayor a right to take the chair when the county justices are sitting as a petty sessional division, and not acting in relation to the business of the borough. There is no non-intromittant clause in this charter, and therefore the jurisdiction of the county justices over the borough remains, and is concurrent with that of the borough justices: *Blankley v. Winstanley* (1789) 3 T. R. 279; 1 R. R. 704; *Rex v. Sainsbury* (1791) 4 T. R. 451; 2 R. R. 433; *Rex v. Amos* (1819) 2 B. & Ald. 533; 21 R. R. 386. The court at which the plaintiff claimed to take the chair was a court for a petty

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sessional division of the county : *Huntingdon Corporation v. Huntingdon County Council*, 1901. 2 K. B. 257; 70 L. J. K. B. 755, and the particular matter in question was a summons granted by a county justice, and had been earmarked as county business; the court was not, therefore, "acting in relation to the business of the borough." *Macmorran, K.C.*, replied.

Cur. adv. vult.

March 1. FARWELL J. The mayor of Hornsey claims a declaration that he is entitled, by virtue of section 155 of the Municipal Corporations Act, 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough, under the following circumstances. The borough of Hornsey forms part of the county of Middlesex, and was incorporated by Royal Charter of August 17, 1903. The plaintiff was duly elected mayor of the borough on November 9, 1903, and has taken the oath of allegiance and the judicial oaths required to be taken by a justice of the peace for the borough and also by a justice of the peace for the county. The borough has not a separate court of quarter sessions, nor has it a separate commission of the peace, and the county justices continue to hold petty sessional courts for the Highgate Division in exactly the same way as they held them before the incorporation, and their jurisdiction is in no way abridged or affected by the incorporation. The question turns on the true construction of section 155 of the Municipal Corporations Act, 1882, which is as follows: [His Lordship read the section, and continued:—] The Act obviously contemplates that the mayor will sit with the county justices, and gives him the right to take the chair at all meetings of justices held in the borough at which he is present *virtute officii*, and not merely at meetings of borough justices, for, having regard to the exception, I cannot read "justices" as if it were "such justices." This right to attend meetings of the county justices is in accordance with the general law as laid down in *Rex v. Amos* (1819) 2 B. & Ald. 533; 21 R. R. 386, and stated by Lord Blackburn in *Reigate Corporation v. Hart* (1868) L. R. 3 Q. B. 244, at p. 348; 37 L. J. M. C. 70, that in a borough where there is no court of quarter sessions and no non-intromittant clause in the charter (which is this case), the justices of the borough have no exclusive jurisdiction within the borough and no jurisdiction beyond the borough, but act in ease and in aid of the county justices, so far as they act upon what are at the same time borough and county offences, and all acts that the borough justices can do can be done by the county justices. The county justices and the borough justices have exactly

the same powers and authorities, but the ambit of the exercise of such powers is different—that of the county justices includes, and that of the borough justices is limited to, offences committed within the borough. They may act together: per Lord Kenyon, *Rex v. Sainsbury* (1791) 4 T. R. 451, 456; 2 R. R. 433, and the county justices cannot lawfully exclude the borough justices: *Reg. v. Williamson* (1891) 7 *Times* L. R. 534, and the county justices can, if they please, sit with the borough justices in petty sessions for the borough and dispose of borough business. This brings me to the consideration of the exception. I observe that the subsection begins by giving precedence and the right to take the chair, while the exception specifies precedence only, and I do not forget that under the Act 5 & 6 Will. IV. c. 76, it was held that words giving precedence only applied to social and not to magisterial precedence: *Birmingham (Mayor), Ex parte* (1860) 3 E. & E. 222; 30 L. J. Q. B. 2; but I do not think that it is possible so to limit the exception, having regard to the reference to business.

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The next question, to my mind, is, "What is meant by 'the business of the borough'?" The facts in the present case, and on which alone I express an opinion, are as follows:—On December 9, 1903, the county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the court included an information laid against Gerald Herman for throwing stones within the borough on a summons against Herman signed by a county justice. On the case being called on the mayor claimed the right to take the chair, on the ground that he was entitled so to do on all cases in which the offence had been committed within the borough. His right was not admitted, and this action is brought to establish such right. I am of opinion that the mayor has no such right. The court was sitting as a petty sessional division, not as petty sessions. The summons was granted by a county justice, and the county justices had full jurisdiction to deal with the case. The fact that if there were a mayor and ex-mayor, so as to constitute a quorum, they could have sat in petty sessions (see *Reg. v. Whittles* (1849) 13 Q. B. 248, at p. 254; 18 L. J. M. C. 96), and have granted a summons to bring the prisoner before them, does not make the trial of this offence business of the borough. It was, in fact, business of the county, and not the less so because it might in certain events have been dealt with as business of the borough. Even if there were a quorum of borough justices, they could not as such try the case after the jurisdiction of the county justices had attached. When a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal,

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as the case may be, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case. The question before me is governed, in my opinion, by the decision of the Court of King's Bench in *Rex v. Sainsbury* (*supra*), that where two sets of magistrates have a concurrent jurisdiction and one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the others, although both might sit together. In that case the mayor and some of the aldermen of the City had by charter jurisdiction in Southwark, but as the charter contained no non-intromittant clause the justices of Surrey had a concurrent jurisdiction. Lord Kenyon, at p. 456, says: "But another question has arisen, and which is proper should be settled—whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these. Some of the justices for the county of Surrey, having before them the statute of 26 Geo. II., and knowing that the licences ought to be granted on a certain day and time, appointed a day—the 4th of September—for licensing alehouses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the City of London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting had attached before this time, not, indeed, so as to exclude the City justices from acting at the first meeting, for they might all have acted together, but it excluded the City justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion that the Surrey justices and the magistrates for the City have a co-ordinate jurisdiction in this district; that the meeting of the City justices in this case was illegal, the jurisdiction of the other magistrates having first attached." In my opinion, the mayor in the case before me could not issue a summons against, or hold a petty sessions for the borough on, a prisoner already summoned before the county justices, because the jurisdiction of the latter had already appropriated it as county business, and by parity of reasoning he cannot be heard to intervene and say that it is borough business for the purpose of founding upon it a claim to take the chair at a meeting of the county justices sitting for the petty sessional division to try it. It was, in fact, *ab initio*, and remained throughout county business. In the same way, if there were a borough petty sessions

and the summons had required the prisoner to attend there, the county justices could not have intercepted it, and if they had chosen to sit at the borough sessions the mayor would have taken the chair. The result is that the action fails, and is dismissed with costs. 1904.
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Action dismissed.

Solicitor for the plaintiff—L. J. Tatham.

Solicitor for the defendant—Sir Richard Nicholson.

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Feb. 16.

HOUSE OF LORDS.

SHOREDITCH BOROUGH COUNCIL v. BULL.

Highways—Restoration of highway after laying sewer—Liability of local authority—Highway made temporarily fit for traffic—Negligence—Action for damages—Remote consequences of negligence—Accident due to negligent restoration of highway in conjunction with obstruction of highway by stranger—Non-feasance—Misfeasance.

The metropolitan vestry of S., the predecessors of the appellant council, being both highway authority and sewer authority, laid a sewer in a highway and negligently filled in the trench in such a way that, though made temporarily fit for traffic, the part of the highway where the trench had been dug became dangerous in a few days. A cab driver, driving along the side of the road which had thus become dangerous, which was his near side, crossed to his off side in order to avoid the danger, and drove against a heap of soil which had been placed on the latter side of the highway, without the knowledge or consent of the vestry, but of the existence of which they were, by their officers, aware, and the cab overturned causing injury to the respondent who was being driven in the cab.

Held, that the appellants were liable for the injury.

Judgment of the Court of Appeal 1 L. G. R. 81, affirmed.

N.B.—In the following report the expression the defendants is used as including both the appellant council and their predecessors the Shoreditch Vestry.

APPEAL by the Shoreditch Borough Council from an order of the Court of Appeal ordering judgment to be entered for the plaintiff Bull in an action tried before Phillimore J. with a jury in which the jury gave a verdict for the plaintiff, but Phillimore J. entered judgment for the defendant council.

The action was brought to recover damages for personal injuries caused to the plaintiff by the overturning of a cab, in which he was driving home between 10 and 11 p.m., on April 4, 1900, on a heap of soil lying on the right or off side of a highway in the defendants' borough known as Buttesland Street.

The defendants, who were the sewer authority as well as the highway authority, were at and before the time of the accident engaged in laying down a new sewer in Buttesland Street. For the purpose of laying the sewer it was necessary to dig a trench 3 feet wide down the centre of Buttesland Street. The width of Buttesland Street was 24 feet from kerb to kerb, so that there was a space of 10 feet 6 inches on either side of the trench remaining entirely undisturbed.

Leading from Buttesland Street and running at right angles to it was Great Chart Street.

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On the date of the accident the condition of things in Buttesland Street was this :—To the north of Great Chart Street (or to the left hand of a person coming down Great Chart Street into Buttesland Street) the street was closed, as the work of laying the sewer was in progress. To the south of Great Chart Street (or to the right hand of a person coming down into Buttesland Street) the street was open, as the work of laying the sewer was finished, the trench having been filled in about 14 days prior to the accident, and the road having been opened to the public about six days before the accident. On the night of the accident there was in Buttesland Street on the west side (or off side of a person driving down Buttesland Street from Great Chart Street) and close to the kerb and about 50 yards from Great Chart Street, a heap of rubbish which had been improperly shot there by a carman who was not in the employ of the defendants and over whom they had no control, and who had shot the rubbish in the street without any permission from them.

On the night of the accident the respondent was being driven home in a hansom cab. The driver came down Great Chart Street and, finding that portion of Buttesland Street which was to his left hand closed, turned to the right, intending to proceed down that portion of Buttesland Street which was open. In order to do so he crossed the site of the trench which had been filled in, and so got on to his near side of Buttesland Street. Thinking that possibly the off side of Buttesland Street might be better than the portion he was on, he recrossed the site of the trench and so got on to his off side in Buttesland Street, and shortly afterwards he drove over the heap of rubbish, which upset the cab and caused the injuries to the respondent, in respect of which this action was brought.

The action was heard before Darling J. and a common jury on August 1, 1901. At the end of the plaintiff's evidence the learned judge held that there was no evidence of misfeasance to go to the jury, and entered judgment for the appellants. The respondent appealed, and on December 14, 1901, the Court of Appeal ordered a new trial. The new trial took place on April 16, 17, and 18, 1902, before Phillimore J. and a common jury. At the conclusion of the plaintiff's case, the judge was asked to non-suit, and stated that he should have done so had it not been for the decision of the Court of Appeal reversing the judgment of Darling J., but that in view of that decision he should leave certain questions to the jury and take their answers.

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The following questions were put to the jury, who returned the following answers:—

(1.) "Was the left half of the road down Buttesland Street from Great Chart Street to Pitfield Street dangerous to traffic"? Answer.—"Yes; sufficient to warrant the driver to cross from the near to the off side."

(2.) "If so, was it the part which had been excavated, or the part to the left of what had been excavated"? Answer.—"Both, chiefly the trench."

(3.) "Was the work properly finished by the defendants after it was completed"? Answer.—"Yes, properly finished at the time, but the rain spoilt it."

(4.) "Did the cabman go to the off side owing to the work not being properly finished"? Answer.—"Yes."

The Foreman of the jury added: "We do not intend to say that he went over to the off side because the road was not properly finished, but that he went to the off side on account of the state of the road."

(5.) "Was the heap put there by the direction of the vestry or its servants"? Answer.—"No."

(6.) "Was the heap put there by the permission of the vestry or its servants"? Answer.—"No."

The jury added, as a rider to their answer to question (3) that the road was properly finished, but had become dangerous in the six or seven days since it was open to traffic.

Phillimore J. held that the whole case turned on the answer to question (5), and after argument entered judgment for the defendants, with costs.

From this judgment the plaintiff appealed, and the Court of Appeal (Romer L.J. *dubitante*) allowed the appeal, and ordered judgment to be entered for the plaintiff. The decision of the Court of Appeal is reported 1 L. G. R. 81.

From that judgment the defendants appealed to their Lordships' House.

J. Eldon Bankes, K.C., and *R. V. Bankes* for the appellants. The defendants are not liable. In the first place, the plaintiff cannot succeed on the ground that the defendants did not guard or remove the heap of rubbish which had been placed on the highway by the tortious act of a third party. The defendants were under no duty towards the plaintiff to guard or remove that heap; or at highest their failure so to do was non-feasance only, for which they are not liable. Secondly, the plaintiff cannot rely on the state of the near side of the road over the sewer trench. If that side of the road was in a

foundrous condition on the night of the accident that was due to non-feasance of the defendants in their capacity of highway authority, for which the defendants are not liable in an action: *Thompson v. Brighton Corporation*, 1894, 1 Q. B. 332; 63 L. J. Q. B. 181, overruling *Kent v. Worthing Local Board* (1882) 10 Q. B. D. 118; 52 L. J. Q. B. 77; *Cowley v. Newmarket Local Board*, 1892, A. C. 345; 62 L. J. Q. B. 65; *Moore v. Lambeth Waterworks* (1886) 17 Q. B. D. 462; 55 L. J. Q. B. 304. Then, if it is said that there was misfeasance on the defendants' part in throwing open the road before it was fit for traffic, the accident is too remote a consequence, if a consequence at all, of the breach of duty to give a cause of action: *Sharp v. Powell* (1872) L. R. 7 C. P. 253; 41 L. J. C. P. 95; *Greenland v. Chaplin* (1850) 5 Ex. 243; 19 L. J. Ex. 293. A wrong-doer is only liable for such consequences of his wrong-doing as he could reasonably anticipate: *Clark v. Chambers* (1878) 3 Q. B. D. 327; 47 L. J. Q. B. 427; *Sneesby v. Lancashire and Yorkshire Railway* (1875) 1 Q. B. D. 42; 45 L. J. Q. B. 1. Further, the findings of the jury really negative the idea that there was any breach of duty at all by the defendants in filling up the trench. The true meaning of the findings is that which Romer L.J. pointed out in the Court of Appeal, namely, not that the road was dangerous, not that there had been misfeasance by the defendants in respect of the sewer or the state in which the road had been left after the completion of the sewerage, but that it had since got into such a state owing to rain and heavy traffic that the driver was justified in crossing to the other side. The findings of the jury, who were, of course, anxious to find for the plaintiff if they possibly could, were directed to negating contributory negligence on the part of the driver and to nothing more. The driver in short was justified in crossing the road to avoid inconvenience. But a person running into danger in order to escape mere inconvenience cannot complain: *Adams v. Lancashire and Yorkshire Railway* (1869) L. R. 4 C. P. 739; 38 L. J. C. P. 277.

Montague Lush, K.C., and *Lewis Thomas* for the plaintiff were not heard.

THE EARL OF HALSBURY L.C. My Lords, in this case I should grieve very much if any facts were so left uncertain as that it would be necessary to send the case for a new trial for a third time, the whole matter in dispute being to the extent of £50, and the expenses, I should think, already incurred in the two trials before coming to this House, amounting to a very considerable sum indeed, thrown upon the ratepayers. But I do not think that that is necessary, because I think there is enough in the findings of the jury here to

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render it proper to affirm the judgment which has been given by the majority of the Court of Appeal.

My Lords, I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think some propositions in respect to the non-liability of the surveyor, or the local authority now representing the surveyor of highways, may be pressed too far. At the same time, I wish to express no difference of view from that which has been expressed before in this House. When the question arises in a direct form it may be worth while to consider whether or not that which has been described as an act of non-feasance may not be considered misfeasance in several of the cases in which that proposition has been applied, I think a little too widely; but it is enough for the present case to say that according to the authority of any of them there is enough here to show that the act which was being done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible.

My Lords, I deprecate very much the sort of notion that you can begin a kind of operation which interferes with the ordinary and normal condition of the roads, and then by reason of having different duties cast upon you you can treat that as a separate operation, so that at one point of time you may be responsible in one capacity or not responsible in one capacity and at another you are, and you may hand over the completion of the operation to an authority which is not responsible at all. My Lords, that would be a sort of metaphysical inquiry which I am loth to enter into. The person who alone could interfere with the structure of the road as it stood happens to be the person who is also responsible for the continuance of the road in a condition in which it shall not be permitted to be dangerous to the public; and in this case I absolutely decline to inquire at what particular point of time the liability as sewer authority and the liability as highway authority is supposed to arise. It is enough for me to say that the person sued was the person who interfered in the first instance with the ordinary structure and normal condition of the road, and that was an act—not an omission to do an act, but an act—and until the road was restored in its entirety to the proper and normal con-

dition so that it could be properly and without undue risk traversed by the public at large, it seems to me it would be idle to say that you could put your finger upon any particular point of time and say the liability of the sewer authority began now and ended now, and then it was handed over to an authority which is not responsible for non-feasance and if that authority did nothing nobody is responsible at all. My Lords, that is a process of reasoning which I for one will not assent to. The moment the structure of the road is interfered with, and it becomes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance.

My Lords, I do not deny that there is considerable difficulty in following the findings of the jury. For aught I know to the contrary, the learned counsel who has last addressed us with very great ability may be right in the conjecture which he has formed as to the influences which guided the jury in coming to their findings. I have nothing to do with that provided the findings stand (and there is no application here and no desire I should think on either side for a new trial), and provided the two learned judges in the Court of Appeal are right in construing the findings as they have—and I certainly do not feel myself able to differ from them about that—although I think a different view might be entertained, I certainly do not feel myself able to differ with the interpretation of those findings. Under those circumstances it becomes an ordinary case of the interference with the road, the non-return of it into its normal condition and an accident happening in the course of events, which but for that alteration in the normal condition of the road would not have happened. That seems to me, therefore, to be a sufficient chain of events to show that the person who interfered with the normal condition of the road is responsible for it until its return to a safe condition. It was not returned to the normal condition when the accident occurred, and therefore I think the plaintiff is entitled to maintain his verdict.

Under those circumstances I move your Lordships that this appeal be dismissed, with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Notwithstanding the able argument we have heard this morning, I think what was done must be regarded as one operation and by one body. So regarding it I think there was more than non-feasance, there was misfeasance. I agree that the judgment ought to be affirmed.

LORD LINDLEY. My Lords, I am of the same opinion. I have no doubt myself if you look at it broadly and without those subtle dis-

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tinctions which have been addressed to us, that this is a case of misfeasance and not of non-feasance. There were three breaches of duty, so far as I can make out, or at all events there were three acts done—not merely omissions. There was breaking up the road and putting it into such a state that it was not fit for traffic; there was restoring the road and not restoring it so as to be fit for traffic; and there was leaving the cart-load of rubbish there which it was the duty of someone on the part of the defendants to clear away (I do not say an actionable duty), and that was not done. Three wrongs do not make one right. It is more than omission. It is not as if they left the road alone; they did nothing of the sort. They first began by putting it out of a proper state of repair, and they never put it back into a proper state of repair.

Appeal dismissed.

Solicitor for the defendants—H. Mansfield Robinson, LL.D., Town Clerk.

Solicitor for the plaintiff—Graham Gordon.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

KIRKDALE BURIAL BOARD *v.* LIVERPOOL CORPORATION.

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Feb. 24, 25 ;

Mar. 26.

Areas—"Urban district"—County borough—Adoptive Acts—Transfer of powers—Local Government Act, 1894 (56 & 57 Viet. c. 73), ss. 21, 35, 62.

A county borough is an "urban district" within the meaning of section 62 of the Local Government Act, 1894, and the borough council are accordingly entitled to exercise the powers conferred by that section upon the council of an urban district of transferring to themselves the functions of authorities under the adoptive Acts.

So held : first, on the ground that the provisions of section 21 of the Act, that the districts of urban sanitary authorities shall be called urban district councils and their districts urban districts, operate as a definition of urban district, which, except for the purposes of Part II. of the Act (sections 20-35), extends to county boroughs, notwithstanding that by section 35 that Part of the Act is not to apply to a county borough save as specially provided ; and, secondly, if section 21 ought not to be read as having this effect, then, on the ground that the expression "urban district" in sections of the Act not comprised in Part II. extends to county boroughs by virtue of the provisions in section 75 (1), under which expressions in the Act have in general the same meaning as in the Local Government Act, 1888, where the expression urban district is used to include the districts of all urban authorities.

THIS was an action raising the question whether a county borough is an "urban district" within the meaning of section 62 of the Local Government Act, 1894.

The plaintiffs were the burial board for the township of Kirkdale, and were duly constituted under the Burial Acts, 1852 to 1900, and had provided a burial ground for the township of Kirkdale under the said Acts.

The township of Kirkdale was situate within the borough of Liverpool, which was made a county borough by section 31 of the Local Government Act, 1888. The borough contained various parishes or townships, some of which had, and others had not, appointed burial boards and provided burial grounds.

The defendant corporation, acting by the city council, were proposing and intended in exercise of the powers conferred upon the councils of urban districts by section 62 of the Local Government Act, 1894, to pass a resolution transferring to themselves, as from a specified date, the powers, duties, property, debts, and liabilities of the plaintiff burial board.

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The plaintiffs denied the right of the defendants to exercise the powers in question, on the ground that a county borough was not an "urban district," and that the plaintiffs were not entitled to the benefit of the section, and accordingly commenced this action claiming a declaration that the area of the county borough of Liverpool was not an "urban district" within the meaning of the Local Government Act, 1894, or otherwise, and that any resolution that the powers, duties, property, debts, and liabilities of the plaintiffs should be transferred to the defendants, acting by the city council, as from a date to be specified in such resolution or otherwise, or any resolution to that or a similar effect (if passed) would be *ultra vires* and void; and an injunction restraining the defendants from passing or acting upon any such resolution.

The following provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 73), are material:—

PART II.

* * * * *

Section 21. As from the appointed day,—

(1) Urban sanitary authorities shall be called urban district councils, and their districts shall be called urban districts; but nothing in this section shall alter the style or title of the corporation or council of a borough.

* * * * *

(3) In this and every other Act of Parliament, unless the context otherwise requires, the expression "district council" shall include the council of every urban district, whether a borough or not, and of every rural district, and the expression "county district" shall include every urban and rural district whether a borough or not.

* * * * *

Section 35. Save as specially provided by this Act, this Part of this Act shall not apply to the administrative county of London or to a county borough.

PART IV.

* * * * *

Section 62 (1). Where there is in any urban district, or part of an urban district, any authority constituted under any of the adoptive Acts, the council of that district may resolve that the powers, duties, property, debts, and liabilities of that authority shall be transferred to the council as from the date specified in the resolution, and upon that date the same shall be transferred accordingly, and the authority shall cease to exist, and the council shall be the successors of that authority.

(2) After the appointed day any of the adoptive Acts shall not be adopted for any part of an urban district without the approval of the council of that district.

* * * * *

Section 75 (1). The definition of "parish" in section one hundred of the Local Government Act, 1888, shall not apply to this Act, but, save as aforesaid, expressions used in this Act shall, unless the context otherwise requires, have the same meaning as in the said Act

Eve, K.C., Danckwerts, K.C., and R. B. Lawrence for the plaintiffs.

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A county borough is not an "urban district," and the defendants have therefore no right to exercise the powers conferred by section 62 of the Local Government Act, 1894. "Urban district" is defined in section 21, and no doubt the definition, if it stood alone, would include a county borough, since the corporations of county boroughs are urban sanitary authorities, but that section is contained in Part II. of the Act, and by section 35, which is also in Part II., it is provided that "save as specially provided by this Act, this part of this Act shall not apply to the administrative county of London or to a county borough." That prevents the definition in section 21 from applying to a county borough, so that in effect section 21 defines "urban district" as meaning an area other than a county borough under the jurisdiction of an urban authority. There are clear indications in the Act itself that a county borough is not an urban district, for section 32 says that the provisions respecting the transfer to a district council of justices' powers shall apply to a county borough "as if it were an urban district"; and, again, by section 75 (2) the expression "parochial elector," when used with reference to a parish "in an urban district, or in the county of London or any county borough," means any person who would be a parochial elector of the parish if it were a rural parish. In both these instances, if urban district had included a county borough, it would have been unnecessary to specify the latter expressly. The whole power under section 62 hinges on the fact that there must be an urban district, and we submit that on the true construction of the Act the defendant corporation cannot exercise the powers of that section.

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Vernon Smith, K.C., Glen, K.C., and J. Rutherford for the Liverpool Corporation. It is a forced construction to say that section 35 has the effect of making section 21 define "urban district" so as to exclude a county borough. The object of section 35 was to prevent the provisions in Part II. from applying to county boroughs unless the contrary was specified. Section 21 (1) was not intended as a definition of "urban district," but as a clause altering the style of non-municipal urban authorities, and subsection (3) of the section was merely inserted lest it should be thought that the provision in subsection (1) saving the style and title of the corporations and councils of boroughs prevented the expression "urban district" in a generic sense from applying to a borough. The expression "urban district" had a well-known meaning long before the Act of 1894. It is used throughout the Public Health Act, 1875, to mean an urban sanitary district as defined by that Act, and county boroughs are beyond question urban sanitary districts under that Act. It would require something much stronger

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and more express than the provisions of sections 21 and 35 of the Act of 1894 to change the meaning of a well understood expression. By section 75 (1) of the Act of 1894, moreover, expressions in that Act, unless the context otherwise requires, have the same meaning as in the Local Government Act, 1888, and although "urban district" is not defined in the Act of 1888, it is used in section 57 (1, c), and, in view of the definitions of "county district" and "district council" in section 100 of that Act, clearly as meaning urban district within the meaning of the Public Health Act, 1875. That the expression "urban district" in section 53 (2) of the Act of 1894 was intended to include a county borough is shown by the Local Government (Joint Committees) Act, 1897, which is drawn on the assumption that the expression has that meaning. Again, in section 54 of the Act of 1894 it is clear that the expression "borough or other urban district" must be intended to include county boroughs. The reason why a county borough is expressly referred to in the definition of "parochial elector" in section 75 is that there are references to parochial electors in sections in Part II. which are expressly extended to county boroughs, e.g., section 30. And in view of section 35 it was necessary to make some express provision as to the meaning of parochial elector for the purposes of those sections as so extended. The insertion of the words "as if it were an urban district" with reference to a county borough in section 32 is similarly explicable with reference to section 35. It cannot possibly have been intended to confer the powers of section 62 on all small urban authorities and not on the far more important authorities in county boroughs.

Danckwerts, K.C., in reply. *Rex v. Connah's Quay Overseers*, 1901, 2 K. B. 174; 70 L. J. K. B. 651, shows that the sole effect of section 62 of the Act of 1894 is to substitute one body for another. It is no slur on county boroughs that in such a trivial matter they should not have had this power given to them.

Cur. adv. vult.

March 26. SWINFEN EADY J. The question to be determined in this action is whether the area of the county borough of Liverpool is an "urban district" within the meaning of section 62 of the Local Government Act, 1894. If the answer to this question should be in the affirmative, it is not disputed that the defendants, acting by the city council, are entitled to resolve that the powers, duties, property, debts, and liabilities of the plaintiffs, the burial board for the township of Kirkdale, shall be transferred to the defendants, acting by the city council, as from a date to be specified in such resolution, and that thereby upon the said date the said powers, duties, property, debts,

and liabilities will be transferred accordingly, and that the plaintiff burial board will cease to exist, and the defendants will be successors of the plaintiffs. The definition of "urban district" contained in the Act of 1894 is in section 21. It is the district of an "urban sanitary authority." The defendants are an urban sanitary authority, and, therefore, if this section were applicable, their district would be an "urban district"; but section 21 is contained in Part II. of the Act, and by section 35 it is enacted that, save as specially provided by that Act, that part of that Act shall not apply to a county borough. It is contended that the effect of section 35 is to exclude a county borough from the definition of "urban district" contained in section 21, except where specially otherwise provided by some other section of the Act, but I only read section 35 as meaning that an "urban district," where mentioned in Part II. of the Act, does not include a county borough except where expressly so provided. There is no provision that other parts of the Act shall not apply to a county borough, save as specially provided, and section 21 cannot, in my opinion, be read as if it was a definition of "urban district" excluding county boroughs. If section 21 is to be treated as defining "urban district" for all the purposes of the Act, including section 62 (1), then county boroughs are within the definition. If section 21 is excluded by section 35, and is not applicable to section 62 (1) in Part IV., then section 75 (1) meets the case, which provides that expressions used in the Act of 1894 shall, unless the context otherwise requires, have the same meaning as in the Local Government Act, 1888. The expression "urban district" occurs in section 57 (1, c) of that Act, and having regard to section 100—interpretation of "district council" (b)—the expression there means the district of an urban sanitary authority within the meaning of the Public Health Act, 1875. By sections 5 and 6 of that Act, England (except the Metropolis) is divided into urban and rural sanitary districts, and urban districts and urban authorities are described, and the county borough of Liverpool is an urban district. Under these circumstances, I am of opinion that the county borough of Liverpool is an urban district within the meaning of section 62 (1) of the Local Government Act, 1894. Moreover, a contrary decision would lead to this result—which would certainly be a curious one—that in every urban district, other than a county borough, the adoptive Acts cannot be adopted for any part of an urban district without the approval of the council of that district; but in county boroughs, which are probably more populous and important, there is nothing to prevent the various portions of the borough, after the appointed day, adopting adoptive Acts without any consent or approval whatever of the council of the borough. The expression "urban district" is also used in

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section 54 in Part IV. of the Act of 1894, and, in my opinion, the expression is used there as including a county borough. Thus, section 54 (1) provides: "Where . . . the area of an urban district is extended," &c.; section 54 (2): "The provision aforesaid shall be made . . . (c) where the area of an urban district is extended, by an Order of the Local Government Board under section 54 . . . of the Local Government Act, 1888." Now the Local Government Act, 1888, s. 54 (1), provides (*inter alia*) for the alteration of the boundary of any county borough by the Local Government Board, and, in my opinion, the provision made by section 54 of the Act of 1894 in the case of an extension or diminution of the area of an urban district applies where the area of a county borough is altered under section 54 of the Act of 1888. The plaintiffs placed considerable reliance on the definition of "parochial elector" in section 75 (2) of the Act of 1894, " . . . the expression 'parochial elector' when used with reference to a parish in an urban district, or in the county of London or any county borough, means," &c., and it was contended that "urban district" could not include a county borough, as, if it did, it would not have been necessary to add the words "or any county borough"; but the answer to this argument is that in this particular instance the context shows that it was not intended to include a county borough in the expression "urban district." Again, the Local Government (Joint Committees) Act, 1897, is to be construed as one with the Local Government Act, 1894, and it is clear from section 1 (1) of the Act of 1897 that the statute contemplates that one of the councils appointing a joint committee for the purposes of the Burial Acts may be the council of a county borough. But it only has power to do that if it is a district council, and if its district is an "urban district" within the meaning of section 53 of the Act of 1894. Reading these two statutes together, I am of opinion that the Legislature itself has afforded an exposition of the sense and meaning in which the expression "urban district" is used in the earlier Act: see *Battersby v. Kirk* (1836) 2 Bing. N.C. 584, at p. 606; 5 L. J. C. P. 166; *Morgan v. London General Omnibus Co.* (1883) 12 Q. B. D. 201, at p. 207, and on appeal 13 Q. B. D. 832; 53 L. J. Q. B. 352. For these reasons I am of opinion that the claim of the plaintiffs fails. The judgment will be as follows:—The Court, being of opinion that the area of the county borough of Liverpool is an "urban district" within the meaning of section 62 of the Local Government Act, 1894, dismiss the action, with costs.

Solicitors for the plaintiffs—Sharpe, Parker, & Co., for Cleaver, Holden, & Co., Liverpool.

Solicitors for the defendants—Venn & Co., for Edward R. Pickmere, town clerk, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

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SKINNER v. HUNT AND OTHERS.

May 20.

Streets—Paving expenses—Metropolis—Landlord and tenant—Covenant by tenant to pay charges imposed on frontages—Payment by tenant to local authority of rent due to landlord—Right of landlord to distrain—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96.

The payment made by an occupier of premises of a sum apportioned on the premises in respect of paving expenses under the Metropolis Management Acts, on the demand of the local authority under section 96 of the Metropolis Management Amendment Act, 1862, is not a payment of rent, but a payment of a sum on account of the charges and expenses incurred by the local authority measured by the amount of the rent due from the occupier to his landlord. The occupier is entitled to deduct the amount which he so pays from his rent, provided that he has not entered into any contract with his landlord which prevents him from so doing; but if he has entered into an agreement with his landlord to pay such charges as those in question he is not entitled to make the deduction, and the rent remains due notwithstanding the payment to the local authority, and the landlord can distrain for it.

APPLICATION by the defendants for judgment or new trial on appeal from a verdict and judgment at the trial of the action before Ridley J. and a common jury.

The action was brought for damages for wrongful distress.

The plaintiff was lessee of certain premises for twenty-one years from November 29, 1896, at a rent of £40, payable quarterly. By the lease he covenanted to pay the rent and all tithe or tithe rent-charge, and all sewers and main drainage rates, education rates, and all taxes, rates, and assessments whatsoever then or thereafter during the said term to be charged upon the premises, or upon the landlord or tenant in respect thereof (the property or income tax only excepted), and also to observe and perform the stipulations under which the lessor held the land thereby demised (a copy of which was contained in the schedule thereof) and to indemnify the lessor from and against any breach thereof.

One of the stipulations in the schedule was that the owner of the property should maintain in good and sufficient repair half the road and the footpath abutting on it until such road and footpath should be taken over by the local authority, and should pay all charges imposed

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by any local authority on the frontages in respect of such road and footpath, or the making or repair thereof.

The demised premises were subject to a mortgage created by the lessor, and this mortgage was afterwards transferred to the defendant Hunt. In February, 1900, Hunt appointed the defendant, Philip Geen, receiver of the rent of the premises under the powers of sections 19 and 24 of the Conveyancing and Law of Property Act, 1881; and on February 22, 1900, the receiver gave notice of his appointment to the plaintiff, and thenceforward up to Michaelmas, 1902, the plaintiff paid his rent to him. On December 18, 1902, the Wandsworth Borough Council gave the plaintiff notice under section 96 of the Metropolis Management Amendment Act, 1862, not to pay any rent then or thereafter to become due in respect of the premises without first deducting therefrom £34 19s. 2d. due to the council in respect thereof under an apportionment of the estimated cost of paving the road and footpaths there, and demanding the rent as it became due, or so much thereof as was necessary to satisfy their claim. The plaintiff informed the receiver of this notice.

The borough council pressed the plaintiff for payment to them of the rent due at Christmas, 1902, and threatened him with proceedings, and on January 20, 1903, the plaintiff paid the council £10, being the quarter's rent due at Christmas, 1902, and he informed the receiver that he had done so. The receiver demanded the rent, and, it not being paid, the defendants, on February 12, 1903, levied a distress on the premises, but they on February 18 withdrew. The plaintiff claimed compensation, and brought this action. By their statement of defence the defendants alleged the covenants in the lease, and that the plaintiff was liable under the terms of those covenants for the charges imposed by the borough council; and they counter-claimed for the two quarters' rent due at Christmas, 1902, and Lady-Day, 1903. By his reply the plaintiff alleged that the rent for both those quarters had been paid to the borough council for paving expenses, and he denied that any rent was due for either quarter.

At the trial of the action a verdict was given for the plaintiff for £50, subject to the determination of the question whether, under section 96 of the Act of 1862, any right of distress under the circumstances remained to the lessor.

Section 96 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), is as follows:—

The 217th, 218th, and 219th sections of the firstly recited Act [the Metropolis Management Act, 1855] are hereby repealed; and in lieu thereof be it enacted, that it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to

pay under the said recited Act or this Act either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent: provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier: provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant.

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Ridley J. was of opinion that under the section, after payment by the tenant to the local authority, the rent must be regarded as between him and his landlord as to that extent gone, and there could be no right of distress in respect of it, though under the proviso the tenant would remain liable under any covenant that he had entered into for payment of the expenses. He directed judgment to be entered for the plaintiff for £50 on the claim, and also judgment for him on the counterclaim. With regard to the case of *Sweet v. Seager* (1857) 2 C. B. n.s. 119, which had been cited on behalf of the defendants, his Lordship said:—"It appears to me that that case was not argued upon this point. I have a suspicion in my mind that the point did not arise, because whichever way it may be decided it is certainly worth arguing. Yet it is singular, if that were so, that neither of the learned counsel engaged in the case dealt with the matter, nor did the Court. According to the facts, it was not a proceeding similar to this at all, but some other proceeding. The facts there, as stated in the report at p. 123, were these:—'On the 16th of December, 1856, the plaintiff was required by the said Board to pay and did pay to the said Board the sum of £27 16s. 8d., being the amount of the expenses paid by the Board for the said works. On the 25th of December, 1856, the sum of £22 10s. became due from the plaintiff to the defendant for a quarter's rent for the said house and premises reserved by the said underlease. The plaintiff claimed to retain the said sum of £22 10s. in part satisfaction of the said sum of £27 16s. 8d. paid to the said Board of Works. On the 22nd of January, 1857, the defendants distrained the goods of the plaintiff on the

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said demised premises for the said sum of £22 10s.' Therefore I do not quite understand how it can have been in respect of a similar proceeding to this as to the amount due. The part of section 96 dealing with the matter begins by providing that "no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him." That is the main provision. It would not be right that the occupier should be ordered to pay more than is due from him to the owner. But then there is another consideration which made it necessary to add some further words to those I have quoted. The notice is given first of all, but some rent may accrue due between the time when the notice is given, and the time when the payment is made; and the section says that for the rent which may accrue due during those few days there still shall be the right to proceed as far as that amount may go. I think, on reading the words, the section clearly means to refer to the rent which is for the time being due, or which after demand and after notice not to pay to the landlord becomes payable by the occupier. Then, further on, the section says, "but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier." Therefore, I think that is the meaning of those words, and that being so I cannot quite see how *Sweet v. Seager* can really have been decided upon this point, but it may be so. All I can say is that my reading of these words is according to the natural sense, which it appears to me is the sense I have indicated."

J. A. Hawke for the defendants. Under section 105 of the Metropolis Management Act, 1855, the owners of houses forming the street were liable for the paving expenses, and under section 217 the local authority could recover them from the occupier. Under the Metropolis Management Act, 1862, s. 77, the owners of land bounding or abutting on the new street are made liable to contribute, and under section 96 the expenses can be recovered from the owner or the occupier, but the Act does not interfere with agreements on the subject between the owner and occupier. On the view taken by the learned judge, the agreement by the plaintiff to pay these charges would be affected by the Act, as he held that, though the landlord's right of action remains, his right of distress has gone.

What the tenant pays to the local authority is not rent, but the amount of the charges and expenses incurred by them. Under sections 226 and 227 of the Act of 1855 an order for payment of these expenses may be made by the justices, and the order enforced under the Summary Jurisdiction Acts; but if the tenant has covenanted to pay

these charges and to indemnify his landlord therefrom, he can only say, as against his landlord, that the payment is in discharge of his covenant. He cannot say that it is rent. He therefore remains liable to distress by the landlord: *Sweet v. Seager* (1857) 2 C. B. n.s. 119; *Thompson v. Lapworth* (1868) L. R. 3 C. P. 149; 37 L. J. C. P. 74. 1904.
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The point in *Ryan v. Thompson* (1868) L. R. 3 C. P. 144; 37 L. J. C. P. 134, was a different point from this.

A mere covenant by a lessee to pay the rent without any deduction would not deprive him of his right to deduct from his rent the amount of these charges: *Home and Colonial Stores v. Todd* (1891) 63 L. T. 829, but a specific covenant to pay the charges such as there is here would deprive the lessee of that right: *Fod on Landlord and Tenant* (3rd ed.), p. 169.

[VAUGHAN WILLIAMS L.J. referred to *Fod*, p. 195, and to *Tidswell v. Whitworth* (1867) L. R. 2 C. P. 326, 337; 36 L. J. C. P. 103, 106.]

If the Legislature had intended that the landlord's right of distress should be destroyed by the payment to the local authority, it could have provided for that.

[VAUGHAN WILLIAMS L.J. Ought the tenant to plead payment or set-off in answer to a claim for the rent?]

He should plead the statute: *Payne v. Burridge* (1844) 12 M. & W. 727; 13 L. J. Ex. 190.

S. G. Lushington and *E. H. Tindal Atkinson* for the plaintiff. The tenant is liable for the rent, and the rent only. It is claimed by the local authority by a paramount title under section 96. The rent is gone when it has been paid to the local authority, and the proper plea of the tenant to a claim by the landlord would be payment. That is always the proper plea where rent has been demanded by some one under a title paramount to that of the landlord. The liability for these charges is really that of the owner, both under the Act of 1855 and the Act of 1862. If he fails in his duty, there is a remedy under the Act of 1862 against the occupier to the extent of his rent. When the rent has gone the right of distress has gone. The proviso in section 96 does not affect that. That means that the landlord can sue for the damage that he has sustained by reason of the payment to the local authority, and the measure of damage would be the amount of the rent paid over by the tenant to the local authority. He can also sue on the covenant. *Payne v. Burridge* (1844) 12 M. & W. 727; 13 L. J. Ex. 190, and *Sweet v. Seager* (1857) 2 C. B. n.s. 119, were different cases from this.

J. A. Hawke replied.

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and the only question raised is whether at the moment of the distress any rent was due for which the landlord was entitled to distrain. If there was rent then due, there was nothing wrong in the distress. If there was not rent then due, the distress was wrong. It was said that rent was not then due because under the Metropolis Management Amendment Act, 1862, power is given to a local authority who have incurred certain expenses to give notice to the tenant of the property in respect of which they were incurred not to pay his rent without deducting the amount of these expenses which the owner of the property was liable to pay, and calling upon him to pay that amount to them to the extent of the rent due, and also power to apply to the magistrates for an order for payment if the tenant does not pay, which order could be enforced by a statutory distress. The plaintiff says that he was compelled to pay in this way; and the result is that he has *pro tanto* discharged his rent, and the defendants have no right to distrain for rent without deducting the amount which he has so paid.

The defendants, on the other hand, say that it is not true that when the tenant pays under section 96 of the Act of 1862, he pays rent, but what he does really pay is merely an amount of expenses which the local authority is entitled to recover; and as that is all which he has paid, and the rent has not been paid, the right of distress remains. The question, therefore, is whether the tenant, having regard to the terms of this particular lease, has the right to deduct or set off this payment which he has made to the local authority when called upon by his landlord to pay rent. The defendants say that he is not entitled to make the deduction, as there is in the lease a provision under which the tenant has bound himself to bear this burden and to indemnify his landlord against it.

The question then turns upon this: What is it that the tenant has paid? If what he has paid was a payment on account of rent, that cannot afterwards be sued for or included in any distress. If on the other hand, it was a payment on account of charges which the local authority was entitled to recover, then the rent has not been paid, and the tenant cannot deduct or set off what he has paid against the claim for rent, having regard to the provisions of this particular lease which throws these charges on the tenant. The defendants accepted the decision of North J. in *Horne and Colonial Stores v. Todd* (1891) 63 L. T. 829, that if all that there is in a lease is a covenant to pay rent clear of all deductions except property tax, that would not be enough to prevent the tenant deducting such a payment as this; but to prevent that, some specific covenant beyond the covenant to pay rent would be wanted—that is to say, a specific covenant relating to the particular subject-matter. To my mind, so far as the lease is concerned, it is plain that

if the effect of the payment by the tenant to the local authority has not been to discharge the rent, but merely to give him a right of deduction, if he attempted to plead that right by way of set-off against a claim for rent it would be a perfect answer to such a plea in this case to point to the covenant by which the tenant undertakes, as between himself and his landlord, to bear the ultimate burden of these charges. 1904.
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It remains now to consider the words of section 96 of the Metropolis Management Amendment Act, 1862. I will deal with the proviso first. The result of that is that the covenant by which the tenant agreed to indemnify the landlord against the stipulations in the schedule is by the very terms of the proviso not to be affected by anything in the section. That covenant is in full force; but that does not help the landlord if it is true to say that the payment to the local authority constitutes a payment of rent. Then does that payment under the first part of the section constitute a payment of rent? It seems to me that what the local authority are entitled to require under that, whether from the owner or the occupier, is costs and expenses; and I doubt whether the proper receipt for them to give would be a receipt for rent. All that they could give, as it seems to me, would be a receipt for that of which they were entitled to demand payment—namely, costs and expenses which the owner or occupier is liable to pay.

The observations of Willes J. in *Tidswell v. Whitworth* (1867) L. R. 2 C. P. 326, 337; 36 L. J. C. P. 103, 106, in which, when dealing with the Act in question there, he points out that which constitutes a difference between the Metropolis Management Amendment Act, 1862, and the Act of 1855, were, in my opinion, well founded. He points out that under the Act of 1855 the remedy was not given directly against the landlord, but only through the tenant; whereas, in the Act with which he was dealing there (the Manchester Improvement Act, 1851) not only was the duty imposed upon the landlord, but it was a direct obligation upon him; and in that respect the Act of 1862 is to the same effect as the Manchester Improvement Act.

When I first read section 96 of the Act of 1862 I was inclined to think that the words "out of the rent" in the second clause must be read as connected with the word "pays," but on consideration, and after hearing the arguments, I think that they must be read in connection with the word "deduct"; and I may point out that the words which follow indicate that that which is paid is not paid as rent, as the tenant is allowed to deduct what he pays "as if the same had been actually paid to such owner as part of such rent." I think, therefore, that the payment by the tenant is payment of costs and expenses to which the local authority are entitled, and not payment of rent; and if it is not payment of rent the landlord has not lost his right of distress. Nothing

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in the Act takes away from the landlord any right of distress by reason of the payment by the tenant to the local authority under the Act. If the rent is still due, then, subject to the question whether the tenant has any right of set-off, the right of distress remains.

Section 96 of the Act of 1862 is not easy of construction, but I prefer the view of the section taken by Willes J. in *Thompson v. Lapworth* (1868) L. R. 3 C. P. 149, 157; 37 L. J. C. P. 74, 77, though in part of his judgment not material to the decision of the question there, to that which appears to have been the opinion of Bovill C.J. in *Ryan v. Thompson* (1868) L. R. 3 C. P. 144, 147; 37 L. J. C. P. 134, 135. Willes J. says: "The effect, therefore, of the 96th section is to give a remedy against the tenant, who is to be allowed to recoup himself out of the rent due from him unless there be some agreement between himself and his landlord to the contrary." In my judgment, there is something to the contrary in this lease in the covenant to which I have referred. Bovill C.J. in *Ryan v. Thompson* says: "What the plaintiff's counsel had to establish was, that the landlord's right to distrain was taken away. It has been ably argued that the mere giving of the notice by the vestry clerk to the tenant amounts to a discharge of the rent, and to payment *pro tanto*. I do not, however, find any language in the Act to warrant that position. The words are, 'the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the premises, as if the same had been actually paid to such owner as part of such rent.' I find no prohibition, either express or implied, against the landlord's pursuing his ordinary remedy where the rent has not been paid. And I see no hardship on the tenant in this." Bovill C.J. does seem to think that, although the notice did not constitute a discharge of the rent and payment *pro tanto*, notice when followed by payment did constitute a discharge of the rent and payment *pro tanto*. He says: "When a notice has been given, and the rent is due, he must pay the amount to the vestry. He cannot pay it to the landlord." These expressions point to payment by the tenant to the local authority being payment in discharge of the rent, but on the whole I think that the other view is the right view.

I do not want to go back to such obsolete things as forms of pleadings, but I have looked at a good many of those cases in which the plea was raised of payment under a statute such as the one in question here of sums of money which primarily the landlord had to bear, and in respect of which the tenant, if he paid them, was given a right of deduction very like that given in section 96—cases also in which the liability of the tenant to pay was limited to the amount of rent due; and I have found out that the plea of the statute and a right

to set-off under it is often successfully followed by a replication that the tenant had by the lease undertaken the responsibility for the sums sought to be set off, and to indemnify the landlord against them. Maule J. in *Franklin v. Carter* (1845) 1 C. B. 750, 759; 14 L. J. C. P. 241, 243, describes the tenant's right as a right of set-off. He says: "Then comes the question whether money paid by a tenant on account of his landlord under that Act, may be set off, or deducted, in an action brought by the landlord for the recovery of rent." There is no difference for this purpose whether the question arises in an action for recovery of rent or in an action for distress for rent put in by the landlord followed by replevin or by an action for illegal distress. 1904.
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Under these circumstances I think that this appeal should be allowed.

I wish to say, as the learned judge referred to it, that I agree with him in his criticism based on the dates in *Sweet v. Seager* (1857) 2 C. B. n.s. 119.

STIRLING L.J. I am of the same opinion, and for the same reasons; but as we are differing from the learned judge, I will state shortly the grounds of my decision.

The question is one of the construction of section 96 of the Metropolis Management Amendment Act, 1862. By section 105 of the Metropolis Management Act, 1855, certain paving expenses were charged upon the owners of property adjoining the road in respect of which the expenses were incurred, and the amount of the expenses was recoverable either by action or in a summary manner. Then section 96 of the Act of 1862 gives a remedy against the occupier as well as against the owner. The result of that is that in respect of these costs and expenses the occupier may be sued in an action or be summoned before the justices of the peace, and the expenses be recovered in that way. Then it is provided that the owner shall allow the occupier to deduct from his rent what he has so paid. It is contended on the one hand that these words are to be treated as showing that what the local authority recover from the occupier is actually rent and nothing else. On the other hand, it is contended that what is recovered from the occupier is not rent, but simply the amount of the costs and expenses which the occupier is liable to pay, with the right of deducting the amount from his rent as against the landlord. The fact that the occupier is not bound to pay more than the amount of the rent due from him is relied upon as showing that what he pays is really rent; but on the best consideration it does not seem to me to go so far as that. In the first place, the Act does not in express terms say that what is to be paid by the occupier is rent. The language points in the opposite direction, as he is to deduct it as if the same had been actually paid to the owner

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as part of the rent. In the next place, the local authority are not put in the position of landlords. They can summon an occupier, but they cannot distrain. That is clear; and in my judgment the local authority could not give a receipt for rent, but only for the costs and expenses which the occupier was liable to pay—nothing more. I can see nothing in the Act which compels us to regard the payment as a payment of rent; and the better view, in my opinion, is that the tenant is merely made liable to pay costs and expenses which in the first instance ought to fall upon the landlord to the extent to which any rent may be due from him, and to deduct that from the rent.

Then comes the proviso at the end of the section. In the present case the tenant is by his own covenant bound to make these very payments to the local authority, and to indemnify his landlord against them, so that he is precluded from making any such deduction as he claims, and the rent remains due. The appeal therefore should be allowed.

COZENS-HARDY L.J. I agree. In construing section 96 the real thing is to see what it is that the local authority can require to be paid. There is nothing to show that they can sue the tenant for rent. All that they can require is a sum in payment of costs and expenses measured by the rent due. No receipt could be given by the local authority for rent. The only receipt that could be properly given by them would be a receipt for the whole or part of the improvement charge, not being in excess of the rent due to the landlord. If that is the true view of the section, it amounts to this—that there is in this section authority for a tenant, who has paid the improvement charge to an amount not greater than the amount of the rent due to the landlord, to deduct that amount from the landlord's rent; but by the section it is provided that nothing therein is to affect any covenant entered into by the tenant with the landlord. Where there is, as here, an express covenant by the tenant to pay these charges, and to pay the rent without deducting anything in respect of them, then the tenant is not entitled under section 96 to tell his landlord that he has deducted from his rent that which he has paid to the local authority. The answer would be that he is not entitled to do so, and that the proviso neutralises the earlier part of the section.

Appeal allowed, and judgment for the defendants.

Solicitor for the plaintiff—Alexander Pope for H. R. Jones, Wandsworth.

Solicitors for the defendants—Todd, Dennes, and Lamb.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

ESCOTT v. NEWPORT CORPORATION.

Jan. 11, 12.

Tramways—Local Act—Power to construct apparatus in street—Erection of standard on foot pavement—Trespass—Taking of Land—Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 18, 68—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 149—Newport Corporation Act, 1900 (63 & 64 Vict. c. xlii), s. 51.

A local Act incorporating the Lands Clauses Acts and authorising the taking of certain scheduled lands gave a municipal corporation (who had constructed tramways in their borough under earlier Acts) powers for the extension of their tramways and for the working of their tramways by mechanical power instead of horses. By section 51 of the Act the corporation were empowered to construct lay down place erect and maintain on in over or under any street or road in which any of their tramways were for the time being laid works and appliances including poles and posts.

Held, that under this section the corporation had power, without the consent of the owner of the subsoil and without any notice to treat, to place on the foot pavement of a street in which one of their tramways was laid an iron pillar, sunk to a depth of some feet into the ground, for the support of an overhead electric cable for the supply of power to the tramcars; and that the remedy of the owner of the subsoil, if his property was injuriously affected, was by obtaining compensation under section 68 of the Lands Clauses Consolidation Act, 1845.

APPEAL by the defendants from a judgment of the learned judge of the Newport County Court in favour of the plaintiff.

The action was for damages and for a mandatory injunction in respect of an alleged trespass to the plaintiff's land by the erection of an iron pillar for the support of an overhead electric cable used by the defendants in connection with their tramways. The facts and circumstances of the case are set out in the following written judgment of the learned county court judge:—

“This is an action brought to recover damages for an alleged trespass by the defendants upon the plaintiff's property by the erection on it of an iron pillar for the purpose of conveying an overhead electric cable, and for a mandatory injunction to remove the pillar.

“The facts of the case are not in dispute, and are as follows:—

“By a lease dated November 6, 1885, a plot of ground upon part of which this pillar has been erected was leased to one John Page

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for the term of 99 years from March 25, 1883, and by an indenture dated April 18, 1899, the premises were assigned by Page to and are now vested in the plaintiff for the residue of the term. The lease was of a plot of ground adjoining and abutting upon the Chepstow Road, upon which the lessee covenanted to build and did build a house and shop now known as No. 103, Chepstow Road. There is a plan upon the lease of the plot of ground demised with a number referring to an estate map, and upon that estate map the frontage building line of the house to be built is shown, between which line and the boundary of the plot abutting on the Chepstow Road there is a space 10 feet in width which was originally intended as a forecourt to the house. The plot of ground demised was at the date of the lease divided from the Chepstow Road by a hedge which was included in the lease. When the lessee built the house he pulled down this hedge, and with the leave of the ground landlord, instead of using the piece of ground in front of the house as a forecourt, he paved the whole of it from the house up to the roadway in the Chepstow Road, and he put down a line of kerbing immediately adjoining the road. This paving and kerbing were wholly upon the plot of ground leased to him. Other houses on each side of Page's house were from time to time built, forming a continuous row of houses with their frontages built up to the line shown on the estate map, and such houses all had pavement in front forming a continuous line of pavement. Page carried on in the shop which he so built the business of a furniture dealer, and was in the habit of putting furniture for sale upon the pavement in front of his shop. The plaintiff since he bought the premises has carried on there a similar business, and has also put furniture for sale upon the pavement in front of his shop. Such user of the pavement by Page and the plaintiff has been without interruption and without any objection to it, either by the defendants or any other authority. Subject to this user of the pavement a right by the public to use the pavement as a footpath has been acquired. In 1890 the defendants remetalled the Chepstow Road and straightened the footpaths on each side of it, and put in new curbing and channelling in the same place as the curbing put in by Page. The defendants have also from time to time at the public expense repaired the pavement in front of the plaintiff's shop. The Chepstow Road is now a street of almost continuous lines of houses on each side, with paved footpaths in front of them leading from the Newport Bridge over the River Usk towards Chepstow. The plaintiff's house is situated about a mile to the eastward of the bridge. In exercise of the power given to them by the Newport Corporation Acts of 1892 and 1897 the defendants constructed a tramway in the

Chepstow Road passing in front of the plaintiff's premises. It was used for tramcars for the conveyance of passengers, and the tramcars were drawn by horses. In 1900 the defendants being minded to apply electrical power as the motive power of their tramcars, were empowered by the Newport Corporation Act, 1900, to use mechanical power on their tramways. The system adopted by the defendants is a system by which electrical power is supplied to the tramcars from a continuous wire cable running along the tramways and suspended above them at a height of about 25 feet. This cable is supported by wires across the roadway at fixed distances, and these wires are fastened to hollow iron pillars on each side of the roadway. One of these pillars has without the plaintiff's consent been fixed in the pavement immediately in front of his shop, and has been fixed in a place which is wholly within the boundaries of the plot of ground demised by the lease under which the plaintiff holds. This iron pillar is 31 feet in height, and about 10 inches in diameter at the base, and about 6 feet of its height is sunk in the ground. The placing this pillar in the place where it has been fixed is the trespass of which the plaintiff complains in this action.

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"The defendants' defences to the action are: (1) that the pillar complained of was erected by them under and pursuant to the authority given to them by the Newport Corporation Act, 1900, s. 51; and (2) that the pillar having been erected on August 8, 1902, the claim is barred by the Public Authorities Protection Act, 1893, s. 1.

"In the Corporation Act, 1900, the Lands Clauses Acts are incorporated, and it is provided that the several words and expressions to which by the Public Health Acts meanings are assigned shall in that Act have the same respective meanings. And it is provided by section 51 (1) that 'for the purpose of working any of the corporation tramways by mechanical power . . . the corporation may subject to the provisions of this Act construct lay down place erect maintain renew and repair on in over or under any street or road in which any corporation tramways are for the time being laid,' certain works and appliances, including poles and posts, and the defendants are further empowered to 'make such alterations in any existing tramways of the corporation and execute all such works on and in connexion therewith as may be necessary or expedient for adapting the same to be worked by mechanical power.'

"By section 4 of the Public Health Act, 1875, the word 'street' is to include 'any highway . . . and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not.' It is admitted that the roadway of the Chepstow Road and the footpaths on each side of it are together

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a street within this definition. The defendants contend that by section 149 of the Public Health Act, 1875, the Chepstow Road, including the pavement in front of the plaintiff's house and the place where the pillar has been fixed, became vested in them, and that they are therefore empowered by section 51 of their Act of 1900 to erect the pillar in question in the place where they have erected it without obtaining the consent thereto of the plaintiff and without making him any compensation therefor. I think that this, which is the defendants' first defence to the action, is disposed of by authority. It has been decided by a series of cases, beginning with *Coverdale v. Charlton*, 4 Q. B. D. 104; 48 L. J. Q. B. 128, decided by the Court of Appeal in 1878, to *Baird v. Tunbridge Wells Corporation*, decided by the Court of Appeal, 1894, 2 Q. B. 867; 64 L. J. Q. B. 145, and affirmed by the House of Lords, 1896, A. C. 434; 65 L. J. Q. B. 451, that by section 149 of the Public Health Act, 1875, the local authority become the owners of so much of the soil of a street as is necessary for the ordinary user of the street and not of anything more. In the *Tunbridge Wells* case the streets were vested in the corporation in the same way and under the same section of the Public Health Act, 1875, as in the present case, and they were empowered by a special Act to erect lavatories in any street, and it was held that the subsoil in the street did not belong to them, and that they had not any right to excavate the soil and erect lavatories below the surface of a street. The present Lord Chancellor, speaking of the section in question, said that it vested in the corporation the street *quâ* street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining it and using it as a street, and the late Lord Herschell says: 'It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control protection and maintenance of the street as a highway for public use.' In the present case I think the placing of an iron pillar is not necessary for the purposes so mentioned. But then it is said that the defendants are empowered to do this by section 51 of their Act of 1900. Upon this point the observations of Smith L.J. in the *Tunbridge Wells* case in the Court of Appeal are, I think, conclusive. His Lordship says (1894, 2 Q. B., at p. 884): 'Now when a statute enacts that a corporation may erect a building in a street over which they have only a right of way as one of the public, what does that mean? Does it mean that they not only may utilise what the landowner has already dedicated to the public, or does it mean that they may take away from the landowner what he has not dedicated to the public and which still remains his own? It seems to me that the true answer is that it only entitles the corporation

to use what the owner has dedicated to the public, and it does not entitle the corporation to take the landowner's land for nothing; and I should point out if the corporation desire to erect buildings upon another man's lands they can do so by paying for it, for the Lands Clauses Consolidation Acts are incorporated in the Act of 1890, and that Act can be brought into play.'

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"I think, therefore, that the defendants' first defence fails. The only other defence is that as the pillar was erected on August 8, 1902, and the action was not begun until March 30, 1903, the plaintiff is precluded from bringing the action by the Public Authorities Protection Act, 1893. Section 1 of that Act provides that an action brought for any act done in the execution of any Act of Parliament 'shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.' The erection of the pillar is, I think, a continuing injury or damage to the plaintiff, and this defence, I think, also fails. The plaintiff has therefore succeeded. I think, however, that I ought not to grant a mandatory injunction for the removal of the pillar, and what I propose to do is, at the plaintiff's option, either to assess the damage which he has suffered by the defendants' wrongful act, or to do what was done by the Court of Appeal in the *Tunbridge Wells* case, that is, to make a declaration that the defendants are not entitled to the soil in which they have erected the pillar, and that its erection was a trespass upon the plaintiff's property. The defendants must pay the costs of the action upon scale C. If the defendants wish to keep this pillar upon the plaintiff's land they can do so by paying for the right to do so as provided by the Lands Clauses Act."

Macmorran, K.C., and *J. Carver* for the defendants. The point before the Court is shortly whether the defendants had a right to erect this pillar where it was. That depends on whether it was erected in a street. Section 51 (1) of the Newport Corporation Act, 1900, empowers the defendants to "construct lay down place erect maintain renew and repair on in over or under any street or road" in which any corporation tramways are laid, works including "poles" and "posts." This is a street within section 4 of the Public Health Act, 1875, and the judge has found that the public had acquired a right of way over the pavement subject to a certain user by the plaintiff. *Richards v. Kessick* (1888) 57 L. J. M. C. 48, is an authority that houses with a strip of land or pavement in front of them form a street, and that the definition "street" is properly

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applied to property of this kind. The plaintiff may have a right to compensation, but the erection of this pillar is not a trespass: *Goldberg v. Liverpool Corporation* (1900) 82 L. T. 362.

A. T. Lawrence, K.C., and *J. Sankey* for the plaintiff. The defendants have trespassed upon the plaintiff's land. It is not a question here whether there may not have been a dedication of the strip of land as part of the street, but of driving an iron pillar six feet into the plaintiff's land without either notice or compensation: *Farmer v. Waterloo and City Railway*, 1895, 1 Ch. 527; 64 L. J. Ch. 338.

The defendants, although they are undertakers with statutory powers, cannot enter on property unless within the scope of those powers. Section 51 of the Newport Corporation Act, 1900, in one sense includes this area, but yet the defendants must conform to the ordinary law. The area here is the street, and the powers given by the statute allow the defendants to do a great deal as they like in the street, but these powers must be exercised with respect to the ownership of property. Here the defendants actually expropriate the plaintiff of his property, and in consequence the plaintiff can neither form a cellar nor a strong room on his own land. This appropriation by the defendants is directly contrary to the decision of *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451—that the local authority only own so much of the soil of the street as is necessary for the ordinary user and no more. When clothed with statutory powers the defendants can do no more than follow those powers; they cannot extend them, and directly the county court judge found as he did that here there was a trespass, the defendants were out of court.

Macmorran, K.C., in reply. *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128, and *Tunbridge Wells Corporation v. Baird* have no application, but the case is analogous with that of laying a sewer under section 16 of the Public Health Act, 1875; and then the only right of the person whose property is taken is compensation: *North London Railway v. Metropolitan Board of Works* (1859) 28 L. J. Ch. 909; *Hughes v. Metropolitan Board of Works* (1861) 4 L. T. 318.

[*Sankey*. The laying of sewers under the Public Health Act, 1875, is not analogous with what has been done in this case, because the right to compensation in the case of the sewers is given by section 308 of the Public Health Act, 1875, while here the matter is governed by the Lands Clauses Acts, under which notice to treat must be given before the land is taken.]

Cur. adv. vult.

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Jan. 12. LORD ALVERSTONE C.J. This is a question of general importance, and as similar questions may arise in other cases, it is as well that we should say no more than is necessary for the decision of the case actually before us. The point is, shortly, whether the defendants have committed a trespass on the plaintiff's land. Originally his strip of land was separated from the roadway, but subsequently a right of way over the pavement adjoining the roadway was dedicated to the public, subject to any interruption which might be occasioned by placing articles of furniture upon it for sale; and, in my opinion, there can be little or no doubt that as regards the surface that strip of land became a "street" vested in the defendants. Then upon this strip of land thus dedicated the defendants, for the purpose of supporting an overhead electric wire in connection with their tramway line, planted a hollow iron pillar some 30 feet high and about 10 inches in diameter at its base, which penetrates the ground to a depth of some 6 feet. The plaintiff complains that this pillar is sunk in the ground to a depth greater than any that can be vested in the defendants, and to a depth greater than is necessary for the proper user of the pavement or street by the defendants. He contends in the first place that this is such an encroachment upon his property as cannot be justified by statute or otherwise, and that it constitutes a trespass to his land. If that contention be well founded, there can be no doubt but that the judgment of the learned county court judge is correct, and that the plaintiff is entitled to the declaration that the defendants are not entitled to the soil in which they have erected their pillar, and that its erection is a trespass upon the plaintiff's property.

I am of opinion, however, having regard to the provisions of the Newport Corporation Act, 1900, that this contention of the plaintiff cannot be sustained. That Act, which incorporates the Lands Clauses Consolidation Act, 1845, provides by section 51 that for the purpose of working their tramways the defendants may erect "on in over or under any street" poles and posts. Therefore, it appears to me that the defendants had power under that section to erect this pillar on the pavement in question.

The plaintiff, however, further contends that the erection of the pillar amounts to a taking of land within the meaning of section 18 of the Lands Clauses Consolidation Act, 1845, and that since the defendants did not give him notice under that Act of their intention to take land, what they have done here cannot be justified under the Newport Corporation Act, 1900, but of itself constitutes a trespass. I cannot assent to that contention, for in my opinion the erection of

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a pole or post in pursuance of section 51 of the Act of 1900 in a street the subsoil of which belongs to a private owner was never intended to be regarded as a taking of land for the purposes of the Lands Clauses Consolidation Act, 1845. It cannot possibly be said that because the pillar derives its support from the plaintiff's land there has been a taking of land within that statute. I therefore come to the conclusion that the erection of this pillar was not a taking of the plaintiff's land. If the support afforded to the pillar by the land constitutes an injury affecting it, the plaintiff has a remedy under the 68th section of the Lands Clauses Consolidation Act, 1845. But I desire to make it quite clear that in my opinion there has been no taking of the plaintiff's land within the contemplation of the Lands Clauses Acts, and for these reasons I am of opinion that we must allow this appeal.

WILLS J. I am of the same opinion, and for the same reasons.

KENNEDY J. I agree. Under section 51 of the Newport Corporation Act, 1900, the defendants are for the purpose of working their tramways empowered to erect poles or posts on in over or under any street. There can be no doubt that the act of the defendants in erecting this pillar was strictly within the terms of that section. It has been contended for the plaintiff that there is a reservation from the acts the statute empowers the defendants to perform which prevents any interference on their part with the soil not vested in them without the leave or licence of the owner of the soil. I am by no means prepared to assent to that contention, for, in my view, where property is situated within an area such as a street which is under the control of any local authority, even though the property in the soil has not passed to them, yet they may have a right of entry upon it by virtue of statutory powers such as to enable them to do the authorised work. This proposition forms, I think, the basis of the judgment of Chitty J. in *Fareham Local Board v. Smith* (1891) 7 *Times* L. R. 443. I do not think anything to the contrary is to be found in any of the cases referred to by the learned county court judge. The same proposition appears also to be contained in *Taylor v. Oldham Corporation* (1876) 4 Ch. D. 395; 46 L. J. Ch. 105. There the observations of Jessel M.R. referring to the usual clause in local Acts vesting sewers in a sewer authority seem to imply that although the subsoil of a street may not be vested in the local authority, yet they have certain rights of using it in the exercise of their statutory powers. I am therefore of opinion that the defendants have performed these acts within the area subject to their authority, that what they have done does not amount to a trespass to the subsoil, and that, having regard to the place in which they have erected this

pillar, it is impossible for the plaintiff to maintain an action of trespass against them. I am further of opinion that the erection of the pillar is not a taking of land, but the exercise of a statutory right. If the property of the plaintiff has been injuriously affected he will no doubt be entitled to compensation under section 68 of the Lands Clauses Consolidation Act, 1845. Were our decision to be otherwise, every local authority would be bound to give notice under section 18 of that Act whenever in the execution of their powers under a local Act they find it necessary or expedient to penetrate below the surface of a street the subsoil of which is not vested in them.

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Appeal allowed.

Solicitors for the plaintiff—Ley, Lake and Ley, for Morgan & Co., Newport.

Solicitors for the defendants—Cole and Jackson, for A. A. Newman, Newport.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

The above case proceeded on the footing that the strip of land which had been thrown open to Chepstow Road by the plaintiff's predecessor in title had been dedicated to the public, subject to a right reserved to obstruct the passage by articles exposed for sale, and that, in consequence of this limited dedication, the strip was vested in the defendants as a street under section 149 of the Public Health Act, 1875.

There are, however, considerable difficulties in the way of the conclusion that the strip really was so vested.

It seems that there can be a dedication of a highway, subject to a right reserved of the character in question (see *Le Neve v. Mile End Old Town Vestry* (1858), 8 E. & B. 1054; 27 L. J. Q. B. 208; 4 Jur. (n.s.) 660; *Morant v. Chamberlin* (1861), 6 H. & N. 541; 30 L. J. Ex. 299; *Gerring v. Barfield* (1864), 16 C. B. n.s. 597; *Jones v. Matthews* (1885), 1 Times L. R. 482; *Leicester Urban Sanitary Authority v. Holland* (1888), 57 L. J. M. C. 75; *Reg. v. Londonderry Justices*, 1902, 2 Ir. R. 266), though the point is perhaps not altogether free from doubt. Taking it, however, that there can be such a dedication, it still seems open to very grave doubt whether, assuming that all the material facts are stated in the learned county court judge's judgment, the proper inference in the above case would not have been rather that there had been no dedication at all than that there had been a limited dedication.

Even if it is assumed that there was dedication of the strip, and that the limited nature of the dedication is for this purpose immaterial, it seems by no means necessarily to follow that the strip vested in the defendants.

The streets vested in the urban authority by section 149 of the Public Health Act, 1875, are: "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district." Streets which are not highways repairable by the inhabitants at large are not vested, though there may have been the fullest dedication. Apparently, therefore, the assumption that the strip in question had vested in the urban authority, involves the assumption that the liability of the inhabitants at large had attached to it. It is, of course, familiar that section 23 of the Highway Act, 1835 (5 & 6 Will. IV., c. 50), in general prevents a newly-dedicated highway from becoming repairable by the inhabitants at large, unless and until it is formally adopted under that section or under some other enactment in that behalf, such as section 152 of the Public Health Act, 1875 (see *Reg. v. Dukinfield Inhabitants* (1863), 4 B. & S. 158; 32 L. J. M. C. 230), though there are exceptions where the

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liability of the inhabitants attaches, as before the Act of 1835, without such formality, *e.g.*, where a turnpike road has remained open after the expiration of the trust, or a highway has been formed under statutory powers by the local authority (see *Reg. v. Thomas* (1857), 7 E. & B. 399; 3 Jur. (n.s.) 713; 5 W. R. 321; *Kingston-upon-Hull Local Board v. Jones* (1856), 1 H. & N. 489; 26 L. J. Ex. 33; 2 Jur. (n.s.) 1193; 5 W. R. 161; *Leigh Urban District Council v. King*, 1901, 1 K. B. 747; 70 L. J. K. B. 313; 83 L. T. 777; 65 J. P. 243, per Phillimore J.). There was no suggestion that there had been any formal adoption of the strip in the above case. And it cannot have become repairable by the inhabitants at large unless section 23 of the Act of 1835 is to be construed as not applicable to a mere widening of an existing highway already repairable by the inhabitants at large. There is a good deal to be said in favour of this interpretation; but the question does not appear at present to be really touched by authority. There are one or two cases in which it has been assumed that on the widening of a highway repairable by the inhabitants at large by the voluntary addition of strips of land by the adjoining landowners, the added strips did not become repairable by the inhabitants at large (see *Richards v. Kessick* (1888), 57 L. J. M. C. 48; 59 L. T. 318; *Evans v. Newport Urban Sanitary Authority* (1889), 24 Q. B. D. 264; 59 L. J. M. C. 8; 61 L. T. 684; 38 W. R. 400; 54 J. P. 374), but the point never seems to have been considered. In the above case again there was no argument on the point, and though Lord Alverstone C.J. no doubt said that in his opinion the strip was vested, it seems to have been immaterial to his judgment whether it was so or not so long as it was "street." It seems, accordingly, that the question whether on the voluntary widening of a highway by the adjoining landowner, the liability of the inhabitants at large attaches to the whole highway as widened, or remains confined to the original width of highway, must be regarded as remaining quite open.

It may be added that, on the authorities, there is some ground for arguing that the reservation of a right of obstruction on the dedication of a highway may prevent the highway from vesting as a street in the urban authority or even from being "street" at all for statutory purposes. Thus in *Le Neve v. Mile End Old Town Vestry*, *supra*, there were in a public road in London spaces intervening between the footways and carriageway, which had been, as it was held or assumed, dedicated as highway subject to reserved rights of obstruction; and it was held that the local authority could not cause obstructions to be removed from the spaces under provisions in the Metropolis Management Act, 1855, dealing with "streets," on the ground that the open spaces were not "streets" within that Act. And somewhat similar decisions were given in *McIntosh v. Romford Local Board* (1889), 61 L. T. 185, and *Chelsea Vestry v. Stoddard* (1879), 43 J. P. 782. Perhaps, however, these cases may be explained as going no further than to show that statutory powers as to "streets" will not as a rule, at all events in the absence of provisions for compensation, prevail against special private rights over such streets.

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EASTBOURNE CORPORATION v. ATTORNEY-GENERAL.

Revenue—Stamp duty—Purchase of property under authority of statute—Purchase of specific property authorised by local Act—Production of instrument of conveyance—Default of production—Duty on entire consideration for sale authorised including price of personal chattels—Finance Act, 1895 (58 & 59 Viet. c. 16), s. 12.

Divisional Court,

May 10, 1901

Court of Appeal,

Nov. 28, 1901.

House of Lords,

Feb. 12, 15, 1904.

The provision in section 12 of the Finance Act, 1895, that where by virtue of any Act any person is authorised to purchase property, such person shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable on a conveyance on sale of the property is not confined to real property, but in the case of a purchase under such statutory authority as is contemplated by the section extends to the whole of the property, personal as well as real, which the purchaser is empowered to purchase.

Held, therefore, that a municipal corporation who were empowered by an Act to purchase the undertaking of a particular electric light company, comprising both real and personal property, and who purchased such undertaking accordingly, were liable under the section for ad valorem stamp duty on the whole consideration, and not only on so much thereof as related to the realty.

SPECIAL case stated by consent pursuant to Order LXVIII., r. 2, and Order XXXIV., r. 1, in a proceeding commenced by information preferred on behalf of the Crown against the Eastbourne Corporation, as follows:—

1. This is an information on behalf of the Crown to recover £443 15s. and interest for duty claimed under section 12 of the Finance Act, 1895, in respect of a purchase of property by the defendants under statutory power as hereinafter mentioned.

2. On April 19, 1899, an agreement was entered into between the Eastbourne Electric Light Company, Limited (thereinafter and hereinafter called the Company), and the defendants (thereinafter called the Corporation).

3. It was recited in the said agreement that the Company under the Eastbourne Electric Supply Order, 1890, confirmed by the Electric Lighting Order Confirmation (No. 8) Act, 1890, had acquired land and erected electric lighting works and provided plant, machinery, mains and other appliances, and had been supplying electrical energy within the area specified in the said Order.

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4. Clause 1 of the said agreement was as follows :—

“ Subject to the provisions hereinafter contained the Company will sell and the Corporation will buy the whole of the undertaking of the Company under the said Order and all the powers rights and privileges thereby conferred on the Company together with the full benefit of all pending contracts and engagements to which the Company are or may be entitled in connection with the said undertaking, together with the freehold piece of land and the building erected thereon situate in Junction Road, Eastbourne, aforesaid with all the works engines and fixed and movable plant and machinery wires cables pipes instruments utensils tools and all other goods chattels and effects belonging to the said Company which now are or shall at the time of completion of the said purchase be used and provided by the Company for the purposes of the said undertaking save and except all depreciation and other reserve funds cash balances book and other debts earnings rights and credits belonging or due to the Company at the time of such completion and the Company's books and papers and the furniture of their board room.”

5. By clause 2 it was agreed that the consideration for the purchase should be the sum of £82,135 in addition to the sums thereafter and hereinafter mentioned, provided always that if the Corporation agreed to take into their employment either the manager or secretary of the Company upon such terms as should be agreed upon between the Corporation and the said manager and secretary respectively, then the Corporation should be entitled to deduct from the said purchase-money the sum of £2,000 in the proportion of two-thirds thereof in respect to the manager and one-third thereof in respect to the secretary so agreed to be taken into the employment of the Corporation for the loss of office. The Corporation did not take either the said manager or the said secretary into their employment, and no part of the said £2,000 became deductible.

6. By clause 3 it was provided that the purchase should be completed and the purchase-money paid on January 1, 1900, on which day the Company would convey their freehold premises to the defendants, and also assign or deliver over to them all the remainder of the premises agreed to be sold.

7. By clause 4 the Company were to carry on the undertaking as a going concern until the day of completion, and by clause 5 the defendants were to pay for all new plant and machinery provided since December 31, 1898, and for certain additional capital outlay which might be incurred by the Company before completion; the amount which became payable under this provision was £6,614 2s. 9d.

8. Of the two sums of £82,135 and £6,614 2s. 9d., together making £88,749 2s. 9d., the consideration for the sale as aforesaid, £37,929 was in respect of goods, wares, and merchandise.

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9. By section 3 of a Provisional Order subsequently granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, to the defendants it was provided as follows:—

“ 3. (1) This Order shall not except as provided by this section come into force or have effect notwithstanding the confirmation thereof by Parliament until such date as the Board of Trade fix in accordance with this section and the date so fixed is in this Order referred to as ‘the commencement of this Order.’

“ (2) The Board of Trade shall fix a date for the commencement of the Order when they are satisfied that the Undertakers have completed the purchase of the undertaking of the Eastbourne Electric Light Company Limited under the Eastbourne Electric Supply Order 1890 in accordance with the agreement made between that Company of the one part and the Undertakers of the other part dated the 19th day of April 1899 or any further agreement made between the Company and the Undertakers necessary or expedient for enabling the original agreement to be carried into effect.

“ (3) As from the commencement of this Order the Eastbourne Electric Supply Order 1890 (confirmed by the Electric Lighting Orders Confirmation (No. 8) Act 1890) shall be revoked without prejudice to anything done or suffered or any liability to a penalty or otherwise incurred or to the prosecution of any legal proceedings thereunder.

“ (4) The Undertakers shall have power to buy and the Eastbourne Electric Light Company Limited shall have power to sell the undertaking of the Company in conformity with this section and for that purpose this Order shall come into force and have effect on the day when the Act confirming this Order is passed.”

10. By section 4 it was provided that the Undertakers for the purposes of the Order should be the defendants.

11. By section 2 of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, passed July 13, 1899, the above-mentioned Provisional Order was confirmed, and it was enacted that all the provisions thereof should from and after the passing of the Act have full validity and effect.

12. The purchase provided for by the said agreement of April 19, 1899, was duly completed on January 1, 1900, payment of the purchase-money being made as to £88,135 on that day, and as to the balance, £614 2s. 9d., on the 27th February following. It is to be taken that

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the defendants have been always ready and willing to produce to the Commissioners of Inland Revenue an instrument of conveyance stamped with *ad valorem* duty upon the consideration excluding the £2,000 in paragraph 5 hereof mentioned, and excluding the £37,929 in respect of goods, wares, and merchandise in paragraph 8 hereof mentioned, and that if the production of such a conveyance so stamped would have been a compliance with the requirements of section 12 of the Finance Act, 1895, the defendants have committed no default. Save as aforesaid no conveyance has been produced under the said section.

13. The said agreement and the Provisional Orders and Acts hereinbefore referred to and the above referred to conveyance and the correspondence between the Commissioners of Inland Revenue and the defendants, copy of which is annexed hereto, may be referred to as part of this case.

14. The Attorney-General contends that by virtue of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, confirming the Provisional Order granted to the defendants as hereinbefore mentioned, the defendants were authorised to purchase the property comprised in the said agreement of April 19, 1899, and were therefore bound within three months of the completion of the said purchase, that is to say on April 1, 1900, *i.e.*, within three months of January 1, 1900, to produce an instrument of conveyance of the whole of the said property, including chattels, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of such property, that is to say with a duty of £443 15s., or 5s. for every £50 of the sum of £88,749 2s. 9d., such sum being arrived at by adding together the sum of £82,135 mentioned in paragraph 5 hereof, and the sum of £6,614 2s. 9d. mentioned in paragraph 7 hereof, the whole of which sum of £88,749 2s. 9d. the Attorney-General contends to be consideration for such sale. The Attorney-General further contends that under the circumstances a default has been made within the meaning of section 12 of the said Act, and that the duty claimed with interest at 5 per cent. from the date of completion is a debt due to His Majesty from the defendants.

15. The defendants contend—

(1) That no duty is payable on the sum of £37,929 mentioned in paragraph 8 hereof.

(2) That no duty is payable on the sum of £2,000 mentioned in paragraph 5 hereof.

The question for the Court is whether *ad valorem* duty on so much of the consideration as represented goods, wares, and merchandise, *viz.*, £37,929, and on the sum of £2,000 referred to in paragraph 5 hereof, is recoverable or not. If the decision is in the affirmative on

either or both points judgment is to be entered for the Crown for the amount recoverable with interest. If the decision is in the negative on either or both points judgment is to be entered for the defendants upon that point or points. The costs to be in the discretion of the Court.

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Section 12 of the Finance Act, 1895 (58 & 59 Vict. c. 16), is as follows :—

12. Where after the passing of this Act, by virtue of any Act whether passed before or after this Act, either—

(a) any property is vested by way of sale in any person ; or

(b) any person is authorised to purchase property ;

such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property ; and in default of such production, the duty with interest thereon at the rate of five per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person.

The case came before the Divisional Court on May 10, 1901, when the *Solicitor-General* (*Sir E. Carson, K.C.*) and *S. A. T. Rowlatt* appeared for the Crown, and *J. Ritchie Macoun* for the defendants. The case is reported, 1901, 2 K. B. 773 ; 70 L. J. K. 1046. The following judgments were delivered :— *

KENNEDY J. It appears to me, having listened to the very careful argument addressed to us by the subject in this case, that the contention of the Crown is right. The Eastbourne Electric Light Company, Limited, entered into an agreement in 1899 in which it is recited that the Company had "acquired certain freehold land and buildings and erected thereon electric lighting works and provided and set up plant and machinery and laid down mains wires pipes and other appliances for that purpose and have for several years past been supplying electrical energy for public and private purposes within the area." After that recital it was there provided that the Corporation should buy, subject to certain provisions contained in the agreement, the whole of the undertaking and all the powers, rights, and privileges conferred on the Company with the benefit of all contracts and engagements together with land and all their works and plant and machinery and so on. To keep to the question as to the goods first, it must also be taken for the purposes of to-day—and I suppose simply for the purpose of raising this contention, which the Corporation of Eastbourne wish to raise—that you

* The judgments in the Divisional and in the Court of Appeal are taken substantially verbatim from the shorthand notes of the proceedings.

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can apportion the contract price mentioned in that agreement, which is said to be £82,135 subject to certain deductions (which I need not refer to at this stage)—that £37,929 is to be taken as being the portion of the total purchase-money which might be attributed to goods, wares, and merchandise. As to the total sum, I should say I was wrong in saying £82,135, it is £82,135 and also a sum of £6,614 odd, which was paid by the Company for plant and machinery provided since December, 1898, and certain further expenditure which might be incurred by the Company before the necessary sanction was obtained, and the whole arrangement carried through and completed. Well, afterwards, there was an Act obtained confirming the Provisional Order under which that agreement was confirmed. Then comes the question of carrying out that agreement; and for the purpose of carrying out that agreement a conveyance is executed; and the question is upon what amount the stamp on that conveyance ought to be calculated; and to me it seems plain under the Finance Act, 1895, section 12: "Where after the passing of this Act, by virtue of any Act whether passed before or after this Act, either—(a) any property is vested by way of sale in any person; or (b) any person is authorised to purchase property; such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act," which authorises the transaction, "and an instrument of conveyance of the property . . . duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property." That clearly to my mind means that wherever a conveyance is produced, it is to be duly stamped with the *ad valorem* duty payable upon a conveyance on sale on the sale of the property which is authorised to be conveyed by the Act of Parliament. What was authorised here was the property for which the sums of £82,000 and £6,600 were the consideration; and I decline altogether to see any way by which you are to take out of that £37,929 worth of goods which are included in the conveyance in fact, it being conceded that if you do execute an instrument of conveyance of goods that instrument must be stamped with an *ad valorem* duty stamp, and therefore in this case with a duty, it appears to me, clearly including the value of the goods. It has been suggested, and that appears to be the real argument, that all that is meant is a conveyance of so much of the property as requires to be included in a conveyance in order that the property may be transferred; and requires therefore to be included in an instrument bearing an *ad valorem* stamp; and that is, as qualified by the agreement, that the sale of goods or merchandise does not require an *ad valorem* stamp—does not require to be in the stamped agreement; and therefore the goods ought not to

be treated as being the subject of the conveyance in this case so far as stamp duty is concerned. I think that argument is wrong. I think it is plain that by this Act it was intended that where Parliament requires for the validity of the transaction a conveyance of property, and that property is in fact conveyed in an instrument of conveyance, *ad valorem* duty must be paid.

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There is a second point here raised with regard to the £2,000. That £2,000 was a sum, an amount by which the payment under the agreement might have been reduced if the Corporation of Eastbourne were willing to take over and continue in their service as the electric lighting authority and providers the manager and secretary of the Electric Lighting Company. They did not take them over; the contract price was not reduced, and I see no reason whatever for not including that sum also in the amount on which the stamp must be paid.

PHILLIMORE J. I am of the same opinion. The stamp duty required by the Finance Act, 1895, is this, that where any person is authorised to purchase property by virtue of any Act of Parliament, he shall within three months produce a conveyance of the property which he is authorised to purchase duly stamped. Here the Mayor and Corporation of Eastbourne are authorised by Act of Parliament to purchase the property of this electrical company including realty and personalty. Being so authorised by Act of Parliament they were required within three months to produce an instrument of conveyance not of part of that property, but of all that property; and inasmuch as they have to produce a conveyance of all that property they must pay the stamp upon all that property. Now, personal property—ordinary personal chattels—may as a rule pass by delivery; then there is no instrument, and therefore no stamp. If for any purpose the passing of personal property requires an instrument, that instrument has to be stamped in the same way and in the same proportion as an instrument conveying realty.

As to the other point I have nothing to add to what my learned brother has said.

The defendants appealed to the Court of Appeal, where the case was heard on November 28, 1901. The case in the Court of Appeal is reported, 1902, 1 K. B. 403; 73 L. J. K. B. 181.

Dankwerts, K.C., and *J. Ritchie Macoun* for the appellants. It is clear that some limitation must be placed on the "property" which is brought within section 12 of the Act of 1895. A public authority such as a highway board can only acquire property by reason of statutory powers, and unless some limitation were placed on section 12, such a

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transaction as the purchase of lamp-posts would come within the section, and a stamped conveyance would have to be produced. The reason for this legislation suggests the proper limitation. It was enacted to meet cases like that of railway companies acquiring property but taking no conveyance: *Great Western Railway Co. v. Inland Revenue Commissioners*, 1894, 1 Q. B. 507; 63 L. J. Q. B. 405. The section was not intended to impose any new taxation, but only to enable the Crown to get hold of duties to which it had been entitled before the passing of the statute. It is only applicable where a conveyance is necessary to pass the property, and was not intended to alter the law as to the passing of chattels, which pass by delivery, and as to which no conveyance is necessary. The mere fact that in this particular case the chattels are included in the conveyance cannot affect the matter so as to make them liable to duty on conveyance. The argument for the Crown imports into the Act a duty which would not otherwise be imposed, contrary to the principles that should govern the construction of a taxing Act: *Tennant v. Smith*, 1892, A. C. 150; 61 L. J. P. C. 11; *In re Micklethwaite* (1855) 11 Ex. 456.

The Solicitor-General (Sir E. Carson) and S. A. T. Rowlatt for the Crown. The limitation which should be applied to the Act is that it relates to specific property vested by statute, or which a person is authorised by statute to purchase. This excludes the difficulty suggested by the argument as to the purchase by public bodies of chattels necessary for carrying on their business. The section refers to one sale of property authorised by statute to be purchased. That is clearly the meaning of sub-division (a) of section 12, and the word "property" has the same meaning in each of the sub-divisions (a) and (b). From this point of view the real property and the chattels purchased by the Corporation come within the section. The only distinction between (a) and (b) is as to the machinery adopted to obtain the duty.

COLLINS M.R.* I am of opinion that this appeal must be dismissed. The case arises in this way. A certain Corporation acquired power to take by purchase the undertaking of an electric light company, and part of that undertaking embraced partly freehold and, to a very large extent, chattels; and the value which the purchasing Corporation have put on the chattel part of the undertaking amounts to £37,929. Now the revenue authorities claim (under the provisions of an Act which I will refer to in a moment) that the Corporation, having acquired this power to purchase, should produce within a given time a conveyance

* The judgments in the Court of Appeal as well as in the Divisional Court are taken substantially verbatim from the shorthand notes of the proceedings.

setting out the whole consideration, and with the obligation of having it stamped in respect of the whole of that consideration. The Corporation, while willing to produce a conveyance stamped only as regards that part of the subject-matter which was subject to conveyance, denied liability to stamp it to any higher extent so as to embrace that part of it which was composed of chattels or dealt with chattels.

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Now the Act of Parliament under which the Crown claim is this. It is section 12 of the Finance Act, 1895. It is in these terms: "Where after the passing of this Act, by virtue of any Act whether passed before or after this Act, either—(a) any property is vested by way of sale in any person; or (b) any person is authorised to purchase property; such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's Printer of Acts of Parliament or some instrument relating to the vesting in the first case" (that is (a)), "and an instrument of conveyance of the property in the other case" (that is (b)), "duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property; and in default of such production, the duty with interest thereon at the rate of five per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person."

Upon that the case was brought before the Divisional Court, and my brothers Kennedy and Phillimore held that the Crown were right, and that it was the duty of the Corporation to produce a conveyance stamped with the whole of the *ad valorem* stamp payable as upon the whole consideration real and personal—embraced in the purchase by them from the electric light company. Now Mr. Danckwerts, in a very ingenious argument before us, contends that that is wrong. He says, —his broad contention is—that the wording of this statute is so wide, inasmuch as it uses the word "property" generally, without any limitation at all, that taken in its natural interpretation, it must embrace all sorts of transactions which it could not possibly be supposed the Legislature intended to embrace, for instance, the right in statutory bodies to purchase chattels from time to time required, such as the right of public authorities to purchase lamp-posts, and he gave us a number of other instances of the same kind, and he says: Taking the wording of this statute as it stands, that is a case where a person is authorised by an Act, passed before in some cases, but whether passed before or after, that is an Act authorising that person to purchase property; and therefore, strictly construed, it might involve this, that the local authority or whatever the body that have to deal with it may be called, may be

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called upon to produce a conveyance for the lamp-posts and all those matters, which would be a ridiculous result, and therefore cannot have been intended. Therefore, says he, you must put some limitation on the word "property" as contained in this Act; and, says he: Where is that limitation to be put? He says: It is to be drawn thus—that this is an Act not for imposing taxation, but simply for collecting taxation already imposed elsewhere; and that inasmuch as before the passing of this Act if any person having bought a property—partly real and partly personal—chose to take a conveyance for that he had to stamp it according to the *ad valorem* value; and that is what is exactly dealt with in the first section (a) in this Act; but that if a person bought property, partly real and partly personal, he was under no obligation to take a conveyance of any part of that which passed by delivery, the chattels; if he chose to take up a conveyance he must pay for it, but he was not bound to do it. On the other hand, as to the real property—that which he wanted to secure himself—he had in all probability to take a conveyance, and taking a conveyance he paid only the *ad valorem* duty upon the value of that which he was purchasing therein. He says that the Act is not intended to impose further liability, to compel a person to take a conveyance of chattels if he does not require to do so, and in that sense put himself in a worse position than before the passing of the Act; therefore, he says, if you are going to put a limitation at all you must put the limitation in such a way as to leave the parties in exactly the same position as they were before the passing of the Act, so far as any imposition of further duties goes.

Then Mr. Danckwerts argued (and I agree with him) that certainly you must put some limitation upon the word "property" in subsection (b) of this section. But it seems to me that by reading the whole section together—(a) and (b) and the rest of the section—you do get a limitation arising upon a fair construction of that section taken altogether; and, if it does result in some additional taxation being imposed, it seems to me that the result arises from a fair construction of all the parts of the same section taken together. It is not the case pointed at in the observations of Lord Halsbury that have been just referred to and other observations of Lord Cairns in other cases—where you are trying to import into the Act something that will impose a duty that is not otherwise imposed. Here we begin with words large enough to impose the duty upon a very, very large area, and it is the opposite process we are engaged in here—we are cutting down the words to limit the area of taxation to some natural and fair limit capable of being gathered from the words and their context. Now what is the governing factor of this legislation? Obviously it is dealing with the case of a purchase of something that I may describe as an "under-

taking"—an ascertained subject-matter which either has to be purchased under the power of an Act of Parliament or for the acquisition of which by purchase power is taken under an Act of Parliament; and it is with that, it seems to me, that it is dealing in both cases.

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Now in the first case where any property is vested in a person by way of sale under an Act of Parliament, upon that, whether he likes it or not and whether it is partly chattels and partly real estate or not, he is compelled to pay the duty as upon the whole consideration. Now suppose instead of taking it by virtue of the Act itself he simply acquires power to take it, why should he in common sense, having regard to the nature of the subject-matter which the Legislature has given him, be in a different position or relieved because he takes power to purchase and does not actually acquire? Why should he be relieved of the obligation of paying any part of the duty which he must pay under this legislation in respect of the same subject-matter had he taken it directly by the operation of the Act itself? I agree that it has put a person who takes the right to purchase in respect of his conveyance in a somewhat different position from what he would have been in before, the difference I have just pointed out and that Mr. Danckwerts dwelt upon. But is it to be supposed that the Legislature had not that definitely in its mind and that it did not intend (the words are certainly large enough to cover it) in these large transactions of large ascertained property that the persons who took the right to purchase should not pay upon it the stamp duty levied on the whole value of the thing? It seems to me when you take the two sections together there (*a*) and (*b*), the two sub-divisions of the section, that the Legislature is dealing with the same class of property; and when it goes on to speak of the conveyance it is dealing with a conveyance of that class of property; when they say "an instrument of conveyance of the property in the other case, duly stamped" they are dealing with the same subject-matter, which has been treated differently, as a matter of machinery, in process of transferring it from the vendor. It seems to me, therefore, on these grounds that we are not putting any strain upon the words of the section to read it in the way I have described. It therefore seems to me in this case that the judgment of the Divisional Court was right, and that the appeal ought to be dismissed.

STIRLING L.J. I am of the same opinion. It is conceded on both sides that some limitation must be placed on the meaning of the word "property" in case (*b*) of this enactment. Two alternative limitations have been proposed. On behalf of the appellants in the present case it is proposed to limit "property" to such property as would in the ordinary course of completion of a contract of purchase be the subject of conveyance by deed. On behalf of the Crown it is said that the

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proper limitation is, property specifically defined by the Act of Parliament which is referred to ; and we are to determine as a matter of construction which of these is the right contention. Now I come to the conclusion that the limitation contended for on behalf of the Crown is the proper one ; because I think one ought to read the word "property" throughout, in the section, in the same sense ; and when we look at case (a), referred to in the 12th section, we find that clearly we must attribute to the word "property" there the meaning of property specifically defined by the Act which is vested by way of sale under the Act in any person. It was not intended in case (a) that the "property" should be limited to property which in the ordinary course of the completion of the purchasing contract would be the subject of a conveyance. For the short reason I have stated I think the appeal fails.

MATHEW L.J. I am of the same opinion. Mr. Danckwerts' argument was this, that when you are dealing with section 12, subsection (b), which says : "Where any person is authorised to purchase property," "property" there is spoken of as meaning landed property. It would be an extraordinary conclusion to come to when we see that the word "property" is used throughout apparently in the same sense. What is the meaning of the section ? It is perfectly clear, it seems to me, that what was intended to be dealt with was specific property acquired or vested under special statutory power—applicable, therefore, to the transaction in question. Now, how is that property dealt with ? In subsection (a) there is a provision that a stamp duty shall be imposed on "a copy of the Act printed by the Queen's Printer of Acts of Parliament or some instrument relating to the vesting in the first case." What is that duty ? The duty is "the *ad valorem* duty payable upon a conveyance on sale of the property." Then when we come to subsection (b), the property dealt with there is to have the same *ad valorem* duty stamped upon it as "upon a conveyance," the strongest possible indication, it seems to me, that both those subsections were meant to deal with property of the same description—certainly specific as to subsection (a) ; clearly specific, it seems to me, as to subsection (b). Therefore I agree that the appeal must be dismissed.

The defendants appealed to this House.

It may be mentioned that in the respondents' "case" in the House of Lords the question involved in the appeal was said to be "whether under the above enactment it is necessary that a person authorised by Act of Parliament to purchase property should produce a conveyance of property the property in which does not legally require to be transferred by means of a conveyance but may be legally transferred without a written conveyance, as, for example, by delivery or otherwise."

Danckwerts, K.C., and *Macoun* for the appellant corporation repeated their argument before the Court of Appeal.

The Solicitor-General (Sir Edward Carson, K.C.) and *S. A. T. Rowlatt* for the Crown were not called upon to argue.

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THE EARL OF HALSBURY L.C. My Lords, we have had a very long and ingenious argument on this question, which seems to me to be a very plain one. I certainly do not mean to go through all the different and ingenious hypotheses which have been put forward in order to show that the plain words of the Act of Parliament may be cut down and reduced to an absurdity. I think so far as there is any argument at all, the whole question turns upon the word "conveyance," and, although with some hesitation and a considerable amount of circumlocution, the learned counsel has addressed to us what I must admit to be a learned and ingenious argument, which simply comes to this: that the statute is intended in its operation to apply only to land, or what would be equivalent to land in its natural sense. But as I have before said, the whole of that argument seems to depend upon the use of the word "conveyance," which he says only means, according to the technical view of that question, a conveyance of land or realty in some form, whether it be land or not. My answer to that is that it is not true. The word "conveyance" means what it says; it conveys any property. I find in Wharton's Law Lexicon that he defines it as "an instrument that transfers property from one person to another." That is all; and although it may be perfectly true to say that where you are dealing with personal property it may pass and does pass completely by mere delivery, it is a very illogical consequence of that proposition to suggest that it may not pass in any other way, and that you may not convey it by an ordinary conveyance. I think you may.

My Lords, I think that really disposes of the whole argument. When I look at the statute itself and see what it does, I am content to apply it to the particular facts with which your Lordships have to deal. It seems to me that it would be impossible to say, having regard to the particular facts with which your Lordships have to deal, that the case is not included in the language of the statute. We have heard a great deal about confusion, about ambiguity, and about alternative constructions; but when I apply the language of the statute to the transaction which is engaging our attention, it appears to me to be as clear as possible that in the ordinary natural meaning of the words therein employed the statute does apply to this transaction.

My Lords, I decline to go into hypotheses about other cases in which it might be supposed that this language would be too wide and

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would include something else. It is enough for me to say that as applicable to this particular transaction the words seem to me to be absolutely clear, without confusion and without any alternative construction at all, and to apply literally and strictly to the transaction in question.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed, with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also am of the same opinion. It appears to me that the very purpose of the Act of 1895 was to enlarge the subject of taxation so that personal property bought by sale should be liable to duty just as heritable property was previously liable. The Act, I think, succeeded in its purpose, and I agree in the opinion of their Lordships in the Court below and with my noble and learned friend on the Woolsack and Lord Macnaghten that the judgment must be affirmed and the appeal dismissed.

LORD LINDLEY. My Lords, I am of the same opinion. I think the case becomes absolutely clear if you read the section shortly, leaving out the words which are not applicable to the present case. The section runs thus: Where after the passing of this Act by virtue of any Act, whether passed before or after this Act . . . any person is authorised to purchase property; such person shall within three months . . . after the completion of the purchase . . . produce to the Commissioners of Inland Revenue . . . an instrument of conveyance of the property"—that is of the property which the purchaser is authorised by an Act of Parliament to purchase—"duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property." Now what is that? What is the property of which an instrument of conveyance is to be produced, and what is the property the *ad valorem* value of which is to govern the stamp? It is obviously the property which the purchaser is authorised by an Act of Parliament to purchase. I think it is plain beyond all question that this Act was not intended to affect ordinary purchases made in the ordinary course of business. It was confined, and intended to be confined, to purchases expressly authorised by some special Act of Parliament, the property being, if not accurately defined, at all events described in such Act of Parliament. That gets rid of the whole difficulty. There is no ambiguity about it at all. Every word in this section has its natural meaning, and requires no forced construction whatever. The whole fallacy of the argument on the part of the appellants appears to me to be this:—that because personal chattels pass, or can pass by delivery without any instrument at all, you cannot have an instrument of conveyance for them. That is not the case. In this case the Act of Parliament

is addressed to cases where an instrument is required, and being required it must be stamped. The little difficulty, if there is any difficulty about it, arises entirely from not seeing that it does not apply to ordinary purchases in the ordinary course of business, but to special purchases specially authorised.

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Appeal dismissed with costs.

Solicitors for the appellants—Sharpe, Parker, & Co., for H. W. Fovargue, Eastbourne.

Solicitor for the Crown—The Solicitor of Inland Revenue.

Reported by George Brooke, Esq., and Erskine Reid, Esq., Barristers-at-Law.

Note.

As is explained more fully below, before the Finance Act, 1895, it was the practice, for the protection of the Revenue, to insert in local Acts effecting or authorising transactions in the nature of sale and purchase, provisions for the payment of *ad valorem* conveyance duty on the transaction. The insertion of such provisions is now rendered unnecessary by section 12 of the Finance Act, 1895 (58 & 59 Vict. c. 16), the section in question in the above case, by which it is enacted that where, by virtue of an Act of Parliament, (a) any property is vested by way of sale in any person, or (b) any person is authorised to purchase property, such person shall produce to the Inland Revenue Commissioners a copy of the Act, or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped. The section does not apply to all purchase transactions of a local authority merely because such an authority owe their existence entirely to statute, but as will be seen from the judgments in the foregoing case it applies only where the purchase is effected under what may be called the special authority of Parliament. The appeal of the Eastbourne Corporation seems from the outset to have proceeded on a failure to appreciate, on the one hand, that the operation of the section is limited to transactions of this character, and, on the other hand, that it extends to all property, whether real or personal, included in such a transaction.

The case is one of some importance to local authorities—as removing ambiguity and uncertainty—not only in regard to the interpretation of section 12 of the Finance Act, 1895, but also in reference to the general incidence of stamp duty in the case of transactions of sale and purchase, where property such as personal chattels passes to a purchaser. Although such property is capable of passing completely by mere delivery, and the transaction (section 12 of the Act of 1895 not applying) may accordingly be effected without recourse to an instrument at all, in which case, of course, no stamp duty is payable, yet if there is in fact an instrument relating to the sale, that instrument may be liable to stamp duty under one or other of the heads of charge contained in the table which forms the first schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39). If the instrument is an agreement or contract, which does not itself pass the property in the goods, it is not chargeable with *ad valorem* duty under the head “conveyance or transfer on sale,” for the instrument in that case is not a conveyance, and though some agreements for sale are made liable to duty, like actual conveyances, by section 59 of the Act of 1891, subsection (1) of that section excepts, *inter alia*, agreements for the sale of any interest in any “goods, wares or merchandise.” Nor is the contract or agreement, if “under hand only,” chargeable under the head “agreement or any memorandum of an agreement,” for it comes within the third exemption from that head of charge. In the result accordingly the agreement or contract is not liable to stamp duty. If the agreement or contract is under seal, though it is not chargeable with *ad valorem* duty, it is chargeable with 10s. under the

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head "deed of any kind whatsoever, not described in this schedule." If, however, upon the sale of goods the property is passed by an instrument of transfer, such instrument, being a conveyance on sale within the meaning of section 54 of the Act, is chargeable with *ad valorem* duty under head "conveyance or transfer on sale," whether it is under seal or not.

The matter, however, stands otherwise whenever the sale transaction is effected under the special authority of Parliament; for example, where a water, gas, or electric lighting undertaking is acquired by a local authority under a special Act. Prior to the passing of the Finance Act, 1895, it was the practice to insert in such a special Act a clause providing for the payment of *ad valorem* conveyance duty on the transaction. The clause in the special Act would, as a rule, provide for payment of the duty of 5s. for every £50 upon the entire consideration for the property authorised to be purchased. The special Act thus included within the charge of *ad valorem* duty, not only such property as is ordinarily the subject-matter of conveyance duty charge, as being property requiring to be transferred by stamped instrument, but also chattel property, such as movable plant and other effects, falling within the description "goods, wares or merchandise," in section 59 of the Stamp Act, 1891. The necessity for these provisions was done away with by the enactment in section 12 of the Finance Act, 1895, and that section as now interpreted by the House of Lords in the decision above reported, applies so as to require a conveyance to be executed and stamp duty paid in respect of the whole of any property, both real and personal, including chattels such as "goods, wares or merchandise," where the property is "vested by way of sale," or is authorised to be purchased by special authority of Parliament.

Though, as has been pointed out, the above case shows that section 12 of the Act of 1895 does not apply to purchases effected by a local authority under their general statutory powers, such as, to take the example put in argument in the case, the purchase of lamp posts by a lighting authority, it does not follow that the section is confined to cases where the purchase is effected under a special Act or a Provisional Order duly confirmed pointing to specific property. There are numerous transactions such as in the purchase by a local authority of a market undertaking under section 167 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), or of a tramway undertaking under section 43 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), on the expiry of the 21 years there mentioned, which might well be held to come within the section though effected under powers contained in general Acts. Transactions of this kind were not considered in the above case, and the question whether they come within the section is still open. It is, however, understood that in the opinion of the Inland Revenue Commissioners they do come within the section with the result that *ad valorem* stamp duty is payable in respect of chattels forming part of the undertaking purchased.

High Court of Justice.

KING'S BENCH DIVISION.

**WEARDALE AND CONSETT WATER COMPANY v. CHESTER-LE-STREET
CO-OPERATIVE SOCIETY.**

1904.

April 27.

Water—Supply—Extinguishing fires—Charge for water—Fire-plug on private premises fixed at consumer's request—Waterworks Clauses Act, 1847 (10 Vict. c. 17), ss. 38, 42.

The obligation on a water company under section 42 of the Waterworks Clauses Act, 1847, to allow all persons at all times to take and use water for extinguishing fires without making compensation for the same is confined to water passing through mains of the company to which fire-plugs are fixed. And where water is supplied to a consumer through a pipe belonging to him and connected with a main of the company to which no fire-plugs are fixed, the company may charge for water used by the consumer for extinguishing fire on his premises though a fire-plug has been fixed to his private pipe by the company at his request.

APPEAL from the county court.

The action was brought by the plaintiff water company to recover the sum of £15, reduced by consent to £5, for water used by the defendants in July, 1903, in extinguishing a fire in a haystack.

Some 17 or 18 years before the action was brought the plaintiffs had, at the request of the defendants, laid a pipe from their main to a trough in a field belonging to the defendants, and they had since that time supplied water to the defendants for agricultural purposes through this trough at a charge of 16s. a year. There was no express agreement between the plaintiffs and the defendants as to this pipe or the supply of water by means of it.

In 1890, at the request and at the expense of the defendants, the plaintiff company fixed a fire-plug in the pipe near the trough. There was no express agreement between the plaintiffs and the defendants as to the fire-plug or the supply of water to it.

In July, 1903, the defendants used water obtained from the fire-plug for extinguishing a fire in a haystack in the field in question; and the present action was brought in respect of the water so used.

The defendants relied on section 42 of the Waterworks Clauses Act, 1847, which applied to the plaintiff company's undertaking.

The defendants' premises and the road in which the company's main from which the defendants were supplied were situate in the urban district of Chester-le-Street. There was no evidence that any fire-plug was fixed to the main in question.

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The learned county court judge held that the section gave the defendants the right to use the water for extinguishing fire free of charge, and gave judgment accordingly for the defendants.

The material provisions of the Waterworks Clauses Act, 1847, are sufficiently referred to in the judgment of Lord Alverstone C.J.

Meynell (*Manisty, K.C.*, with him) for the plaintiffs. The plaintiffs are, it is submitted, entitled to charge for water used for extinguishing a fire when taken from a fire-plug on private premises. The county court judge held that they are precluded from charging for the water by section 42 of the Waterworks Clauses Act, 1847, which requires the undertakers to keep charged with water under pressure "all their pipes to which fire-plugs shall be fixed," unless prevented as in the section mentioned, and to "allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same." That section, however, is one of a fasciculus of sections beginning with section 38. That section imposes upon the undertakers the obligation of fixing fire-plugs in their pipes upon the request of the "town commissioners"—*i.e.*, now the urban authority—in situations to be determined, in case of dispute between the authority and the undertakers, by two justices; and by section 40 the expense of fixing the fire-plugs is to be borne by the authority. It is submitted that section 42 should be read as referring only to fire-plugs fixed in pursuance of the obligation imposed by section 38. There is no obligation on the company to fix fire-plugs, or to permit the fixing of fire-plugs, in private premises at all. And the result, if it is held that section 42 covers the case of fire-plugs fixed by the company, or with their consent, on private premises, will be that the company will refuse to fix such plugs or permit them to be fixed, which would be highly undesirable.

Simey for the defendants. There is nothing in the Waterworks Clauses Act, 1847, to show that water which the undertakers are to allow to be used for extinguishing fires free of charge is to come from a fire-plug at all. Section 66 of the Public Health Act, 1875, no doubt casts the duty of providing fire-plugs on the urban authority; but that does not prevent the public from using the water of the water company for putting out fires, whether it is obtained through a fire-plug or in any other way, *e.g.*, from a leak in the main or the pipe itself. The construction the plaintiffs seek to place upon section 42 of the Act of 1847 is an extremely narrow one. It was clearly the intention of the section that every facility should be given for obtaining water for extinguishing fires free from charge; and there is nothing in the Act to show that this gratuitously supplied water is to be taken

from a fire-plug. "Such water" in the section means water kept at a certain pressure, and once that is arrived at, the right arises for any person to take the water for that purpose. If he can get water through a leak in the pipe he may do so.

Secondly, apart from section 42, there is no evidence that this bargain between the defendants and the company did not include the use of the water to be supplied by the company for extinguishing any fire occurring on the premises.

Meynell was not called upon to reply.

LORD ALVERSTONE C.J. Water companies are really trading companies carrying on their business under Acts of Parliament, and though of course it is perfectly open to the Legislature to impose such terms as it thinks fit with regard to the free supply of water, I do not think that anyone reading section 42 can come to the conclusion that it means that the water for putting out fires is always to be supplied free of charge. Section 38 says that at the request of the town commissioners the company shall upon certain terms fix fire-plugs for the town commissioners' purposes, and by section 40 the cost of this is to be defrayed by the town commissioners. Then section 42 enacts that "the undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed." So far I think there is no doubt that the section is referring to the legislation in the immediately preceding sections, and that it relates to the pipes of the undertakers in which they are bound by statute to put fire-plugs. Then the section goes on to provide that, except when prevented by certain causes, the undertakers "shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same." I think the ordinary meaning of the language is that the undertakers are bound to keep the water in the pipes at a certain pressure, because of the arrangement made under the earlier sections, and that the water may be taken without compensation. Now it is said that if a private proprietor on his own premises puts in a pipe in order to obtain water to be used for agricultural purposes, he can use it for extinguishing fires for nothing if he gets the water company to fix a fire-plug in it. I think that if such an obligation is to be put upon a trading company, it must be expressed either in clear words or by necessary implication. I think we should be straining the words of the section were we to hold that it applies where the water is supplied through a private pipe or a private hydrant for the consumer's own benefit. We cannot accede to Mr. Simey's argument that because there was an agreement that the plaintiffs should supply water to a cattle trough for an annual

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payment, no charge can be made if the water is used to extinguish fires. In my opinion it cannot possibly be said that that arrangement implies that the defendants can take water and use it for a purpose entirely different from that for which it was supplied. The appeal must be allowed, and judgment entered for the plaintiffs for the £5.

WILLS J. I am of the same opinion. I think that under section 42 the water which is to be used for extinguishing fires must pass through pipes to which fire-plugs are fixed. If Mr. Simey's construction of the Act is correct, the greater part of the section would be quite unnecessary, and it would have been sufficient to say that the company must at all times keep their water throughout their system at high pressure in order to extinguish fires, and that at all times it must be ready for people to take it whenever they want it for that purpose.

With regard to the argument that the water supplied for putting out a fire in a haystack is water supplied for ordinary agricultural purposes, I think it is as reasonable to say that water used to extinguish fires in a house is water used for domestic purposes. I think the proposition, with all respect to Mr. Simey, is quite extravagant.

KENNEDY J. I agree, and have nothing to add.

Appeal allowed. Judgment for plaintiffs.

Solicitors for the plaintiffs—Cooper and Goodyer, Durham.

Solicitor for the defendants—John Turnbull, Durham.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

BRASS v. LONDON COUNTY COUNCIL.

1904.

April 27.

Factories and workshops—Means of escape from fire—Building containing separate factories belonging to one owner—"Tenement factory"—Buildings within the same "curtilage"—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 14 (2, 3, 7), s. 149.

Two or more factories comprised in the same building, in each of which the occupier produces his own power, do not together constitute a "tenement factory" within the meaning of the Factory and Workshop Act, 1901, although the whole building belongs to one owner. To constitute a "tenement factory" within the definition in section 149 of that Act, the power supplied to different occupiers of different parts of the same building must be derived by them from a source of supply external to themselves. Consequently, the owner of a building comprising two or more factories, in each of which the occupier produces his own power, cannot be compelled to provide means of escape from fire from the building on the footing that it is a tenement factory.

Toller v. Spiers and Pond, 1903, 1 Ch. 362, 1 L. G. R. 193; 72 L. J. Ch. 191, approved.

Semble, that two factories with separate entrances and no internal means of communication with each other are not necessarily within the same "curtilage" for the purpose of the definition of "tenement factory," merely because the one to some extent overlaps the other.

SPECIAL case stated for the opinion of the Court by Joseph Douglass Mathews, the umpire appointed by the arbitrators in an arbitration under section 14 (3) of the Factory and Workshop Act, 1901, as follows:—

1. By a notice in writing under the seal of the London County Council, dated June 3, 1902, given to the above-named William Brass, the owner within the meaning of section 4 of the Public Health Act, 1875, of the premises No. 31A, Old Street, and No. 90, Goswell Road, Finsbury, in the county of London, the London County Council (hereinafter called the Council), after reciting that the said premises were a tenement factory within the meaning of the Factory and Workshop Act, 1901, and that by section 14 of the said Act it was provided that the whole of a tenement factory should for the purposes of such section be deemed to be one factory, and that more than forty persons were employed in such factory, and that the Council had ascertained pursuant to the provisions of section 14 (2) of the said Act that the said factory was not provided with such means of escape in case of

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fire for the persons employed therein as could reasonably be required under the circumstances of the case, required William Brass to carry out the measures therein specified which in the opinion of the Council were necessary for providing such means of escape as aforesaid.

2. Thereupon a difference of opinion arose between the said William Brass and the Council under section 14 (2) of the said Act, and such difference was referred to arbitration under subsection (3) of that section, and I was duly appointed by the arbitrators as umpire to decide on points on which they might differ.

3. The arbitrators differed, and were unable to agree on the award to be made, and I, having taken upon myself the burthen of the said arbitration and umpirage, appointed a day to proceed with the same, on which day the parties appeared before me by their counsel, solicitors, and witnesses on the part of the Council, and it was then submitted on behalf of William Brass that the said premises were not a tenement factory within the definition of a tenement factory in section 149 of the Act, and I, having heard and considered the evidence and arguments of the parties upon the point, consented at the request of William Brass and with the assent of the Council to state this case for the opinion of the Court upon the question.

4. The premises consist of three floors and a basement under part of the ground floor, and are occupied in part by the Paper Cutting Company, Limited, whose business consists of unwinding paper from large rolls and cutting and perforating the same for toilet purposes, in part by Messrs. Pillivant and Company, who carry on the manufacture of wood and cardboard boxes, and the rest of the premises is used by the owner, Mr. Brass, as a builder's store.

5. Annexed to and forming part of this case are three plans, numbered 1, 2, and 3 respectively. Plan No. 1 comprises a plan of the ground floor and a block plan of the premises. Plan No. 2 is a plan of the first floor, and plan No. 3 is a plan of the second floor of the premises. The part of the premises occupied by the Paper Cutting Company, Limited, is coloured red and lettered A, the part occupied by Messrs. Pillivant and Company is coloured blue and lettered B and B1, and the part occupied by Mr. Brass is coloured brown and lettered C. The entire area covered by buildings on the ground floor is about 13,700 superficial feet, exclusive of yards and open spaces.

6. Block A, coloured red, is approached from Goswell Road under a gateway leading to an open yard, and consists of a manufactory on the ground floor about 77 feet long by about 67 feet wide, partially covered by a slate roof and lighted by skylights. It is fitted with nine large, eight smaller, and 15 small cutting machines, and an unwinding

machine, all driven by a gas engine belonging to the Paper Cutting Company in the south-east corner, and about 12 males and 13 females are employed in this block. The hatched part on the south side, about 66 feet long by 24 feet wide, has two storeys above the ground floor, both occupied by Messrs. Pillivant and Company, and the only separation between the ground floor of this part and the first floor above is a floor constructed of wood joists bearing on iron girders, and covered with deal floor-boards. There are no communications between this block and the rest of the premises.

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7. Block B, coloured blue, is approached by the open gateway leading from Old Street into a yard. On the west side is a building 95 feet long by 34 feet wide, consisting of basement and ground floor, lighted by skylights along the west side. The first and second floors of this block are the same length as the lower ones, but about 26 feet wide only, and with windows on both sides. The floors are all open, with wood joists bearing on iron girders, and covered with deal floor-boards, except a part on the ground floor over the drying room. The basement is occupied chiefly as a store for wood and cardboard and for cutting and drying rooms, but in the north-east corner is a steam engine, boiler, and fuel store belonging to Messrs. Pillivant and Company, enclosed with walls, and a steam cutting machine. The ground floor is used as offices, warehouses, and cutting room, and there are five steam cutting machines on this floor. The first and second floors are used for cardboard box making, and on these floors are a number of small machines worked by steam power. At the north-west corner on each floor there is a small doorway leading to Block B1, fitted with iron doors.

8. Block B1 and the purposes for which it is used are sufficiently described by the plans. It is occupied in connection with Block B, and there are in all 18 machines on the first and second floors of Block B1. The whole of the machines in Blocks B and B1 are driven by steam power from the engine in the basement of Block B. There are employed in the basement of Block B four males and two females; on the ground floor of Block B 13 males and six females; on the first floor of Blocks B and B1 about 15 males and 59 females; and on the second floor of these blocks about 18 males and 24 females.

9. Block C, used by Mr. Brass as a store, is bounded on the east by a brick wall, and on the west is divided on the first and second floors from Block B1 by a fir quarter partition covered on both sides with match-boarding, and doors on each of these floors lead into a lobby common to Messrs. Pillivant and Company and Mr. Brass. The roof over B1 and C is wood covered with pantiles, but without any separation between the parts over the two blocks.

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10. A fire-resisting staircase situated in the south-east corner of Block B, enclosed with walls, and constructed in accordance with the requirements of the Council, gives access to all the floors and to the roof over Block B. This roof is of timber covered with slates, and no access is provided to the roof over Blocks B1 and C.

11. The chief measures specified and required by the Council in their notice of June 3, 1902, were the provision of a new staircase at the western end of the premises towards Ludlow Street, connected with the second, first, and ground floors, and with the roof, together with safe access over the roofs between the new staircase and the existing staircase in the south-east corner of Block B.

12. From an inspection of the premises I am of opinion that they are not provided with such means of escape in case of fire for the persons employed therein as can reasonably be required in the circumstances of the case.

I submit for the opinion of the Court:—

Whether upon the facts hereinbefore stated the premises comprised in the notice of June 3, 1902, are a tenement factory within the meaning of the Factory and Workshop Act, 1901, and whether these blocks constitute one building.

Assuming that the Court finds that the premises are a tenement factory, whether I have the power to require a means of exit from the upper floors occupied by Pillivant, through or over the premises on the ground floor marked A occupied by the Paper Cutting Company.

The material provisions of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), are sufficiently referred to in the judgment of Lord Alverstone C.J.

Macmorran, K.C., and *Garland* for Brass. The premises in question do not constitute a "tenement factory." The definition of that expression in section 149 of the Factory and Workshop Act, 1901, refers to a building "where mechanical power is supplied to different parts of the same building occupied by different persons"; and those words contemplate cases where the occupiers receive a supply of power from some common external source. Two separate factories not together constituting a tenement factory cannot, even though belonging to the same owner, be treated as a single whole for the purposes of section 14 of the Act, and the owner cannot under that section be required to provide means of escape in one of them for the joint benefit of the persons employed in both: *Toller v. Spiers and Pond*, 1903, 1 Ch. 362; 1 L. G. R. 193; 72 L. J. Ch. 191.

Avory, K.C., and *Dumas* for the London County Council. It is submitted that the premises constitute a "tenement factory" within

the Act. The effect of the judgment of Buckley J. in *Toller v. Spiers and Pond* is to read into the definition of "tenement factory" in section 149 the words "from one common source." And there is no reason for reading into the definition words that are not there. The expression "supplied" in the definition has the meaning of "used" in other parts of the Act, *e.g.*, in section 87. The limitation put by Buckley J. upon the meaning of the definition defeats the obvious purpose of subsection (7) of section 14.

Macmorran, K.C., in reply. When the Factory and Workshop Act, 1901, was passed, there had already been a decision under the Act of 1891 which it repealed of *London County Council v. Lewis* (1900) 69 L. J. Q. B. 277, and it was in order that the benefit of that decision in favour of owners of property of this kind should not be entirely lost to them that the Legislature adopted the language employed in the definition of tenement factory.

LORD ALVERSTONE C.J. I am of opinion that this collection of buildings is not a tenement factory within section 149 of the Factory and Workshop Act, 1901. I confess that the case gives me very great difficulty, because whichever view be taken difficulties can be raised which seem to apply to either construction.

Undoubtedly in legislation giving rights over and casting burdens upon the property of persons for the benefit of others one expects to find clear language to indicate the intentions of the Legislature; but in the case which is admitted to come within the section, the ordinary common case of a tenement factory where the owner supplies mechanical power to a number of small factories in the same curtilage, it may very well be that one may be obliged to put a burden upon one of those factories in order to provide sufficient fire escapes from another. Still, looking at it as a whole, I am bound to say that I feel that the language of section 149 is not sufficiently plain to enable us to say that what are here found to be the facts bring the buildings in this case within the definition of tenement factory.

Section 14 provides for means of escape from fire being furnished in cases in which there are more than 40 persons employed, and by subsection (7) it is provided that "for the purposes of this section the whole of a tenement factory or workshop shall be deemed to be one factory or workshop, and the owner shall be substituted for the occupier." That brings us to the question that is raised here as to what is a tenement factory for the purposes of the section.

Turning to section 149 (1), we find first the definition of "textile factory," which refers to premises where "steam, water or other mechanical power, is used. Then we find "non-textile factory"

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defined as meaning (a) certain works, &c., named in Part I. of the sixth schedule, and (b) premises or places named in Part II. of the same schedule "wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power, is used" in aid of the manufacturing process, and (c) certain other premises in the description of which we again find words referring to the use of steam, water or other mechanical power. Therefore in those cases in the same subsection with the definition of "tenement factory" the Legislature uses words indicating the mere presence or user of steam, water or other mechanical power.

We now come to the expression "tenement factory," and the words are: "The expression 'tenement factory' means a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories." Stopping there for the moment, it seems to me that the persons who framed this Act saw that they must put some restriction upon the power of bringing factories which were tenement factories within the purview of section 14. So far as that section applies, it seems to me to be obvious that they considered that they could not bring in and make subject to all the provisions of the Act every factory simply because it happened to be in the same building as, or close by, or within the same curtilage as, another factory. They thought some other test of limit must be imposed. Whether they have found a very reasonable one or not is not for us to consider. We have only to construe the limit they have put by the words I have read upon the class of factories they meant to include. It seems to me it is not going too far to say that they had in their minds the common case of a number of small factories which do receive their power from some central source, very often from the owner of the premises, because in the north of England one constantly sees buildings containing factories on different floors the motive power for which is supplied by the owner, and those buildings would particularly require to be dealt with in connection with the provision as to escape from fire, that we are considering it in this case. Then the definition goes on to say: "And for the purpose of the provisions of this Act with respect to tenement factories all buildings situate within the same close or curtilage shall be treated as one building." It seems to me that the Legislature there speaks of all buildings being treated as one building for the purpose of determining what is a building to different parts of which mechanical power is supplied. It was desired to include the case not only of floors of one building or parts of one building, but of separate buildings within the same close or curtilage. Speaking

for myself, though it is not necessary to decide it in the view I take, I have a strong opinion that the buildings in question in the present case cannot be said to be within the same curtilage. I think a general consideration of the language shows that the Legislature are speaking of parts of a building or houses within the same curtilage to which mechanical power is supplied from one source in such a manner that the separate parts constitute in law separate factories. One reason why I am driven to that conclusion is that I cannot imagine that such a complicated definition or limitation would have been devised if it had been intended to make the legislation applicable to any part of any building in which mechanical power is used, or any building in which mechanical power is used, provided there are more than 40 persons employed in that building. And I am pressed by the fact that language is found dealing with the question of factories in which steam or mechanical power is used. I should add that while we are not bound by the decision of a judge of the Chancery Division sitting alone, as Buckley J. was in *Toller v. Spiers and Pond*, 1903, 1 Ch. 362; 1 L. G. R. 193; 72 L. J. Ch. 191, we should not differ with it without strong grounds.

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I therefore come to the conclusion that there is not in this case such a supply of mechanical power to the two parts of the building as would justify the suggestion that it is a tenement factory so as to bring it within the provisions of section 14, and that an order, therefore, cannot properly be made upon Mr. Brass requiring him to deal with the whole property in the sense in which it is attempted to be done. I quite agree with Mr. Avory that there may be cases in which it is very desirable to be able to deal with the building as one; but, at the same time, I think the Legislature has not made it sufficiently clear, and in a case affecting the rights and obligations of third persons, the language ought to be clear. I am not satisfied that it is not possible to deal with part B of the factory without involving the case in the difficulties which would be raised by putting a construction on the section which would make these factories one factory.

WILLS J. I have come to the same conclusion. No one can say that the definition of "tenement factory" is free from difficulty, which is increased by the consideration that the many anomalies which present themselves to my mind in considering the effect of the construction contended for by Mr. Avory, would equally apply in cases in which there could be no doubt the section would apply. Mr. Avory's contention would require us to say that the definition means something of this kind: "A factory consisting of a building in at least two different parts of which mechanical power is used, provided that these parts are so occupied that they constitute separate factories."

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If that had been meant it would have been very easy to say it, and it seems to me that the use of the expression "a factory where mechanical power is supplied to different parts of the same building" is a very awkward way of expressing such a simple idea as that. Therefore we are driven to the conclusion that that cannot be the right construction of the section.

I should also like to express my opinion that these buildings cannot be said to be within the same curtilage. For these reasons I agree entirely with the judgment my Lord has expressed.

KENNEDY J. I agree. I assent to the view that these buildings are not within the same close or curtilage within the meaning of the section. We should be in great difficulties if we were to hold that merely because one factory overlaps another the two must be within the same curtilage. Further, it is not giving the fair and full effect to the words of the section if we construe the words "supplied to" as bearing the same meaning as "used in."

Case remitted to arbitrators, with the direction that the buildings were not a tenement factory.

Solicitor for Brass—H. C. Wallace.

Solicitor for the London County Council—W. A. Blaxland.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

HAMMOND v. FARROW.

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May 5.

Poor rate—Recovery—Occupier for term not exceeding three months—Weekly tenancy—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 1, 2.

In section 1 of the Poor Rate Assessment and Collection Act, 1869, the words "occupier of any rateable hereditament let to him for a term not exceeding three months" mean an occupier who has not an assured tenancy for more than three months. Accordingly an occupier holding on a tenancy from week to week terminable at a week's notice is entitled to the benefit of section 2 of the Act, and cannot be compelled to pay to the overseers at one time a greater amount of the poor rate than would be due for one quarter of the year, though his weekly tenancy has subsisted for many months, and may continue for an indefinite period.

CASE stated by justices for the borough of Bury, Lancashire, who had issued a distress warrant for the levy of the sum of £1 13s. due from the appellant under a poor rate for the parish of Bury, dated March 26, 1903. The facts and contentions were set out in paragraphs 3 *et seq.* of the case as follows :—

3. (a) The rate was duly laid and published, and the appellant lawfully and properly rated.

(b) The appellant was what is known as a weekly tenant, viz., the tenement in respect of which he was rated was held by him as tenant from week to week at a rent of 7s. 3d. a week, but not for any certain number of weeks, and he had been tenant of the tenement for six months.

(c) Although there was no express agreement for notice or as to length of notice required to determine the tenancy, nevertheless by local custom prevailing between landlords and tenants of weekly tenements a week's notice was given on either side.

(d) The appellant had neither given nor was under any such notice.

(e) The rate was laid on March 26, 1903, for the year ending March 25, 1904.

(f) The rate was payable in two equal instalments on March 27, 1903, and October 1, 1903, respectively.

(g) The appellant was only liable to an apportioned part of the first instalment, viz., 13s. 6d.

(h) Payment of the appellant's proportion of the first instalment, to wit, 13s. 6d., and also of the second instalment, had been in due form demanded of the appellant by the respondent.

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(i) The appellant had neglected and refused to pay the same.

The appellant contended (a) that he was entitled to the benefit of section 2 of the Poor Rate Assessment and Collection Act, 1869, and, therefore, (b) that he could not be compelled to pay to the overseers upon the present complaint a greater amount of the rate than would be due for one quarter of the year. In support of these contentions the appellant referred to *Walton-on-the-Hill Overseers v. Jones* 1893, 2 Q. B. 175; 62 L. J. M. C. 123, as showing that it had been assumed that a quarterly tenant was entitled to the benefit of the section.

5. Sections 1 and 2 of the Act provide as follows:—

(1) The occupier of any rateable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate assessed upon such hereditament from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate so paid.

(2) No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year.

The respondent contended (a) that in section 1 of the Act the expression "a term not exceeding three months" meant a term certain which would determine at a given date not exceeding three months without notice from either landlord or tenant; (b) that a tenancy such as the appellant's was not for such a term, but was a tenancy for an uncertain term determinable by notice from either landlord or tenant; and, therefore, (c) that the appellant was not entitled to the benefit of section 2 of the Act.

The justices were of opinion that the section of the Act did not apply to tenancies such as the tenancy of the appellant, as such tenancies were not for a term certain, but for an uncertain term which was to be determined by a week's notice, and disallowed the objection of the appellant, and issued their warrant for the full amount claimed.

The question for the opinion of the Court was whether upon the above statement of facts the justices had come to a correct determination in point of law.

C. C. Scott for the appellant. The premises were let to the appellant for a term not exceeding three months. *Non constat* that the tenancy would ever last three months, for the tenant can be turned out at the end of a week upon a week's notice. The result of the decision of the justices is that because this letting is not for a term certain under three months—say for eight weeks certain—the appellant is not within the benefit of section 2 of the Act. But a tenancy of a week, or at most two weeks

certain, cannot be said to be a tenancy exceeding three months: *Walton-on-the-Hill Overseers v. Jones*, 1893, 2 Q. B. 175; 62 L. J. M. C. 123; *Hastings Union v. St. James's, Clerkenwell, Vestry* (1865) L. R. 1 Q. B. 38; 35 L. J. M. C. 65. 1904.
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Danckwerts, K.C., and *Gordon Hewart* for the respondent. The words of section 1 are "let to him for a term not exceeding three months"; but this is a letting for an indefinite period determinable at a week's notice, which certainly exceeds a term of three months: *Jones v. Mills* (1861) 10 C. B. n.s. 788; 31 L. J. C. P. 66. There is a difference between a tenancy from week to week and a tenancy from year to year, for the latter is not to be considered as a continuous tenancy, but as commencing every year: *Gandy v. Jubber* (1864) 5 B. & S. 78; 33 L. J. Q. B. 151, whilst the former may last for years: *Bowen v. Anderson*, 1894, 1 Q. B. 164.

C. C. Scott replied.

LORD ALVERSTONE C.J. The question is whether or not the appellant, against whom the distress warrant was issued, is entitled to the protection of the Poor Rate Assessment and Collection Act, 1869, because the warrant was issued for more than one quarter's rate. Now the statute is obviously part of certain legislation which contemplates the liability of owners instead of occupiers for rates. This is plain from section 3, which enacts that owners may agree to pay the rate and be allowed a commission, and from section 4, under which an order may be made for rating the owner instead of the occupier. Section 1 allows the occupiers of tenements let for short terms not exceeding three months to deduct the poor rate paid by them from their rents, and section 2 enacts that "no such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year." Therefore the whole scheme of this legislation is obviously for the purpose of easing the position of the occupiers of small tenements.

It is found in the present case that the tenement in respect of which the appellant was rated was held by him as tenant from week to week at a rent of 7s. 3d. a week, but not for any certain number of weeks, and that he had been tenant of the tenement for six months. It is also found that although there was no express agreement for notice or as to length of notice required to determine the tenancy, yet by custom a week's notice was given on either side. It is perfectly true that a weekly tenancy may continue for a long time and yet be determined by a week's notice; and Mr. Danckwerts contends for the respondent that because the tenant under a weekly tenancy has a right to stay on until the proper notice determining it is given, the tenancy here was not one

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of the tenancies contemplated by section 1 of the statute as "not exceeding three months." In my opinion that argument is not a sound one. The Act was obviously intended for the relief of occupiers of small tenements, and it was never the intention of the Legislature to deprive such occupiers of the benefit of section 2 merely because they may continue to be occupiers for a long time, or are likely to occupy their tenements for many weeks, when their only right to remain in possession is for one week or two weeks at most. To lose the benefit of section 2 the tenant must, in my opinion, by virtue of the letting have a right to occupy the premises for a period exceeding three months. As I said at the beginning of my judgment, everything in the following sections of the statute points to the view other than that urged on behalf of the respondent. I come to the conclusion, therefore, that the present appellant was the occupier of a rateable tenement let to him for a period not exceeding three months, and that his appeal must be allowed.

WILLS J. I am of the same opinion, and entirely agree with the construction placed on the statute by my Lord. Exactly the same words occur in section 2 of the Statute of Frauds as to leases not exceeding three years; yet for many years it has been held that tenancies from year to year may be created by parole. The Poor Rate Assessment and Collection Act, 1869, is a modern Act made by persons who had the phraseology of the old Acts before them, and no doubt the draftsman had the Statute of Frauds before him and followed the phraseology. In my opinion the words in section 1, "occupier of any rateable hereditament let to him for a term not exceeding three months," mean a person who does not possess an assured tenancy for more than three months.

KENNEDY J. I entirely agree. Taking the words in their natural sense, I see very little possible room for doubt. The appellant is the occupier of a rateable hereditament let to him for a term not exceeding three months. If he were asked whether his tenancy were for three months, he would reply, "No; it is a weekly tenancy." The letting is what we have to look at here, and it amounts to this, a week certain, or perhaps two weeks certain.

*Appeal allowed. Order and warrant set aside.
Leave to appeal.*

Solicitors for the appellant—Nicol, Son, and Jones, for Pickstone and Jones, Radcliffe (Lancs.).

Solicitor for the respondent—James Isherwood, Bury (Lancs.).

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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CHANCERY DIVISION.

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Feb. 11.

**HEBBURN URBAN DISTRICT COUNCIL v. HEDWORTH, MONKTON,
AND JARROW UNITED DISTRICT SCHOOL BOARD.**

Education—Transfer of property, &c., to local education authorities—Adjustment—Different appointed days for different parts of one school district—Adjustment between school board and local education authority—Education Act, 1902 (2 Edw. VII c. 42), Sched. II. (1, 22)—Local Government Act, 1894 (56 & 57 Vic c. 73), s. 68.

Where a school district under a school board extends into two or more areas for which by the Education Act, 1902, different local education authorities are established, and different appointed days are fixed for the coming into operation of the Act as regards these local education authorities, so that there is an interval during which the school board continues in existence, but the control of elementary education in part of its district has passed to a local education authority, that local education authority are entitled to an immediate adjustment of property, &c., between them and the school board, under section 68 of the Local Government Act, 1894, as incorporated with the Education Act, 1902, by Sched. II. (22) of that Act.

THIS was an adjourned summons taken out by the Hebburn Urban District Council for the appointment of an arbitrator under section 68 of the Local Government Act, 1894, as incorporated with the Education Act, 1902, by Sched. II. (22) of that Act. The circumstances were as follows:—

The respondents to the summons, the Hedworth, Monkton, and Jarrow United District School Board, were a school board constituted under the Elementary Education Acts for a "united district," comprising the urban district of Hebburn, the borough of Jarrow, and the rural district of Monkton, all in the county of Durham.

The effect of the Education Act, 1902, was, as from the "appointed day," to constitute the Hebburn Urban District Council and the Corporation of Jarrow "local education authorities" for the purposes of Part III. of that Act, and, as from the appointed day, to put the rural district of Monkton under the jurisdiction of the Durham County Council as the local education authority for the purposes of the Act.

The Board of Education fixed June 1, 1903, as the appointed day for the purpose of the carrying into operation of Part III. of the Act in the urban district of Hebburn, and April 1, 1904, as the appointed

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day for the purpose of the coming into operation of that part of the Act in the borough of Jarrow and the county of Durham.

The result was that as from June 1, 1903, while the respondent school board temporarily continued to discharge their functions in Jarrow and Monkton, the Hebburn Urban District Council had the control of all elementary education in their district.

Under these circumstances the applicant council contended that an adjustment of property, &c., between them and the respondent school board had become necessary under section 68 of the Local Government Act, 1894, as incorporated with the Education Act, 1902.

Failing to agree with the respondents on the matter, they on the 24th October, 1903, served on the respondents a notice requesting them within seven days of the service of that notice to concur in the appointment of a named London accountant to act as single arbitrator. The respondents having failed to comply with this notice, the applicants took out this summons asking the Court to appoint the arbitrator named by them.

Sched. II. to the Education Act, 1902 (2 Edw. VII. c. 42), contains the following provisions :—

(1) The property, powers, rights, and liabilities, (including any property, rights, and liabilities vested, conferred, or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board.

* * * * *

(8) Sections eighty-five to eighty-eight of the Local Government Act, 1894 (which contain transitory provisions), shall apply with respect to any transfer mentioned in this schedule, subject as follows . . .

(b) the powers and duties of a school board or school attendance committee which is abolished . . . shall be deemed to be powers and duties transferred under this Act ; . . .

* * * * *

(16) The officers of any authority whose property, rights, and liabilities are transferred under this Act to any council shall be transferred to and become the officers of that council, . . .

* * * * *

(22) Section sixty-eight of the Local Government Act, 1894 (which relates to the adjustment of property and liabilities), shall apply with respect to any adjustment required for the purposes of this Act.

Section 68 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), provides as follows :—

(1) When any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may hereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing of the parties to the agreement

(2) The agreement may provide for the transfer or retention of any property, debts, or liabilities, with or without any conditions, and for the joint use of any property, and for payment by either party to the agreement in respect of property, debts, and liabilities so transferred or retained, or of such joint user, and in respect of the salary or remuneration of any officer or person, and that either by way of an annual payment, or, except in the case of a salary or remuneration, by way of a capital sum, or of a terminable annuity . . .

(3) In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act, 1889 . . .

* * * * *

P. O. Lawrence, K.C., and *W. M. Cann* for the applicants. The applicants are entitled, under section 68 of the Local Government Act, 1894, as incorporated with the Education Act, 1902, by Sched. II. (22) of that Act, to an immediate appointment of an arbitrator independently of the borough council and the county council. By reason of the fixing of different appointed days for different parts of the district of the school board difficulties arise daily which require immediate adjustment. The adjustment sought is, within Sched. II. (22) of the Act, "required for the purposes of this Act"; and section 68 of the Local Government Act, 1894, says that, in default of agreement the adjustment "shall" be referred to arbitration: *Julius v. Bishop of Oxford* (1880) 5 App. Cas. 214; 49 L. J. Q. B. 577.

[They also referred to clause (8) of Sched. II. to the Education Act, 1894, and to sections 84-87 of the Local Government Act, 1894.]

Warrington, K.C., and *Gatey* for the respondents. It is submitted that no transfer of the property, &c., of the school board has yet taken place, and that no transfer will take place till the school board is abolished on April 1st. Clause (1) of Sched. II. to the Education Act, 1902, contemplates a single transfer, and not a series of piecemeal transfers. Consequently no occasion for an adjustment has yet arisen or can arise till April 1st, when no doubt there may be an adjustment between the local education authorities. This view is supported by clause (16) of Sched. II. as to the transfer of officers. That clause clearly cannot operate otherwise than once for all.

KEKEWICH J. Those who followed the wearisome history of the Education Act, 1902, may be surprised to hear that there was some point which had escaped observation, but so it was. I can find nothing in the Act which points to the conclusion that the existence of a united school board was present to the minds of those who framed this Act. I cannot help thinking that if that had occurred to the framers of the Act there would have been some express reference providing for this case. It does not follow that the Act will not fit it, and I am bound

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to construe this Act as meaning that all school boards, with their property, rights, and liabilities shall be transferred to these new authorities.

But it is said that, admitting that the Act must apply in some way to united school boards, the transfer must not take place piecemeal, but must be done once for all, *uno actu*, so to speak. Undoubtedly there is much to be said in favour of that view. Clause 1 of the second Schedule does contemplate one transfer and one only. The result is that, if that clause is construed literally, according to the grammatical meaning of the words, there must be a single transfer. But a difficulty arises when one has to deal with the transfer of a united school board and a transfer possibly to several educational authorities, as is the case here. Starting with the hypothesis that there is to be a transfer sooner or later, it becomes necessary so to mould the meaning of the clause as to make it apply to the case of a united school board, where one transfer is not sufficient. I agree with the suggestion that this is an automatic transfer. It takes effect by force of the Act of Parliament, so that there is in one sense one transfer; but when the transfer is to several authorities, that is equivalent to so many transfers by deed. That must be the meaning of the Act if it is to have the effect of transferring the whole of a united school board to more than one authority. The language of this second Schedule has been criticised, and it is said that it is difficult to make it fit the possibility of more than one transfer. But the difficulty is not all on one side. According to the Act there may be more than one appointed day for its coming into operation. There may be a transfer of a part of the school board to one educational authority and of another part to another educational authority; and the Board of Education may appoint one day for one authority and another day for the other; and, further, the Act enables the Board of Education to appoint different days, not only for different councils, but for different purposes. Therefore, it is quite competent for the Board of Education to say that, even as regards Hebburn, the transfer should not be all at one time; and so with regard to Jarrow and Durham. If the clause is to be dealt with strictly and confined to a single transfer, one is met with this great difficulty—that the value of the Act is destroyed. The Act plainly contemplates more than one appointed day. It can only mean that the transfer shall take place as often as is necessary, and that the transfer shall extend on each appointed day so far as it ought to extend on that particular day. If that is so, there is no difficulty at all in construing the other clauses of the schedule. They all fall into line when once the difficulty of construing the first clause is got over.

Then arises the question, what is likely to require adjustment? The

Legislature is silent as to that, and for a good reason. It contemplates that all sorts of questions may arise for adjustment, and it leaves that point entirely open. Practically any question of finance or anything else may be adjusted—for example, the question who is to pay a particular officer. But then it is objected that there cannot be a complete adjustment because there are questions which will arise between the united school board and the two other educational authorities, which have not yet come into existence because the other appointed day has not arrived. But the answer to that is that the Hebburn authority is not concerned with those questions. Supposing the arbitration is concluded before April 1, the Hebburn authority will be out of it. All the questions between the Hebburn authority and the united school board are to be settled under the present arbitration. That arbitration will settle, for example, how much a particular officer is to be paid by the Hebburn authority. It is true that this arbitration might not be concluded on April 1. The result of that will be that the Jarrow and Durham authorities will step into the shoes of the united school board and no serious difficulty will arise.

In my opinion, whether the question is looked at as a matter of convenience or as a matter of strict construction of the Act of Parliament, there ought to be an arbitration at once. With regard to the question who is to be appointed arbitrator, I agree with the respondents that it is more convenient to appoint a local arbitrator. With regard to the costs, the summons raises a question of construction which could not have been settled without the assistance of the Court, and under the circumstances I think that there should be no costs.

Arbitrator appointed accordingly.

Solicitors for the applicants—Baker, Lees, & Co., for A. Robson, Hebburn.

Solicitors for the respondents—J. E. and H. Scott, for W. L. Daglish and Mulcaster, Newcastle-on-Tyne.

May 18. The respondents having appealed, the appeal was reached this day, but was withdrawn on terms agreed between the parties.

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May 5.

ATTORNEY-GENERAL *v.* WIMBLEDON HOUSE ESTATE COMPANY, LTD.

Streets—Building line—Projection in front of front main wall of adjoining house—Statutory obligation—Statutory penalty—Imposition—Continuing offence—Subsequent action by Attorney-General—Injunction—Mandatory order—Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3.

The statutory penalty prescribed by section 3 of the Public Health (Buildings in Streets) Act, 1888, for offences against the enactment contained in that section, is not the only remedy available in respect of a breach of the statutory obligation thereby imposed. The Act is a public general statute, and where an offence against the section has been committed, the Attorney-General, on behalf of the public, can sue for a mandatory order to pull down the offending building, notwithstanding that the statutory penalty has been already imposed in respect of the same building.

THIS was an action by the Attorney-General at the relation of the Urban District Council of Wimbledon against the defendant company for a mandatory injunction in the following circumstances:—

On August 28, 1903, the defendant company submitted to the plaintiff council plans and sections of a house or building which they proposed to erect on the east side of Parkside Gardens, in the urban district of Wimbledon, and gave notice that the contractors would commence work on August 31, 1903. At that time six houses only had been erected in Parkside Gardens. They were of a good size and ornamental character, and surrounded on every side with garden ground belonging to them. The defendants intended to erect houses of a similar character on the vacant plots. All the houses on the east side of Parkside Gardens were set back 30 feet from the road. The west side of Parkside Gardens abutted on the gardens of houses fronting on the main road called Parkside.

Some time previously to the deposit of the plans the plaintiff council's surveyor had sent copies of the following notice to the defendants' architects and others:—

"Re Plans of New Buildings or of Alterations or Additions:—

"All building plans and building notices must be deposited not later than noon on the second Thursday and last Tuesday in each month. The surveyor will before submitting them to the buildings committee proceed to examine them and give notice to the person depositing them

of any matters in respect of which they may appear to him to contravene the Public Health Acts or the bye-laws of the council.

"The plans will not be returned, but may be corrected or altered at the surveyor's office any morning between 9 a.m. and 11 a.m. before the meeting of the committee."

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On September 8, 1903, the plaintiff council's surveyor required the defendants' architects to make certain amendments in the plans in order that they might comply with the council's bye-laws, and on September 14 these amendments were made. On September 24 the defendants' architects received a notice from the surveyor that the plaintiff council disapproved of the plans in question, accompanied by a letter, saying, "I beg to give you notice that the Wimbledon Urban District Council, at a meeting held on the 23rd day of September, 1903, disapproved of the plans for the intended works and buildings, namely, one dwelling-house in Parkside Gardens, deposited on August 28, 1903, the said plans not being in conformity with the council's bye-laws." This reason was given by mistake, but on September 28 the assistant surveyor informed the defendants' assistant architect that the plans were disapproved because the proposed billiard-room projected in front of the main wall of the adjoining building in contravention of the provisions of section 3 of the Public Health (Buildings in Streets) Act, 1888.

On September 28, 1903, the walls all round the house in question, including the front wall of the billiard-room, had been built up to the height of the roof of the billiard-room. The front wall of the billiard-room did not exceed 12 feet in height to the eaves, but projected 6 feet 3 inches beyond the line of the main front wall of the adjoining house.

On November 18, a written notice was given by the plaintiff council to the defendants that the latter were offending against the Act. By that date the erection of the house and billiard-room was almost complete, but no further work had since been done to the billiard-room.

On December 9 the defendants were convicted before the petty sessional court at Wimbledon of contravening the section, and were fined £20 and costs. It appeared that at the trial the magistrates, in the circumstances of the case, although urged by the clerk of the plaintiff council to inflict such a fine as would compel the defendants to pull down the projecting wall, declined to inflict a continuing penalty so as to compel the pulling down of the wall in question, and decided that the same ought to be allowed to remain, but ordered the defendants to pay a sum of £20 and costs. The fine and costs were duly paid. Since the conviction the defendants continued and threatened to continue and complete the erection of the said house in accordance

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with the plans, and this action was consequently commenced for an injunction restraining the defendants from erecting or bringing forward the house without the written consent of the plaintiff council contrary to the provisions of the statute, and for a mandatory order on the defendants to pull down so much of the house as had been already erected or brought forward beyond the front main wall aforesaid.

At the hearing the learned judge admitted in evidence, *de bene esse*, a transcript of the shorthand note of the proceedings before the petty sessional Court.

Danckwerts, K.C., and *R. J. Parker* for the plaintiffs. The Attorney-General has thought it expedient to initiate these proceedings on behalf of the public, and the Court has no jurisdiction to question his right in so doing: *London County Council v. Attorney-General* 1902, A. C. 165; 71 L. J. Ch. 268, and in an action of this nature he is a necessary party: *Devonport Corporation v. Tozer*, 1903, 1 Ch. 759; 1 L. G. R. 421; 72 L. J. Ch. 411.

Upjohn, K.C., and *Wartlers Horne* for the defendant company. This is a breach of a statutory prohibition, and there is only one remedy open to the plaintiff council, namely, the remedy specified by the Act itself. Buckley J., in his judgment in *Attorney-General v. Ashborne Recreation Ground Company*, 1903, 1 Ch. 101; 1 L. G. R. 146; 72 L. J. Ch. 67, draws a distinction between a prohibition by statute and a prohibition by a statutory bye-law. In that case there had been a breach of a prohibition by a statutory bye-law. The plaintiffs there had not sued for a penalty, but had brought an action for an injunction at the suit of the Attorney-General. In *Devonport Corporation v. Tozer*, 1903, 1 Ch. 759; 1 L. G. R. 421; 72 L. J. Ch. 411, the Court of Appeal approved of Buckley J.'s judgment in the earlier case; but the judgment is expressly referred to only on the question whether or not the Attorney-General was a proper party to such an action. Having once been fined, the defendants are not now liable to be attacked by the Attorney-General. In *Kinnis v. Graves* (1898) 67 L. J. Q. B. 583, it was held that where an information under this section has once been dismissed, a subsequent information for continuing the offence will not lie. The proceedings before the magistrates in this case were by information in the name of the Crown, and are binding on the Attorney-General, who now sues in the name of the Crown. The penalty is personal to the person who erects the offending building, and does not attach to the property. There is no jurisdiction to grant any injunction, nor is there any remedy against the purchaser of the property: *Blackpool Corporation v. Johnson*, 1902, 1 K. B. 646; 71 L. J. K. B. 485. Moreover, there has been delay on the part of the Attorney-General

such as to disentitle him to relief. The Lord Chancellor in *Attorney-General v. Johnson* (1819) 2 Wils. Ch. 87, at p. 102, said: "In the *Attorney-General v. Cleaver* (1811) 18 Vesey 211, if I recollect rightly, there had been considerable delay in making the application; and if the King's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to the Court to prevent it, the Court would not consider them entitled to the extraordinary assistance of a Court of Equity, but leave them to their legal memory." And in *Attorney-General v. Sheffield Gas Consumers Co.* (1853) 3 De G. M. & G. 304; 22 L. J. Ch. 811, it was held that laches might be a defence to an application for an injunction by way of information as well as upon a bill. Lord Justice Turner, in his judgment, on page 320, says: "It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this Court is or can be called on to interfere; it is on the ground of injury to property that the jurisdiction of this Court must rest." In this case no other property has been injured. Proceedings should have been taken within a week after September 24, if it was intended to stop the defendants erecting the billiard-room. The delay is attributable to the Attorney-General.

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According to the decision in *Grand Junction Waterworks Co. v. Hampton Urban District Council*, 1898, 2 Ch. 331; 67 L. J. Ch. 603, the Court will not interfere by way of injunction, where the Legislature has pointed out a mode of procedure before a magistrate, unless in very special circumstances. There are no very special circumstances in this case.

R. J. Parker in reply. Delay or laches may not be imputed to the Attorney-General suing on behalf of the public where it might be against an individual in a similar case: per Wood V.-C. in *Attorney-General v. Bradford Canal* (1866) L. R. 2 Eq. 71; 35 L. J. Ch. 619.

FARWELL J. This is an action by the Attorney-General, and also by the Urban District Council of Wimbledon, and it is not the less the Attorney-General's action because it is on the relation of the urban district council. That merely goes to the liability of the urban district council for costs. The object of the action is to obtain a mandatory injunction directing the pulling down of a house which was erected in contravention of the 3rd section of the Public Health (Building in Streets) Act, 1888, by which it is enacted that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any

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addition to any house or building beyond the front main wall of the house or building on either side of the same." There is no dispute that the billiard room in question does project, and has been erected and brought forward beyond the front main wall of the house on the side of it, and by an authority which is not disputed, one side is sufficient when there is a building only on one side, and no building on the other. Also, there is no dispute that no written consent of the urban authority has ever been obtained. The objections taken are several, and I will state very shortly the facts, so as to make my judgment intelligible. On August 28, 1903, the local authority received plans of the new house which the defendants proposed to build. In accordance with the ordinary practice, if not under at any rate by analogy to the provisions of the bye-laws, the local authority take a month to consider the plans and within that time to consider and approve or disapprove. On August 31, that is, three days afterwards, the defendants began to build. They are a land company, with eminent architects advising them, and I cannot assume they did not know, and, indeed, they were bound to know, the provisions of this section, and they must have known, therefore, that they began to build at their own risk. On September 18, 1903, the plans which they had deposited were amended in accordance with certain suggestions made by the surveyor. With regard to that I ought to mention that in this particular district the surveyor officiously—I use the word quite in its inoffensive sense—officiously, not officially, issued a notice that the plans would be inspected by him, and that he would consider them and notify deviations from the bye-laws before they came on for consideration by the council. That is one of the points put forward as the ground on which the defendants say they were misled. Considering that the surveyor did this *mero motu* out of goodwill, and in order to save time, I cannot believe that it is not perfectly well understood, and I confess I think it is a little ungracious of the defendants. I would suggest that in future some statement should be added to the notice sent to the effect that these are gratuitous suggestions of the local authority and not intended to bind them in any way. I do not think the notice does bind them in the least. There is no provision in the Act, or in the bye-laws for any such suggestions by the surveyor, and I think he does it, as I said, out of mere grace.

On September 15, 1903, the committee before whom the plans came disapproved them, and on September 23, 1903, the council, on the recommendation of the committee, also disapproved those plans. Now, the notice of disapproval was sent on August 24, coupled with a letter to the effect that the plans had been disapproved because they were not in conformity with the council's bye-laws. That was a mistake.

They were in accordance with the council's bye-laws, but they were not in accordance with the Act of Parliament, and on September 28 the assistant surveyor saw the defendants' assistant architect, and told him that the plans could not be adopted, and being asked the reason why they were disapproved, he told him it was because the billiard-room was in front of the main wall of the adjoining building. Down to this point so far from there being any written consent of the urban authority, or any ground on which any reasonable being could suppose that such a written consent would ultimately be given, there is not the smallest suggestion of it. Then, on November 18, a notice was given within the second clause of the 3rd section for the purpose of founding proceedings, and then the defendants were prosecuted before the magistrates, and were fined £20.

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Now the first point taken by the defendants is that there is one remedy only, namely, the remedy given by the statute, which is in the latter part of the section: "Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority." In my opinion that is concluded by authority which is really binding on me because it is the decision of Buckley J. in the case of *Attorney-General v. Ashborne Recreation Ground Co.* 1903, 1 Ch. 101; 1 L. G. R. 146; 72 L. J. Ch. 67, approved of by the Court of Appeal in the case of *Devonport Corporation v. Toser*, 1903, 1 Ch. 759; 1 L. G. R. 421; 72 L. J. Ch. 411. I am clear that there is not one remedy only, namely, the statutory remedy. There is, first of all, if the offence is committed, the statutory obligation not to build without the written consent. If that obligation is disobeyed, then, apart from any question of penalty, this being a public general Act prohibiting certain matters in the interests of public health, and in order to preserve uniformity in the public streets and their width, the matter is one for which the Attorney-General can sue.

Then the next point taken is that, inasmuch as the defendants have already been fined by the magistrates, they cannot now be attacked by the Attorney-General. In my opinion that is a misapprehension. The penalty imposed is a penalty which can be, and has been, according to one of the reported cases, imposed time after time if the offence is continued. Although the section is curiously worded, making, as it were, the actual erection of the building the only offence, the penalty is measured by the continuance of the offence; but if the offence is committed I see no reason why the Attorney-General should not be heard to say in this Court, "The defendant has done that which the Act of Parliament has forbidden him to do; and I appeal to the Court to make him take it down again." I think there is nothing in the

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point that inasmuch as he has been fined once he cannot now be ordered to take down the building so as to avoid the necessity for multiplicity of indictments or prosecutions that would otherwise follow.

Then the third point taken is laches. I do not think it is necessary for me to express any opinion on the conflicting authorities which have been referred to, the dictum of Lord Eldon, the statement by Turner L.J., and the conflicting statement of Vice-Chancellor Wood as to whether the Attorney-General can have laches attributed to him. The Court, no doubt, has a discretion in the case of Attorney-General actions as well as other actions. It is not sufficient for the Attorney-General simply to come to the Court and say, "I call attention to the fact that there has been a breach of this statute, and it follows as a matter of course that the mandatory injunction for which I ask must be granted." But whatever may be the doctrine of laches, if it can properly be called laches, imputable to the Attorney-General, in my opinion there is no case for it here. In the first place there is nothing that can be charged either against the district council or the Attorney-General which shows any default on their part that can have led the defendants to go on building as they have done. They chose to begin to build within three days after they deposited their plans, and they had the billiard-room up with the roof on by November 18. The building was up 5 feet high on September 28, and on November 18 the walls were up and the roof rafters were put upon them. During all this time, down to the expiration of the month, there was no sort of ground for supposing that the local authority were going to give their consent. The defendants knew, and must have known, that they were building at their own risk. I find no evidence whatever which goes to suggest that the officials of the local authority had in any way led the defendants to believe that the local authority would consent to the erection of the billiard-room as it is, and I think it would be most dangerous, even although the architect and assistant architect, and the builder and inspector, all came and said, "We have no doubt the local authority will give their consent because we shall advise them to do so," to say that the local authority would be bound thereby in any way, so that if in the exercise of their discretion in that behalf they refuse to approve, they are afterwards to be controlled by these unauthorised, and wholly officious, statements of their own officials, and that they are to be prevented from putting the Attorney-General in motion to exercise his rights for the protection of the public which the Act of Parliament has given him. Therefore there is nothing in the point of laches in that respect. The parties were then at arms' length: they knew that the consent had been actually refused; and they knew the reason why

it had been refused. They knew that the council would not consent, whatever they said, although they tried to arrange with the others to put the tiles on the roof on November 18. They did it at their own risk. I think there is no ground for imputing laches to anyone on the part of the plaintiffs. I can only see a bold determination on the part of the defendants to insist upon going on in their own way in spite of everything, and hoping for the best, and trusting that nobody would compel them to pull down what they had put up. I feel some regret, as one always does, in having to order a building to be taken down when one would have thought that some sort of compensation might be given, and that the injury to the public was very small; but I think that the passage in Lord Halsbury's judgment in the case of the *Attorney-General v. The London County Council*, 1902, A. C. 165; 71 L. J. Ch. 268, is germane on this point: "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the First Law Officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment, but what right has a Court of Law to intervene? If there is excess of power claimed by a particular public body, and that is a matter that concerns the public, it seems to me that it is for the Attorney-General, and not for the Courts, to determine whether he ought to initiate litigation in that respect or not." I cannot say that the Attorney-General ought not to have initiated this litigation, and having initiated it, I cannot say he is not justified in pressing the Court to grant a mandatory injunction because there is no other remedy open. I see no other way of protecting the public in giving them the benefit of this section except by granting a mandatory injunction. There is no one to whom I can give damages; and there is no other means I can see of giving effect to the Act of Parliament.

Then it has been said that the magistrate fined the defendants £20 by way of compensation. I have admitted the shorthand notes of the proceedings before the magistrates *de bene esse*, although, in my opinion, they are not admissible, and I do not think I ought to pay any regard to them. It seems to me that the only jurisdiction the magistrates had was to impose a penalty, and that the penalty is measured by the length of time of the continuance of the offence, and that they can go on imposing those penalties afterwards if they think fit, and they have the right under the Summary Jurisdiction Act if they think it a trifling matter of refusing to impose any penalty at all. How that affects the Attorney-General I fail to see. The general prohibition comes in the earlier part of the section. The Attorney-General has brought to the

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attention of the Court the fact that there has been a clear and deliberate breach of the duty imposed by a public statute, and, in my opinion, the mandatory injunction follows as a matter of course. In the circumstances it will be confined to the billiard-room.

Injunction granted.

Solicitors for the plaintiffs—Sharpe, Parker, Pritchards, Barham, and Lawford, for R. H. S. Butterworth, Wimbledon.

Solicitors for the defendant Company—Horne and Birkett.

High Court of Justice.

CHANCERY DIVISION.

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WALTHAMSTOW URBAN DISTRICT COUNCIL v. SANDELL.

May 31.

June 1.

**Streets—Private street works—"Street"—Passage—Cul de sac—
Premises abutting thereon without right of access thereto—
Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 150.**

A passage forming a cul de sac and not dedicated as a highway may be a "street" within section 150 of the Public Health Act, 1875, and the owner of premises abutting thereon will in such case be liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding that he has no right of access to it.

THIS was an originating summons by the plaintiffs, the Walthamstow Urban District Council, asking (*inter alia*) for (1) a declaration that they were entitled to a charge under section 257 of the Public Health Act, 1875, on certain premises belonging to the defendant in respect of a sum of £31 6s., being the apportioned amount alleged to be payable by the defendant of the expenses incurred by the plaintiffs under section 150 of the Act, together with interest thereon; and (2) a sale to enforce such charge.

The defendant was the owner of certain premises known as No. 1, Cedars Avenue, Walthamstow, which abutted on the west side of a passage known as Cedars Avenue Passage, leading from Cedars Avenue. The passage formed a *cul-de-sac*. On the east and south sides of the passage there abutted five houses, viz., Nos. 306, 308, 310, 312, and 314, Hoe Street. The passage was used by the occupiers of these houses as a means of access to their back premises, through gates in their back walls. The defendant had no means of access to the passage.

The fee simple in the passage was conveyed to one Frederick Johnston, together with the premises, No. 314, Hoe Street, on July 22, 1889, subject to a right of user thereof by the owners and occupiers for the time being of the premises Nos. 306, 308, 310, and 312, Hoe Street.

For the purposes of the action the following facts were admitted:—

1. That a resolution was duly passed by the plaintiffs on July 28, 1899, to make up Cedars Avenue Passage, being the passage in question, under section 150 of the Public Health Act, 1875.

2. That plans, sections, specifications, and estimates were duly prepared and deposited and duly approved by the plaintiffs pursuant to a resolution passed on September 22, 1899.

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3. That notice requiring the defendant to execute the necessary works to make up the said passage as aforesaid, dated May 15, 1900, was duly served on defendant on May 16, 1899.
4. That the defendant and the other owners made default in executing the works aforesaid within the time limited by such notice.
5. That the plaintiffs incurred expense of £66 10s. in the execution of such works.
6. That the sum of £31 6s. was duly apportioned by the plaintiffs' surveyor to be the proportion payable by the defendant as owner of premises fronting, adjoining, or abutting upon the passage.
7. That notice of such apportionment, dated October 1, 1902, was duly served upon the defendant on the date thereof.
8. That a demand for the sum of £31 6s., dated January 27, 1903, was duly served on the defendant on the date thereof; and
9. That no objection was made to such apportionment, and that no appeal was made to the Local Government Board against such demand under the provisions of the Act of 1875.

Naldrett for the plaintiff Council. The only question here is whether this passage is a "street" within section 150 of the Public Health Act, 1875. The word "street" is defined by section 4 of that Act to include, among other things, any "passage, whether a thoroughfare or not." That definition is sufficiently wide to include the passage in the present case, and must be read into section 150: *Jowett v. Idle Local Board* (1887) 57 L. T. 928; affirmed on appeal (1888) 36 W. R. 530; W. N., 1888, 87; *Portsmouth Corporation v. Smith* (1883) 13 Q. B. D. 184; 53 L. J. Q. B. 92; *Richards v. Kessick* (1888) 57 L. J. M. C. 48; *Fernwick v. Croydon Sanitary Authority*, 1891, 2 Q. B. 216; 60 L. J. M. C. 161.

By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), further powers are given to urban authorities to make bye-laws with reference to passages such as this, which are called secondary means of access. In many districts bye-laws are now in force which require the owners or builders to lay out passages at the back of premises in order that there may be means of access thereto at the back. The question has arisen under section 157 of the Act of 1875 whether bye-laws relating to new streets apply to these passages; and in *Reg. v. Goole Local Board*, 1891, 2 Q. B. 212; 60 L. J. Q. B. 617, it was held that the ways there in question were "passages" within the meaning of section 4 of the Act, and were therefore "streets" within the meaning of that section, and consequently that the urban authority had by section 157 (1) power to make bye-laws with respect to their width and construction. It follows from that that a passage

such as the one in the present case is within section 4, and is therefore a "street" within section 150. It is immaterial for the present purpose whether the public have a right of way over the passage or not: *Taylor v. Oldham Corporation* (1876) 4 Ch. D. 395, 407; 46 L. J. Ch. 105. 1904.
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It is very important from a public health point of view that passages like the one in the present case should be dealt with at times. The local authority are not obliged to make them up, but have a discretion in the matter. It is a well-known fact that passages of this kind do get into a very neglected and insanitary state. The present passage is one of them, and the local authority have therefore taken the necessary proceedings to have it made up under section 150, and it is submitted they have a right to do so and are entitled to charge the expenses of so doing upon the adjoining owners.

R. Cunningham Glen for the defendant. As regards the latter contention, local authorities have ample powers under the nuisance sections of the Act of 1875, for the purpose of abating any nuisance, to require the owners of such passages to put them into a proper state of repair at their own expense. The present proceeding is altogether a new departure, because here it is clear upon the evidence that the defendant, who is not the owner of the passage at all, and is in no way responsible for its insanitary condition, is called upon to pay very nearly half the expense of making it up as a street. The question is whether or not the plaintiffs have power for sanitary purposes to put in force the provisions of section 150. It is submitted that they have no such power. It may very well be that some of the provisions of the Act of 1875 are consistent with the interpretation of "street" as including such a place as this. But because Courts have held it is consistent to so hold, and have so read it into sections dealing with the making of bye-laws with reference to how the places when made and used shall be paved, it does not follow that such application of the definition is one which must be made by the Court in construing another section. Some limit must be placed upon the application of section 4 to section 150, otherwise a local authority would have power to require any private approach to any gentleman's residence, even his avenue, to be made up as coming within one or other of the descriptions in section 4. It is a question for the determination of the Court whether a merely private passage or approach to a few houses, as in the present case, is intended to be included, by virtue of the definition in section 4 of "street," in such provisions as are contained in section 150, or whether it is inconsistent with such a construction to so apply the definition. In applying the definition, it is submitted that the words "passage, whether a thoroughfare

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or not" ought to be excluded, and the word "street" in the section read as applying only to the other words in the definition.

BUCKLEY J. In my opinion this case is covered by authority. The passage or alley, or whatever it may be called, in question is a small passage-way leading from Cedars Avenue, upon which there abut on the east and south five houses, which have means of access into the passage-way through gates in their back walls, and upon which there abut on the west side the premises of the defendant. The defendant has no gateway outside his premises into the passage, which is a *cul-de-sac*. In the first place nothing turns upon the fact that it is a *cul-de-sac*. Section 4 of the Public Health Act, 1875, defines "street" as including, amongst other things, any "passage, whether a thoroughfare or not." Mr. Cunningham Glen does not contend that anything turns upon the fact that it is a *cul-de-sac*. Secondly, nothing turns upon the fact that the defendant has not an opening into the passage. The Act throws upon the frontagers, in proportion to their frontages, the expense of doing the acts which are mentioned in the Act, and does not confine it to such frontagers as have openings into the passage in question. All that I know as to the nature of the user of this passage is that the fee simple of the passage-way was conveyed with the premises No. 314, which are those at the extreme end of the passage, in 1889, to one Johnson, subject to a right of user thereof by the owners and occupiers for the time being of the premises now known as Nos. 306, 308, 310, and 312, Hoe Street. So the passage-way in question is subject to rights of user by those five houses. There is no evidence to show that the public cannot pass along this passage as they like. The passage-way opens into the public highway, Cedars Avenue, and there is nothing to show that any member of the public, if he pleases, cannot turn down the passage-way and pass and re-pass there, and there is nothing, I think, to show that the defendant, if he were minded, could not open an access from his premises on to this passage-way. I do not say that, I do not know. If the passage has become a public way by being thrown open in this way, he could do so. If it is still a private way, no doubt he could not. It was decided in *Jowett v. Idle Local Board* (1887) 57 L. T. 928; (1888) 36 W. R. 530, a case which has been followed in subsequent cases, that the definition clause (section 4) of the Act of 1875 applies to the word "street" as used in section 150. And it was decided in *Reg. v. Goole Local Board*, 1891, 2 Q. B. 212; 60 L. J. Q. B. 617, that section 157, which gives power to an urban authority to make bye-laws with respect to the width of new streets, authorises an urban authority to dictate the

width of passages such as the one now in question, affording what may be called secondary means of access, or access at the back of premises for the convenience and sanitary removal of dust-bin refuse and things of that description. The argument which has been addressed to me by Mr. Cunningham Glen is this: not that the defendant is not liable if the local authority have the right to make up this passage under section 150, but that the local authority have no right to make up this passage under section 150. In other words, he contends that, although it was decided in *Reg. v. Goole Local Board*, 1891, 2 Q. B. 212; 60 L. J. Q. B. 617, that "street" in section 157 includes such a passage as this, yet that "street" in section 150 does not include such a passage. I can see no ground for such a contention. It seems to me that I must read section 4 into section 150, so as to say that the urban authority may make up a passage whether a thoroughfare or not. Then, no doubt, I have to see what sort of passage it is, whether it is a private approach to a man's house—his avenue leading up from the street—or whether it is something which can properly be dealt with by this Act as a passage-way rightly open to any member of the public who is going along an adjacent highway, and as to which Mr. Justice Day said in *Reg. v. Goole Local Board (supra)* "there is nothing to show that the public cannot pass along it." I am clear that this is such a passage as is a street within section 150. The result is that the plaintiffs, as the local authority, had power to make it up, and from that it results that the defendant, as a frontager, is liable to pay his proportion. The plaintiffs therefore succeed. I make the declaration asked, and I give liberty to apply.

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Judgment accordingly.

Solicitors for the plaintiffs—G. Houghton and Sons.

Solicitors for the defendant—Vincent and Vincent.

Supreme Court of Judicature.

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COURT OF APPEAL.

Mar. 25, 26,
28.

NETHERLANDS STEAMBOAT COMPANY v. LONDON CORPORATION.

Rates — Exemptions — Special statutory exemption — Exemption whether confined to existing rates — Fixed composition payable “for ever hereafter” — Consolidated rate in City of London — 52 Geo. III. c. 66, ss. 3-5-2 & 3 Will. IV. c. 66, ss. 2, 3 — City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), ss. 169, 187.

The 52 Geo. III. c. 49 extended the time for the exercise of certain statutory powers then vested in the Treasury for the purchase of the “legal quays” (which were at that time private property) in front of the old custom house in Lower Thames Street, in the City of London, and gave the Treasury power for the acquisition of certain premises in Lower Thames Street for the purpose of erecting a new custom house in substitution for the old custom house.

Section 3 of the Act provided that an annual sum of £220 12s. 10½d., which was then paid by the Treasury in respect of the old custom house, and a like sum which was then paid as rates in respect of the legal quays, to the collectors of the parochial and ward rates in the ward of T. and in the parish of A. in the said ward should for ever thereafter be paid out of consolidated customs to the collectors of the rates to whom the sums were then paid and should be considered as part of the produce of such rates. Section 4 of the Act provided for the payment of a contribution in lieu of rates in respect of the premises to be purchased for the site of the new custom house. And section 5 enacted that the old custom house and “the said premises in Lower Thames Street” should be exempt from all rates and assessments although the same might become private property.

By the 2 & 3 Will. IV. c. 66 provision was made as to the sale of the legal quays and the site of the old custom house. And by sections 2 to 4 of that Act it was provided that the two sums of £220 12s. 10½d. each referred to in section 3 of the 52 Geo. III. c. 49 should after the sale of the property by the Treasury cease to be payable out of the customs and become payable by the proprietors for the time being of the property.

Held—(1) That the legislation had the effect of putting the legal quays in the same position as the site of the old custom house as regards rates.

(2) That the provisions exempting the property in the hands of private individuals from rates, except to the extent of the fixed contribution, were not confined to rates existing at the time of the Acts, but extended to future rates.

Sion College v. London Corporation, 1901, 1 K. B. 617; 70 L. J. K. B. 369, distinguished.

(3) That the privilege attaching to the property was not taken

away as regards the consolidated rate by the City of London Sewers Act, 1848, notwithstanding the provisions of that Act declaring that such rate should be levied on property in the City whether the occupiers were liable to poor rate or were not liable to poor rate by reason of the property being situate in any precinct or extra parochial place or otherwise, and declaring that churches, prisons, public buildings, &c., should be rateable to such rate.

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APPEAL by the Netherlands Steamboat Company from the decision of the Divisional Court (Lord Alverstone C.J., Wills and Channell JJ.) on a case stated by consent and by order of a judge under section 11 of the Quarter Sessions Act, 1849, after notice of appeal had been given against a consolidated rate made pursuant to directions of the respondents for the Ward of Tower in the City of London, wherein the steamboat company were rated in the sum of £430 12s. 10d. in respect of premises described as "custom house and wool quays" in Lower Thames Street in that Ward.

The only question argued in the Court of Appeal was whether so much of the premises as was situate on the side of the old custom house and of the buildings contiguous thereto and of the Legal Quays in front thereof mentioned in two Acts of 1812 and 1832 were exempt from the rate, save as in those Acts provided, by reason of certain provisions in those Acts.

The case as stated, which was very lengthy, related not only to these portions of the appellants' premises but also to other portions thereof, and set out a great mass of facts relative to the premises which became immaterial in view of the only point argued. The material enactments and facts were shortly as follows:—

By section 1 of the Act of 1812 (52 Geo. III. c. 49) the time for the exercise of certain statutory powers for the acquisition by the Treasury of the "Legal Quays" between London Bridge and the Tower of London and certain contiguous property conferred by certain prior Acts of Parliament was extended.

By section 2, after reciting that the Custom House and buildings and premises forming a part thereof, in the Port of London, had for some time been inadequate and were dilapidated, and that it was expedient to erect a new custom house, for which purpose the purchase of certain premises in Lower Thames Street was necessary, power was given to the Treasury for the purchase of those lands.

The remaining sections of the Act—sections 3–5—are quoted in full by Collins M.R. in his judgment, and it will suffice to state their effect very shortly here. Section 3, after reciting that the sum of £220 12s. 10½d. was annually paid by direction of the Treasury in

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respect of the existing custom house and the contiguous premises, which by law were not rateable, and that another sum also of £220 12s. 10½d. was legally payable and paid as rates in respect of the Legal Quays, to the collectors of rates in the Tower Ward, and the parish of Allhallows, Barking, in the said ward, enacted that these two amounts should continue to be paid out of consolidated customs. Section 4 recited that by reason of the vesting of the premises in Lower Thames Street in the Crown deficiencies in the rates would arise, and provided that after the purchase of the premises the sum of £816 7s. 5d. should be paid by the Commissioners of the Customs as a contribution to the rates of the parishes of St. Dunstan and St. Mary-at-Hill and the wards of Tower and Billingsgate. And section 5, after reciting that the existing Custom House, being public property, was by law exempt from rates, and that the premises about to be purchased in Lower Thames Street would, when they became public property, also be exempt from rates, enacted that as from a certain date the existing Custom House, and after the completion of the purchase, the premises to be purchased in Lower Thames Street, should be exempt from rates, although the same might become private property.

Section 1 of the Act of 1832 (2 & 3 Will. IV. c. 66), after reciting the purchase, under a series of Acts including the 52 Geo. III. c. 49, of the Legal Quays, warehouses, and other hereditaments therein mentioned, situate between London Bridge and the Tower of London, and that in consequence of the destruction of the Custom House in the City of London, by fire, in February, 1814, several of the title deeds relating to the property had been burnt or destroyed, and that difficulties might consequently arise in making a title to the property, gave the Treasury power to convey and assure any of the said quays, &c., to a purchaser, and to make a good title to the same. Section 2 of the Act recites section 3 of the Act of 1812 and repeals, as from the time that the property in question should be conveyed to a purchaser, so much thereof as makes the two sums of £220 12s. 10½d. payable out of consolidated customs. Section 3 provides that the said sums shall be payable in the first instance by the occupiers. And section 4 enables the occupiers to deduct the said sums from the rents payable by them.

The provisions of sections 2 and 3 of the Act are more fully referred to in the judgment of Collins M.R.

The sites of the portions of the premises occupied by the steamboat company, as to which the question dealt with in the Court of Appeal arose, were sold by Treasury, partly in 1835 and partly in 1892, and at the time the rate was made were owned by the Fishmongers' Company, from whom the appellants held.

The Divisional Court held that the steamboat company were liable in full in respect of the rate. The steamboat company appealed.

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Macmorran, K.C., and *Avory, K.C.* (*Acland, K.C.*, with them), for the appellants. The owners of the lands are under the Acts of 1812 and 1832 to pay a fixed annual composition in lieu of rates, and subject to this payment the lands are by these Acts exempted from rates for all time exactly as if the lands had continued to be in the occupation of the Crown. The Divisional Court held that the case was governed by *Sion College v. London Corporation*, 1901, 1 K. B. 617; 70 L. J. K. B. 369, where it was held that an Act exempting certain premises in the City of London from rates applied only to rates existing at the date of the Act and rates in substitution therefor, and therefore did not extend to the consolidated rate, which was a new rate. The language of the statutes now in question is, however, quite different from that of the statute there in question, and is expressed so as to be applicable as well to future as to existing rates. The general language of the Acts under which the consolidated rate is levied cannot be construed as repealing the special provisions of the Acts of 1812 and 1832, conferring special exemption on the lands in question.

Danckwerts, K.C. (*R. Cunningham Glen* with him), for the respondents. The case is governed by *Sion College v. London Corporation*, 1901, 1 K. B. 617; 70 L. J. K. B. 369, where, on the authority of *Williams v. Pritchard* (1790) 4 T. R. 2; *Perchard v. Heywood* (1800) 8 T. R. 468; and *Rex v. London Gas Light Co.* (1828) 8 B. & C. 54, it was held that an Act exempting property from rates does not, in the absence of express provisions in that behalf, extend to rates that are not in existence when the exempting Act is passed. The consolidated rate is a new rate, as was held in the *Sion College* case.

Secondly, if the exemption given by the Acts of 1812 and 1832 extends to future rates, then it is submitted that the exemption has been withdrawn by the City of London Sewers Act, 1848, ss. 169 and 187. [They also cited *Heath v. Weaverham Overseers*, 1894, 2 Q. B. 108; 63 L. J. M. C. 187.]

Macmorran, K.C., replied.

COLLINS M.R. This is an appeal from the decision of the Divisional Court upon the question whether certain lands in the City are liable to the consolidated rate. The land in question was dealt with by an Act of 1812. It seems that at the time the Custom House in Lower Thames Street, in front of which were certain quays called the "legal quays," was in a very ruinous condition, and it was contemplated that that Custom House would be pulled down, and that other premises not

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far off would be acquired for the purpose of building another Custom House. The Act of 1812 recites that compulsory powers had been acquired for the purchase of the legal quays; it extends the time for that purchase, and gives power to purchase certain other sites which are there described. Then section 3 says:—"And whereas the sum of two hundred and twenty pounds twelve shillings and tenpence halfpenny is annually paid by the direction of the Lords Commissioners of His Majesty's Treasury in respect of the present Custom House, and other premises contiguous to or connected therewith, which by law are not rateable, and another sum amounting to two hundred and twenty pounds twelve shillings and tenpence halfpenny, is legally payable and paid as rates in respect of the legal quays in front of the said Custom House and premises aforesaid, to the respective collectors of the parochial and ward rates and assessments in the said ward of Tower, and in the parish of Allhallows Barking, within the said ward, and it is expedient, that the payment of the same respective annual sums should be continued; Be it therefore further enacted, that the respective annual sums now paid as aforesaid, shall yearly and every year for ever hereafter be paid out of consolidated customs to the respective collectors, for the time being, of the rates and assessments to whom the same respectively are now paid, without any deduction or abatement whatever, in the same parts, shares and proportions, on or at the same days or times and in the same manner as the other rates or assessments of the said ward and parish respectively, shall, for the time being be paid, and shall be considered as part of the produce thereof." At the time with which I am dealing it was contemplated that the site of the legal quays should be acquired by the Treasury on behalf of the Crown, and the Treasury had taken powers to acquire them. Therefore this legislation is, at all events, in contemplation of the quays as well as the site of the new Custom House being acquired by the Crown. The section I have read deals with two classes of payment that were made in respect of that property, the site of the Custom House and the quays. Upon the quays were rates which were by law leviable, there being no exemption by reason of the occupation of the Crown in respect of the legal quays; but with respect to the other part which was in the actual occupation of the Crown, there being no rates leviable, a voluntary payment was made by the Crown. That was the condition of affairs in respect of the plots of land now in question at the time of the passing of the Act of 1812, and the provisions of the section I have just read provide for the continuing payment, it seems to me, in the future, out of the Custom House duties, of the sums payable. Section 4 goes on: "And whereas by reason of the houses and other buildings in Lower Thames Street aforesaid becoming vested in His Majesty, for the

public purposes aforesaid, deficiencies will be occasioned in the produce of the parochial and ward assessments and rates in the parish of St. Dunstan in the East, and the parish of St. Mary at Hill, and the wards of Tower and Billingsgate, wherein the same are situated"—this deals with the site proposed to be purchased for the new Custom House, and deals with the fact that will take out of rateability all those premises which are to be purchased, and deals with that in this way—"and it is not consistent with equity that an additional burden should be imposed on the said wards and parishes, in consequence of the application of premises situated therein, to purposes of general public utility; be it therefore further enacted, that from and after the completion of the purchase of the said premises, according to the provisions of this Act, the sum of eight hundred and sixteen pounds seven shillings and fivepence, being the amount of what was assessed as the parochial and ward assessments and rates on the said houses and buildings, according to the last assessments or rates thereof, made before the passing of this Act, shall be paid, and the said Commissioners of the Customs are hereby authorised and directed yearly and every year for ever hereafter, to pay the respective collector or collectors for the time being of the same rates or assessments respectively, out of consolidated customs without any deduction or abatement whatever, in the same parts, shares and proportions, on or at the same days or times, in the same manner and for the same purposes as the same or the like respective assessments and rates shall for the time being be paid, and shall be considered as part of the produce thereof." Therefore in respect of that property which is to become Crown property the Legislature provides that a sum equivalent to the old rates shall be paid by the Crown. Then comes section 5: "And whereas the present Custom House being public property, is by law exempt from the payment of all rates and assessments, and the said premises in Lower Thames Street about to be purchased under and by virtue of this Act"—that is, the premises referred to in the last section—"will be when the same shall so become public property also exempt from the payment of all rates and assessments; be it further enacted, that from and after the said fifth day of April the said present Custom House, and after the completion of the purchase thereof, the said premises in Lower Thames Street, shall be and be deemed and considered to be, to all intents and purposes, free and exempt from the payment of all and all manner of rates and assessments, although the same and each and every of the said premises may become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding." Now, upon the legislation, so far, we certainly get this: that there is an intention that the premises which were theretofore occupied by the Crown for the Custom House

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should for all time thereafter contribute a certain sum, assessed by reference to the sum that had theretofore been paid voluntarily by the Crown, and also that in respect of the legal quays a sum equivalent to the sum that had theretofore been levied as rates should be continued to be paid after that property had been acquired by the Crown. Therefore, although the position of the legal quays is not specially referred to in section 5 of the Act, it seems to me that it was obviously contemplated that these quays when purchased should stand on exactly the same footing as the other land that was to be purchased by the Crown, and that the commutation or assessment, or whatever it should be called, which was thereby provided, and which was provided in respect of the legal quays as well as in respect of the site of the Custom House, should continue to be the sum payable in respect of them, just as the sum assessed in respect of the Custom House was to continue to be paid in respect of it. That would appear to be the state of legislation up to that point, and, in my judgment, the intention of the Legislature with respect to the legal quays. Before the Act of 1832 (2 & 3 Will. IV. c. 66) was passed the purchase of the legal quays had obviously been completed, and I think the matter is made perfectly clear by that Act. Section 2 of that Act recites section 3 of the Act of 1812, and continues thus: "And whereas, after the sale and disposal of the said quays, warehouses, buildings, and other hereditaments by the said Lord High Treasurer, or Lords Commissioners of the Treasury, or any three or more of them, for the time being, the said last-mentioned premises would cease to be public property, and it would in that event be no longer just and reasonable that the consolidated customs should be charged with the payment of the said annual sums, but that the future proprietor or proprietors thereof should be charged and assessed with the payment of the same; be it further enacted, that from and after the conveyance and assurance of all those quays commonly called or known by the name of the Custom House and wool quays, and the warehouses and other buildings and erections standing and being thereon, with the appurtenances thereto belonging, and in respect of which, or some part or parts thereof, the said two last-mentioned sums are payable, so much of the said Act as directs the payment of the said two sums of two hundred and twenty pounds twelve shillings and tenpence halfpenny, and two hundred and twenty pounds twelve shillings and tenpence halfpenny, out of the consolidated customs, shall be and the same is hereby repealed; anything in that said recited Act to the contrary notwithstanding." Then comes section 3: "And be it further enacted, that it shall and may be lawful to and for the collectors of the said last-mentioned sums for the time being to collect, ask for, demand, and receive the same, and no more, from the occupier or

occupiers of the said premises for the time being ; and if the same are not paid such collectors shall have the same powers to levy or recover the same as they have in other cases where such rates are not paid." Now that puts the site of the Custom House and the legal quays upon precisely the same footing, and it deals with the commuted sum in respect of both of them in the same way. Therefore these lands in the hands of purchasers, the owners of the lands, became entitled to the benefit of this commuted sum.

That seems to me to be the scheme of the legislation, and it is essential as part of its scheme, and it contemplates, that this composition is to be a composition for all time. It does not refer merely to such taxes as happen to be existing at the time and provide for merely a commutation of them ; but by its very terms it contemplates the future. It uses the words "for ever," and it seems it is a composition which once for all is to determine the rights and obligations in respect of the rights of the persons who were to become the occupiers of the property in question in this case. Therefore it seems to me that *Sion College v. London Corporation*, 1901, 1 K. B. 617 : 70 L. J. K. B. 369, which is the authority relied upon to justify the decision of the Divisional Court, is really not in point in this case. The resemblance of that case to the present is really superficial, that is to say, it breaks down in the point which distinguishes the two cases. The headnote of that case is this : "Section 51 of 7 Geo. III. c. 37 provides that certain lands in the City of London reclaimed from the Thames should vest in the adjoining owners 'free from all taxes and assessments whatsoever.' The City of London Sewers Act, 1848, authorised the collection of a consolidated rate"—that is the rate we have to deal with in this case—"Some of the objects to which the rate was to be applied were of a kind for which rates were made at the time of the passing of the Act of Geo. III., but others were new. On appeal against an assessment to the consolidated rate made on land reclaimed under the Act of Geo. III. :—*Held*, that the exemption applied only to then existing taxes and assessments, or others substituted for them, and that the consolidated rate, although it included some purposes for which the rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption." That case was decided upon a series of decisions in the Term Reports which had interpreted the words "free from all taxes and assessments whatsoever" as referring *primâ facie* only to such taxes and assessments as existed at the time of the passing of that Act. A. L. Smith M.R. says : "The result of the decisions in *Williams v. Pritchard* (1790) 4 T. R. 2 ; *Perchard v. Heywood* (1800) 8 T. R. 468 ; and *Rex v. London Gas Light Co.* (1828) 8 B. & C. 54, is that the Act only created an exemption from

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taxes and assessments then in existence, and not from substantially new ones coming into existence at a later date." The other members of the Court, my brother Romer and myself, based our judgments entirely upon the same point. I say myself: "The difficulty in the way of the argument put forward on behalf of the appellants lies in the decisions in the Terms Reports that have been cited in argument, which seem to establish that the exemption in the Act of Geo. III. was from taxes and assessments then existing with the possible extension to substituted taxes suggested by Bayley J. in *Rex v. London Gas Light Co.*, where the learned judge said, 'The house and window tax was a new one, imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes and others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation.'" That case was decided on the principles of those cases in the Term Reports, and if the reasoning of my judgment now upon this point shows, as I think it does, that the special circumstances under which this Act was passed contemplate a complete equivalent being given for all time from the fact that these two particular premises were being taken out of rateability, why then there is no analogy between the two cases. In this case the legislation, on its face, contemplates the future. In the other, according to the interpretation put upon it by the Court, the legislation only contemplated an immunity from the then existing taxation. Therefore the analogy between the two cases, as I have said, breaks down at the critical point. We have here every indication that the arrangement is intended to extend to the future. The Courts refused to draw that inference in the case of the particular section of the particular Act which was dealt with in the *Sion College* case. The next contention of the respondents is that that immunity which, according to my judgment up to this point, was provided by law for the occupants of these premises, has been withdrawn by a subsequent Act. I do not think that mere general words are capable of having this effect simply by their breadth and vagueness. I do not think that the special privilege given by the special Act is to be withdrawn by any general words of that kind. I think there must be a clear inference to be drawn from the words used in the Act alleged to have that effect, and the circumstances under which it was passed. I think there must be a clear inference that it was intended to withdraw a privilege which had been given in this way. It is suggested that the privilege which has been given has been withdrawn. To begin with, it is not suggested that a public Act of Parliament has done it. What is claimed as having done it is a private Act of Parliament, namely, the City of London Sewers Act, 1848, and

when we come to look at the sections which are cited to withdraw this exemption, they are found to be sections passed *alio intuitu*, and obviously, so far as the language used in them conveys, there is no special intention whatever of dealing with the particular immunity given under the Acts that I have referred to. There are two sections that are most relied on by Mr. Danckwerts; they are sections 169 and 187 of the Act of 1848. Now section 169 is in these words: "Be it enacted, that every such rate as aforesaid shall be made by the alderman or his deputy and the major part of the common councilmen of each ward upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City, whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra parochial place" Now, Mr. Danckwerts' argument on that, so far as I understand it, is this. He says the rates in respect of which the commutation was granted were rates payable by persons liable for the poor rate, and the new impost authorised by the Act of 1848 is not to be merely co-extensive in its exigency with the old one, because here is a section which provides that it shall fall upon persons whether liable for poor rate or not, and therefore this is an absolute express imposition by the Act upon persons whether they are liable for the poor rate or not, and therefore it must be taken as a new imposition overriding any special relief given to persons whose liability was only their liability for poor rate. But the section is not pointed at all to depriving any persons who had a statutory exemption from poor rate from the benefit of it. It is pointed to that class of persons who by reason of the property they occupy being situate in a precinct or extra parochial place or otherwise are, by that very anomalous fact, relieved from the obligation of paying the poor rate. I think it would be straining more than is just or reasonable the meaning of the section to hold that it was meant to deprive persons of a statutory exemption deliberately granted to them by the Legislature in return for a composition. That section does not appear to me to carry it nearly far enough. Then the next section is section 187, from which he seeks to draw the inference that the Crown itself was made specially liable by this Act, and that therefore the persons occupying these lands cannot be in a higher position than the Crown, and must also be taken to be made specially liable to the rate. Now section 187, after reciting that "it is reasonable that all churches, chapels, churchyards, burial grounds, meeting houses, prisons, hospitals for sick persons, and public buildings, and all vacant spaces of ground, should be rated in a due proportion to the rates hereby authorised to

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be made," provides that they are to be rated. The strongest word to be found is the word "prisons"—the argument is that prisons are Crown property, and here is an Act which certainly deprives the Crown of exemption in respect of prisons, and Mr. Danckwerts refers also to public buildings and so on. The answer to that, I think, has been well put by Mr. Avory. It is that prisons at the time of the passing of this Act were not necessarily or primarily all Crown property at all. Some were private buildings. They might or might not be Crown property, but some of them were not, and therefore you cannot draw from general words of that kind the inference that it was intended to destroy a special exemption or a privilege, and *a fortiori* in the case of an Act of this class with regard to which the persons whose privileges it is suggested were affected had no means of making themselves heard.

It seems to me, therefore, that Mr. Danckwerts has failed to point to any such express provision of the Legislature as will suffice to take away an already existing immunity.

I come therefore to the conclusion first of all that the exemption was one that extends and was intended to extend to future time; secondly, that that exemption has not been destroyed by subsequent legislation. On these two grounds the decision of the Divisional Court in applying the *Sion College* case to this case was in my opinion wrong. Therefore I think this appeal must be allowed.

ROMER L.J. I am of the same opinion. After carefully considering the Act of 1812 I am satisfied myself, at any rate with regard to the Custom House and the premises in Lower Thames Street, referred to in section 5 of the Act, that it was contemplated by the Legislature and provided by the Act that those properties, if subsequently sold by the Crown, should go into the hands of purchasers or assignees with the same exemption from rates and assessments as the premises enjoyed when in the hands of the Crown. In other words, I think what was meant by the Act was, as regards the premises I have specially mentioned, that it was contemplated and intended that in the hands even of subsequent purchasers, and even in the hands of private individuals, if the premises were parted with by the Crown, they should still for the purposes of rates and assessments be considered as Crown properties used for public purposes. If it had not been for the subsequent legislation, I think there would have been considerable difficulty in dealing with the case of the legal quays. I think there is considerable difficulty in saying that in section 5 of the Act the words "Custom House" were used in a large sense so as to include not only the Custom House and the buildings used with it, but also the legal quays in front after they should have been bought by the Crown. Nor is it at

all clear, although the legal quays in front might for some purpose have been and were premises in Lower Thames Street, that they were intended to be covered by the words, "said premises in Lower Thames Street," as used in section 5. No doubt, in favour of the view that they were intended to be in the same position as the Custom House, you have the provision in section 3 of the Act, which speaks of the legal quays being subjected to the payment of a fixed annual sum, and the provision in section 3 is that that annual sum shall be continued, and, moreover, shall yearly and for ever thereafter be paid and paid out of the consolidated customs to the collector. But still, on the other hand, it might be that although that is so this Act did not contemplate, with regard to the legal quays, at any rate expressly, that they should be sold by the Crown or ever come into the hands of private individuals. Therefore, as I say, if the matter stood only on the Act of 1812, I should myself have felt considerable difficulty with regard to the legal quays; but I agree with what the Master of the Rolls has said, that when you come to look at the Act of 1832, especially when you read fairly sections 2 and 3 of that Act, it is sufficiently clear that the Legislature contemplated that the legal quays, when sold, as by that Act they were authorised to be sold, should, in favour of a purchaser, carry with them an exemption from rates and assessments, excepting a fixed sum which was payable under the Act of 1812. I think, again, that it was intended, probably, by that Act to give the Crown, who were selling these legal quays, a right to get a better price for the property sold on the very footing and ground that the purchaser would take the property subject to the same exemption in his hands as the property had enjoyed when it was in the hands of the Crown.

An argument on behalf of the respondents was founded upon the words of the provision of section 3 of the Act of 1812, as to the fixed annual sums being paid to the respective collectors in the same parts, shares, proportions, and so forth, as mentioned in the section. It was suggested there might be great difficulty as to the kind of rates and assessments being altered, and difficulties in finding the collectors, and so forth. I think the sufficient answer is that it was contemplated by that section that there would be no difficulty in finding a proper collector to receive the moneys; and, in fact, that is what we do find. It is admitted before us that from the time of the passing of that Act of 1812 until quite recently, when this contention was first put forward on behalf of the Corporation of the City of London, those annual sums mentioned in the Act of 1812 have been paid, and no other rates and assessments at all. So that the view we are giving of the meaning and effect of the Act of 1812 has been carried out in practice, and there has not been found the slightest difficulty in finding collectors to receive

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and distribute the annual sums as collected. Lastly, I agree with the Master of the Rolls, that the special exemption of these properties under the Act of Parliament I have referred to has clearly, to my mind, not been taken away by any provisions in the Act of 1848.

I think, therefore, the appeal succeeds.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for the appellants—Pritchard and Sons.

Solicitor for the Corporation—Sir Homewood Crawford.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Supreme Court of Judicature.

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WEST HAM UNION *v.* HOLBEACH UNION.

Poor Law—Settlement and removal—Residential settlement—Residence wholly under sixteen—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34, 35.

A person who has attained the age of sixteen may, as from that age, have a settlement of his or her own (as distinguished from a derivative settlement) under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, by virtue of residence in a parish with his or her parent, though that residence terminated before he or she attained the age of sixteen.

Decision of the Divisional Court, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801, *affirmed*.

Reg. *v.* Elvet Inhabitants (1859) 2 E. & E. 266; 29 L. J. M. C. 17, and Highworth and Swindon Union *v.* Westbury-on-Severn Union (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, *followed*.

APPEAL from a judgment of a Divisional Court (Lord Alverstone C.J., Wills and Channell JJ.), reported in 1 L. G. R. 889, on a case stated by consent and by order of a judge under the Quarter Sessions Act, 1849, after notice of appeal had been given by the West Ham Union against an order of justices adjudging that the parish of West Ham in that union was the place of the last legal settlement of one George Ernest Neep, a pauper, aged two years.

The facts, &c., as stated in the case were as follows:—

1. George Ernest Neep (hereafter called the pauper) is the illegitimate child of Emma Neep, and was born in the Holbeach Union Workhouse on October 25, 1899.

2. Emma Neep, the mother of the pauper, was the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence, in the Wisbech Union, on April 11, 1879.

3. Mary Ann Neep married Alfred Frederick Chapman at Tilney St. Lawrence on December 23, 1881.

4. From June 27, 1890, to September 7, 1893, Alfred Frederick Chapman resided in the parish of West Ham, in the West Ham Union, with his wife for a term of three years, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable therefrom, and settled therein.

5. From September 7, 1893, the said Alfred Frederick Chapman continued to reside in the parish of West Ham, and was in receipt of

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relief from the West Ham Union until his death on September 8, 1894. His wife, the said Mary Ann Chapman, resided with him until his death.

6. From September 8, 1894, Mary Ann Chapman (the widow of Alfred Frederick Chapman and the mother of Emma Neep) continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union from September 8, 1894, until November 28, 1895, when she ceased to reside in the West Ham Union. She died in the Poplar Union Infirmary on October 14, 1896.

7. From June 27, 1890, to July 28, 1893, Emma Neep (the mother of the pauper) resided with Alfred Frederick Chapman and her mother, Mary Ann Chapman, in the parish of West Ham, in the West Ham Union. On July 28, 1893, she went into service in the Poplar Union, and has since had no settled residence.

8. On December 3, 1901, an order of justices was obtained on behalf of the respondents adjudging the pauper to be settled in the appellants union. Notice of such order was duly given to the appellants, and a copy of the grounds of removal, dated December 3, 1901, is marked A, and is annexed to and forms part of this special case.

9. The appellants affirm that the settlement of the said Emma Neep cannot be ascertained without inquiring into the derivative settlement of her parent, the said Mary Ann Chapman, and that she must be deemed to be settled in the parish of Tilney St. Lawrence, where she (Emma Neep) was born.

10. The respondents affirm that the said Emma Neep acquired a legal settlement in the said parish of West Ham by reason of the residence therein of the said Alfred Frederick Chapman and his wife, as mentioned in paragraph 4 of this case, or by reason of the residence of the said Emma Neep for upwards of three years prior to July 28, 1893, in such manner and under such circumstances in each of such years as would (as the respondents affirm) in accordance with the provisions of the several statutes in that behalf, render her irremovable therefrom.

11. The question for the opinion of the Court is whether, upon the facts above stated, the said Emma Neep acquired a settlement, under the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34 and 35, in the parish of West Ham, in the West Ham Union. If the Court shall be of opinion in the affirmative the order of the justices is to be confirmed, but otherwise it is to be quashed.

The Divisional Court were of opinion that Emma Neep acquired an original settlement for herself in the West Ham Union by residence

there under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, which the pauper derived from her. They therefore affirmed the order of the justices. The case in the Divisional Court is reported, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801. 1904.
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The West Ham Union appealed.

Sections 34 and 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict., c. 61), are as follows:—

Section 34. Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

Section 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Montague Lush, K.C., and *W. J. Grubbe* for the appellants. The Divisional Court held that Emma Neep (the pauper's mother), by her residence for three years in West Ham, although then under the age of 16, herself acquired a settlement there under section 34 of the Act of 1876, and that the pauper took his mother's settlement under section 35 of the same Act. It is submitted that the Court was wrong, on the ground that the words "any person" in section 34 do not include unemancipated children, but refer only to persons who are *sui juris* for the purposes of settlement. Unless this construction is adopted, sections 34 and 35 are inconsistent with each other.

The Divisional Court relied on *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17. That case no doubt decided that a child whose parents are dead can reckon residence before their death in making up the period necessary to create a status of irremovability. But it did not decide that an independent status of irremovability could be acquired by a child during its parent's lifetime.

In the *Reigate Union v. Croydon Union* (1889) 14 App. Cas. 465;

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59 L. J. M. C. 29, and the two other cases, *Highworth and Swindon Union v. Westbury-on-Severn Union*, and *Medway Union v. Westminster Union*. decided with it, where the House of Lords were specially invited to lay down a code to settle the meaning of sections 34 and 35 of the Act of 1876, Lord Halsbury L.C. does not decide the question whether an unemancipated child living with its parent can or cannot acquire a settlement of its own. Lord Watson, on the other hand, at p. 484, says: "The provisions of the clause" (that is the last paragraph of section 35) "have in my opinion no application to children under the age of 16, and do not qualify the preceding enactment of section 35 to the effect that a legitimate, or that of 4 & 5 Will. IV., to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age." That is a statement that is absolutely irreconcilable with the respondents' contention that Lord Watson and the other members of the House held that the provisions of section 34 were not restricted to persons *sui juris*. No doubt the rule is well established by authorities that the period of residence in a place before 16 can be tacked on to and made to coalesce with a period of residence there after that age in order to make up the prescribed three years: *Highworth and Swindon Union v. Westbury-on-Severn Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29. But that is a very different thing from holding that a settlement by residence can be completely acquired under that age. *West Ham Union v. Bethnal Green Overseers*, 1894, A. C. 230; 63 L. J. M. C. 97, does not support the proposition that a settlement can be so acquired. There the status of irremovability that the pauper had before 16 was treated as having been dependent on that of her mother. *Manchester Overseers v. Ormskirk Union* (1890) 24 Q. B. D. 678; 59 L. J. M. C. 103, has never been overruled, and there Lord Coleridge C.J. held that an illegitimate child, like a legitimate child, cannot gain a settlement for itself under the age of 16.

[They also cited *West Derby Union v. Atcham Union* (1889) 24 Q. B. D. 117; 59 L. J. M. C. 17; and *Mitford and Launditch Union v. Wayland Union* (1889) 24 Q. B. D. 122; 59 L. J. M. C. 24.]

Rawlinson, K.C., and *Marriott*, for the respondents, were not called upon.

COLLINS M.R. This case raises a rather intricate question as to the settlement of a pauper, but after the elaborate argument of the counsel for the appellants the case seems to me to come down to a very simple point.

The pauper in question was one George Ernest Neep, who was born in the Holbeach Union Workhouse on October 25, 1899. He was an illegitimate child of an illegitimate mother. His mother,

Emma Neep, was born in the parish of Tilney St. Lawrence on April 11, 1879, and the question in this case turns upon whether Emma Neep acquired a settlement for herself by three years' residence in the parish of West Ham, where her mother was living with a man whom she married after Emma Neep's birth. It is found as a fact in this case that the man whose name was Chapman resided in the parish of West Ham with his wife (the mother of Emma Neep) "for the term of three years in such a manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable therefrom and settled therein." Section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, which deals with that particular state of facts, is in these terms:—[His Lordship read the section, and continued:—] Chapman and his wife, the mother of Emma Neep, acquired a settlement under the section. The case of the pauper, inasmuch as he is an illegitimate child, is dealt with by section 35 of the Act of 1876. That section provides that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," and "if any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." If the pauper's mother, Emma Neep, acquired a settlement for herself in West Ham, the pauper takes her settlement in that parish. But if the settlement of Emma Neep was derivative, it is contended that it is otherwise.

Now, what is the difficulty in the way of the contention that Emma Neep acquired a settlement for herself in West Ham? She resided there for three years under circumstances which produce irremovability and result in a settlement, but those three years were before she attained the age of 16. Therefore, the point which arises in this case is whether residence by a person under the age of 16 is or is not capable of giving that person a settlement under section 34. It has been strongly contended by Mr. Lush that section 34 deals only with emancipated persons, and that the residence of a person under 16, an age for the first time fixed by the Act, cannot confer a settlement on that person either before or after that age. That, I have no doubt, is a very arguable question, but it seems to me that we are relieved really from considering it upon first principles, because the matter appears to me to have been clearly decided by the authority of *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17. The

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head note of that case is as follows: "In 1835 the pauper's father and mother went to reside at E., and they both continued to reside there till July, 1847. The pauper was born there in January, 1844. In July, 1847, the mother became chargeable to E. as a lunatic, and was removed to an asylum at B. In September, 1849, an order was made by justices adjudging the mother's settlement to be in S. After remaining in the asylum at the charge of S. for several years, she was removed to the workhouse in S., and was maintained there by S. as a lunatic till her death in October, 1858. The pauper continued to reside with her father in E. from her birth till his death in December, 1857; and after his death she remained there till February, 1858, when she became chargeable to E. In December, 1858, an order was made for her removal to S., which was quashed, on appeal, by an order of sessions. *Held*, confirming the order of sessions, that the pauper was, by statute 9 & 10 Vict. c. 66, irremovable from E.; for that the relief afforded to her father by the maintenance of her mother did not deprive him of the status of irremovability from E. which he had previously acquired; that that status was communicated to the pauper, and that she retained it at the date of the order of removal." The judgments are very short, and I had better read them. Of course, when the case was decided the age of 16 had not been fixed as the limit. There was no statutory limit as to the age at which a child became emancipated. The child at the death of her father was in fact about 14. The judgments are as follows:—Lord Campbell C.J. says: "I am of opinion that the pauper, by her residence with her father, acquired the status of irremovability. This status, which the father had acquired before he received relief through his wife, was not taken from him by such subsequent receipt of relief. And at the time that the order for her removal was made, the pauper continued irremovable, her mother being then dead." Wightman J. said: "By her residence with her father the pauper became irremovable, and as she continued to reside in the respondent township down to the time that the order for her removal was made, and her mother had died before that time, she was then still irremovable." Erle J. said: "The fact that the father of the pauper received relief after he had acquired the status of irremovability does not appear to me to affect the question. When her father died the pauper had acquired an independent status of irremovability, which she retained down to the time that the order of removal was made." As I have said, the pauper was not more than 14, if she was as much, at the time of her father's death, and yet it was held that she had acquired the status of irremovability by residence in the parish with her father. Mr. Lush has strongly contended that that decision only deals with what he

calls a derivative status, and that the child could not be said at any time to have acquired an independent status of irremovability by residence during the father's lifetime. That might be consistent with judgments of Lord Campbell C.J. and Wightman J. looked at by themselves; but it is absolutely inconsistent with that of Erle J., who states in terms that when her father died the pauper had acquired an independent status of irremovability. That judgment really seems to me to give the key to the whole situation, and must, I think, express the grounds upon which the other judgments really went. We have, therefore, a clear authority that a child unemancipated living in a parish with its parents can on emancipation claim a status of irremovability, because no one can contend that the child was emancipated during the father's lifetime. Then what was the view taken of this question in the House of Lords in *Highworth and Swindon Union v. Westbury-on-Severn Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29? Lord Halsbury L.C. said: "The second case, that of *Highworth and Swindon Union v. Westbury-on-Severn Union*, I think is concluded by the authority of Lord Campbell C.J. and Wightman and Erle JJ."—Lord Halsbury treats all three judges as having decided the case on the same point, and that is the reason I read the three judgments, pointing out that Erle J. in his judgment in terms deals with the very point—"which I should be very sorry to see disturbed. I agree with Stephen and Charles JJ. that the case of *Reg. v. Elvet Inhabitants* determines, and rightly determines, the question in debate. The pauper had by more than the necessary period of residence acquired a status of irremovability, and so was 'settled' in the parish of Rhydgwern. It is true that during a part of that period she was under 16 years of age, and it is true that, if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and the unemancipated equally irremovable, and if so, the periods of emancipated and unemancipated residence may be put together." Mr. Lush asked us to assume that Lord Macnaghten and Lord Watson decided something different, and said that we ought to follow them. When we come to sift Lord Macnaghten's and Lord Watson's judgments, it appears to me that Lord Macnaghten said nothing conflicting with the Lord Chancellor's judgment. He adopts the same line of argument as the Lord Chancellor, and he puts the case of *Reg. v. Elvet Inhabitants* as having decided that residence before emancipation was not incapable of founding a settlement. He puts it exactly in the same way as the Lord Chancellor, and says nothing whatever to imply that the residence, if it

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had taken place wholly before the age of 16, would not have been equally effective, assuming, of course, that the question arose after that pauper had acquired the status of emancipation by having attained that age. But Mr. Lush pressed us with the contention that Lord Watson in his judgment, which the learned counsel put before us as though it was the only judgment given, and the only one that contained the true and unadulterated law, decided something different. When one comes to his judgment, though I admit some of the phrases require consideration with their context to ascertain their meaning, it seems to me that he really does not say anything different from the Lord Chancellor or Lord Macnaghten. This he does say, which appears to be perfectly clear on the face of it: "I have been unable to find in section 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of 16. The only provision having a bearing upon the point is to be found in section 35, which enacts that until emancipation the child 'shall retain' the settlement of its father or widowed mother. That provision does not necessarily imply that on attaining 16 the child is not to have the benefit of previous residence; but, even if it pointed to that result, I do not think that any mere implication derivable from it can be permitted to override the express enactment of section 34. The only test of residence sufficient to give 'any person' a settlement under that section is that it shall be such as would, 'in accordance with the several statutes in that behalf,' render him irremovable; and the case of *Reg. v. Elvet Inhabitants* is a clear authority to the effect that the pauper's residence under 16, coupled with her residence after she attained that age, did render her irremovable in accordance with these statutes." That is a distinct affirmation by Lord Watson on the same point which has already been affirmed in the two passages I have read from the judgments of Lord Halsbury and Lord Macnaghten. But it is said that in an earlier passage, on page 484, Lord Watson has laid down the law in a manner inconsistent with the passage I have just read and the passage relied on by Mr. Lush is this: "The provisions of the clause"—the last paragraph of section 35—"have in my opinion no application to children under the age of 16, and do not qualify the preceding enactment of section 35 to the effect that a legitimate, or that of 4 & 5 Will. IV. to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age." As pointed out during the argument by my brother Mathew, that passage is referring to the condition of an unemancipated person during that period of unemancipation. It is

not dealing with that which follows on emancipation, and read in that way it is perfectly consistent with the other passages I have read. So that we have what appears to me to be a unanimous affirmation by the House of Lords of the principle laid down in the case of *Reg. v. Elvet Inhabitants*; and that principle seems to me to be absolutely in point in this case. The mother of the pauper in this case completed three years' full residence, complying with the conditions in section 34, at a time when she was under 16; and it seems to me that now she is of full age she is entitled to claim the benefit of that residence as giving her a settlement. The only difference I can see between this case and that of *Reg. v. Elvet Inhabitants* is that in that case the pauper did continue to reside in the parish after her father's death, when she might be regarded as emancipated. That is the only difference between the two cases; but it seems to me that the principle upon which the law lets in residence before emancipation as a part performance of the conditions laid down by the statute covers the present case.

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On these grounds I think the decision of the Court below must be affirmed, and this appeal fails.

ROMER L.J. Doing my best to guide myself by the authorities as they stand since the decision in the three cases in the House of Lords, I also come to the conclusion that this appeal fails.

I think this case is governed by the second of the three cases, *Highworth and Swindon Union v. Westbury-on-Severn Union* (1889) 4 App. Cas. 465; 59 L. J. M. C. 29. I think in principle that case decided that a child after emancipation may claim to have acquired a settlement by virtue of residence for three years with its parent while under 16 years of age, coupled with a condition of irremovability. The Lord Chancellor, as has been pointed out by the Master of the Rolls, clearly states that the statute knows no distinction for the purpose we are considering between emancipated residence and unemancipated residence by the child, nor do the other learned Lords who addressed the House in those cases differ from that view. On the contrary, in the second case they all base their judgments upon the decision in *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17, as being a decision in point by which the case before them was to be decided. I will only add that I think the suggestion that Lord Watson differed from that view when he stated in his fourth proposition that the effect of section 35 is "in all cases where the parents' settlement was itself derivative to throw children of either class as soon as they attained the age of 16 upon their own birth settlement until they acquire another," is unfounded. He was stating the proposition shortly, and it appears to me he used

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expressions pointing to the future. I think that he certainly did not mean that a child after he became emancipated could not acquire another settlement than the birth settlement by circumstances which wholly occurred while the child was under 16 years of age.

I think, therefore, that the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. It appears to me that the judgment of the Divisional Court is in entire accordance with the language of the Act of Parliament and with the decision in *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17. Mr. Lush argued that section 34, which begins "where any person shall have resided for the term of three years," must be confined to emancipated persons. There is nothing in the language of the Act of Parliament to necessitate that construction, and the Lord Chancellor, in *Highworth and Swindon Union v. Westbury-on-Severn Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, says there is no distinction for this purpose between emancipated and unemancipated persons. It is said that section 35 is inconsistent with this view. But the section provides that a child under the age of 16 "shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." This language seems to make it clear that the section contemplates that a child under 16 may acquire another settlement for itself. In this case the fact that the settlement of Emma Neep and that of her mother was the same parish, the one, however, being by residence and the other derivative, does not appear to constitute any reason under the Act why effect should not be given to the settlement acquired by the former through residence. It is sufficient to say that the authority of *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17, determines that question. According to that case you may add residence after emancipation to residence before emancipation. If so, why should it make any difference that the whole of that residence is before the child becomes emancipated? I can see no reason for making any distinction between the two cases. Under those circumstances it seems to me that the judgment of the Divisional Court was right, and I agree that this appeal fails.

Appeal dismissed.

Solicitor for the appellants—F. E. Hilleary.

Solicitors for the respondents—Callard and Vulliamy, for Richard P. Mossop, Holbeach.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Note.

It was pointed out in a note to the report of the above case in the Divisional

Court, 1 L. G. R. 889, at p. 896, that the judgment of the Divisional Court was open to serious criticism.

In the Divisional Court both Lord Alverstone C.J. and Channell J. expressed the opinion that if Emma Neep's settlement in West Ham had been derivative, then the last paragraph of section 35 of the Divided Parishes and Poor Law Amendment Act, 1876, would have relegated the pauper to his own birth settlement. It was pointed out in the note in question that this opinion was inconsistent with the opinion of Lord Watson in *Reigate Union v. Croydon Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580, and with the deliberate decision of the Court of Appeal in the subsequent case of *West Derby Union v. Atcham Union* (1889) 24 Q. B. D. 117; 59 L. J. M. C. 17; 38 W. R. 361; 54 J. P. 485, according to which the last paragraph of section 35 does not apply to children under sixteen. And it was suggested that the opinion must be regarded as having been expressed *per in curiam*. It will be observed that the opinion is not repeated in the Court of Appeal, a circumstance which goes to confirm the view expressed in the note.

It was further pointed out that the reasoning of the Divisional Court based on *Reg. v. Elvet Inhabitants* (1859) 2 E. & E. 266; 29 L. J. M. C. 17; 5 Jur. n.s. 1350; 7 W. R. 586, was far from satisfactory. But it was observed that *Reg. v. Elvet Inhabitants* does show that a child under sixteen whose parents are dead may be irremovable by reason of its own residence, though to make up the necessary period it is necessary to reckon residence before the parents' death, and that the Court might possibly be understood as having reasoned that if residence under sixteen is capable of giving rise to irremovability it must be capable of giving rise to a settlement under section 34 of the Act of 1876. This seems to be in substance the line of reasoning with reference to *Reg. v. Elvet Inhabitants* adopted by the Court of Appeal.

The observations on that line of reasoning made in the note in question do not, however, seem to be very adequately met by the judgments in the Court of Appeal. And in the Court of Appeal, as in the Court below, the essential ambiguity in section 34 of the Act of 1876 pointed out in the note escaped attention.

It is understood that the case is to be taken to the House of Lords, and it is greatly to be hoped that there section 34 of the Act of 1876 will receive a clear and authoritative exposition.

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KING'S BENCH DIVISION.

May 5, 6.

TEWKESBURY UNION *v.* BIRMINGHAM GUARDIANS.

Poor Law—Settlement and removal—Irremovability—Residence of wife—Husband having no settlement—Poor Law Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1—Poor Law Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1.

Where the wife of foreigner with no settlement of his own resides in a parish for a year, during part of the year being with her husband, and the remainder of the year alone, he being absent abroad, and the husband has not deserted her but intends to return, she is irremovable from the parish under section 1 of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865, as being a person who has resided in the parish for one year.

Reg. v. St. George-in-the-East Inhabitants (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90, followed.

CASE stated by the Recorder of Birmingham upon an appeal by the Tewkesbury Union to the court of quarter sessions for the city of Birmingham against an order of justices, dated September 3rd, 1902, for the removal from the parish of Birmingham to the parish of Bredon in the Tewkesbury Union, of Alice Alinquivist and her four children.

The appeal to quarter sessions was heard at the January quarter sessions, 1903, when judgment was reserved until the April quarter sessions, 1903, when the Recorder allowed the appeal with costs, subject to the opinion of the High Court on the following case:—

1. The pauper, Alice Alinquivist, is the wife of Charles Alinquivist, a foreigner with no settlement of his own. They were married on July 6, 1890, and the children are the lawful issue of the pauper and Charles Alinquivist, and are all of them under the age of sixteen years. Doris was born in August, 1892, at New York. Rose was born January 5, 1898, at 24, Richard Street South, in the parish of West Bromwich, in the West Bromwich Union. Herbert was born on October 17, 1899, at 8, Chapel Street, in the said parish of West Bromwich, and Charles was born on April 26, 1902, in the workhouse infirmary of the parish of Birmingham.

2. The pauper Alice and her husband came to reside in the parish of Birmingham, in January, 1901, and continued so to reside, first at No. 99, Buckingham Street, and then at No. 2, Bath Street, in the parish of Birmingham, until June 20, 1901, when the husband went to America to work for his brother-in-law, intending to send for his wife and children when he got settled. The pauper Alice heard from him

several times, but he said he was not able to get work and had made up his mind to return to England. He had not returned at the date of the order of removal, but I find as a fact that he did not desert his wife, and that he had the intention of returning.

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3. From June 20, 1901, the pauper Alice, with her three older children, continued to reside at No. 2, Bath Street, in the parish of Birmingham, until March 27, 1902, when she removed with them to the Birmingham workhouse, where she was confined of her youngest child on April 26, 1902. She remained there till September 19, 1902, when she went out with all her children and has not returned.

4. The pauper Alice was born in 1869, and is the lawful daughter of Robert Warner, and the said Robert Warner at the time the pauper had attained the age of sixteen years had obtained a settlement by residence in the parish of Bredon in the Tewkesbury Union.

5. It was contended for the appellants that the pauper Alice was irremovable by reason of her continuous residence in Birmingham for more than one year previously to her becoming chargeable, notwithstanding the temporary absence of her husband, and that the case of *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90, was in point. It was further contended on behalf of the appellants that by the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, all derivative settlements were abolished, except in the case of a wife from her husband and of a child under the age of sixteen from its father or widowed mother, as the case may be, and that the husband of the pauper Alice having no settlement she was irremovable; also that, with regard to the children, there was no derivative or other settlement which they could take, inasmuch as their father had no settlement and their mother was not a widow.

6. It was contended for the respondents that there was a break in the residence of the husband when he left for America, June 20, 1901, and that the period of residence of the pauper Alice with her husband prior to his departure could not be added to her residence after his departure so as to make up the full year of residence necessary for her to have acquired a status of irremovability. It was also contended on behalf of the respondents that by the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, inasmuch as the husband had no settlement the wife became removable to the place of her maiden settlement in the Tewkesbury Union derived from her father, and that with regard to the children, as there was no settlement which they could derive from their father, they acquired the settlement of their mother, and were also removable to the Tewkesbury Union.

7. I was of opinion that in the circumstances aforesaid the pauper Alice was irremovable from the parish of Birmingham by reason of her

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continuous residence there for more than one year prior and up to the date of the order of removal, and I adopted the reasoning of the judgment in the case of *Reg. v. St. George-in-the-East Inhabitants* as applicable to the present case.

8. I also considered that the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, was a bar to the setting up of a derivative settlement of the pauper Alice from her father: see *Reg. v. Bridgnorth Union* (1883) 11 Q. B. D. 314; 52 L. J. M. C. 71.

9. I accordingly held that neither the alleged settlement of the mother nor of the children had been made out, and I allowed the appeal with costs and quashed the order of removal.

10. The questions for the opinion of the Court are as follows:—

(1) Was the pauper, Alice Alinquivist, at the time the order of removal was made, irremovable from the parish of Birmingham?

(2) If not, was the pauper Alice Alinquivist, or were any of her children properly removable to the Tewkesbury Union?

The Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, provides as follows:—

From and after the passing of this Act no person shall be removed nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years [now one year under the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8] next before the application for the warrant . . .

The Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1, repeals a proviso originally contained in section 1 of the Poor Removal Act, 1846, and in lieu thereof enacts the following proviso:—

Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act [the Poor Removal Act, 1846], and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act.

N. G. S. Pritchett (Macmorran, K.C., with him) for the Birmingham Guardians. The learned Recorder was wrong in holding that the pauper, Alice Alinquivist, was irremovable from Birmingham. He so decided on the authority of *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90. But the principle of that case has been overruled by the House of Lords in *Medway Union v. Bedminster Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, which was decided together with *Reigate Union v. Croydon Union* and *Highworth and Swindon Union v. Westbury-on-Severn Union*. The House of Lords there adopted the judgment of Lopes L.J. in the *Medway* case in the Court of Appeal (21 Q. B. D. 278; 57 L. J. M. C.

129), where, though arriving at the same result as the other members of the Court, he did so by a different and, indeed, opposed line of reasoning. The Lord Justice, speaking of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, said: "I am unable to agree with the decision of my learned brothers with regard to the construction of section 34 . . . To my mind the important question is as to the meaning of the words 'any person' in section 34. I think that they mean persons *sui juris* who are capable of acquiring a settlement or status of irremovability for themselves, and that they do not include unemancipated children or women under coverture, cases otherwise provided for in the Act. While the husband lives, I think that his residence only, and not the wife's, must be looked to, and his state of irremovability, not hers." This all proceeds on the view that a woman under coverture can acquire neither a settlement nor a status of irremovability for herself. The *Medway* case is thus inconsistent in principle with the *St. George-in-the-East* case, and with *Reg. v. Glossop Inhabitants* (1848) 12 Q. B. 117; 17 L. J. M. C. 171, on which it was based, and must be regarded as overruling those cases. In the present case the husband broke his residence when he went to America, and thus acquired no status of irremovability that could be transmitted to the pauper. Moreover, the break of his residence had the effect of breaking that of the pauper: *Reg. v. Manchester Overseers* (1881) 8 Q. B. D. 50; 51 L. J. M. C. 6. The pauper is, therefore, not irremovable from Birmingham.

[He then argued that the pauper and her children were removable to the pauper's maiden settlement. As in the result it became unnecessary for the Court to deal with this branch of the case, it has been thought unnecessary to report the argument on it.]

R. Cunningham Glen for the Tewkesbury Union. The learned Recorder was quite right. He has held as a fact that the pauper's husband had not deserted her, and had an *animus revertendi*. If the husband had returned to Birmingham he could not have been removed. Therefore, if her removability depends upon her husband's she is not removable. If, on the other hand, she is looked upon as an independent person for this purpose, then she has fulfilled the conditions of the principal enactment in section 1 of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865. The case is completely governed by *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90. Neither that case nor *Reg. v. Glossop Inhabitants* (1848) 12 Q. B. 117; 17 L. J. M. C. 171, is touched by the decision of the House of Lords in the *Medway* case. The House of Lords was dealing with settlement, while those cases and the present are concerned with a status of irremovability, which is a

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different thing altogether. The recent case of *West Ham Union v. Holbeach Union*, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801, affirmed in the Court of Appeal, 1904, 2 K. B. 121; 2 L. G. R. 853; 73 L. J. K. B. 607, is to some extent in favour of the respondents; for there it was held that even for the purpose of acquiring a settlement the residence of a person while not *sui juris* may be taken into account. [He was stopped.]

Macmorran, K.C., in reply, cited *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, 1894, A. C. 230; 63 L. J. M. C. 97; *Reg. v. St. Marylebone Inhabitants* (1851) 16 Q. B. 352; 20 L. J. M. C. 61; *Reg. v. Kingston Union* (1869) 21 L. T. 488; 18 W. R. 133; and *Reg. v. Manchester Overseers* (1881) 8 Q. B. D. 50; 51 L. J. M. C. 6.

LORD ALVERSTONE C.J. I am of opinion that the decision of the learned Recorder was right, and substantially for the reasons given by him. Counsel for the Birmingham Guardians in his able argument endeavoured to show that the principles of several of the cases cited by him are inconsistent with *Medway Union v. Bedminster Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, and in my opinion he is quite justified in saying that it is extremely difficult to lay down any rule which is consistent with all the cases.

In my opinion we are not compelled to hold that the period during which a wife is with her husband can never be considered in determining the question whether she has acquired a settlement or status of irremovability in her own right. I do not think any case has gone so far as to decide that that period can under no circumstances be considered. Lopes L.J. in *Medway Union v. Bedminster Union* (1888) 21 Q. B. D. 278; 57 L. J. M. C. 129, did not so decide. The Lord Justice was pointing out that the wife in that case ought to be held to have acquired a derivative settlement through her husband, and on that account, and it may be only on that account, could not acquire a settlement in her own right. The acquisition of a subsisting derivative settlement was the important point in that judgment. To a certain extent the decision in this Court in *West Ham Union v. Holbeach Union*, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801, which has lately been affirmed by the Court of Appeal (1904, 2 K. B. 121; 2 L. G. R. 000; 73 L. J. K. B. 607) gives an indication that the principle ascribed to Lopes L.J. in *Medway Union v. Bedminster Union* cannot be applied with that strictness of application which Mr. Pritchett claims for it. If it be true that the period during which a woman is married has no value whatever except for the purpose of conferring upon her a derivative settlement through her husband, it seems to me it might with equal force have been contended that the time during which an

illegitimate child is under the age of sixteen years and has a derivative settlement through its mother, can have no effect in conferring upon the child in its own right a settlement by residence. But that argument did not prevail in *West Ham Union v. Holbeach Union*.

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The short point upon which I decide this case is that as the learned Recorder has rightly said, the principle laid down by Blackburn J. in *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364 ; 39 L. J. M. C. 90, governs this case. That case has not been even indirectly—it certainly has not been directly—overruled in the House of Lords in *Medway Union v. Bedminster Union*. It is not referred to in any of the judgments in the House of Lords, and I can see nothing, so far as material to the present discussion, inconsistent in the two cases. The question before Blackburn J. arose upon the statute which we have to consider affecting the removability of a wife left, but not deserted, by her husband. When the husband has left the wife under circumstances which lead to the finding of fact that they indicate an intention of returning, and that the departure does not amount to desertion, and the husband cannot be removed—I purposely use this phrase so as not to confine myself to the case where the husband has acquired the status of irremovability. I think Blackburn J. points out very good reasons why the wife, who has in fact resided long enough to become irremovable, should not be removed. His reasoning appears to me conclusive, and I adopt it and apply it to this case. Had the husband been here he could not have been removed either before or after January, 1902. Of course if he had resided in the parish of Birmingham for twelve months the judgment of Lopes L.J., in *Medway Union v. Bedminster Union*, would have applied directly. The husband would then have acquired the status of irremovability, and the wife would have been irremovable by virtue of his irremovability. That being so, we ought not, without very clear language, to hold that in a case so similar, where the husband has merely gone away with the intention of returning, and where upon his return he could not be removed, the wife is to be removed to her maiden settlement, though she has in fact completed the twelve months' residence in the parish from which her husband on his return could not be removed. Then as to the language of the legislation, I think the wife does not come within either the original proviso to section 1 of the Poor Removal Act, 1846, or the enactment contained in section 1 of the Poor Removal Act, 1848, which replaces that proviso. If the effect of the later enactment is that mere *de facto* irremovability of the husband precludes removal of his wife, this case is clear and simple ; but I am certainly not prepared to say that that is the effect of this enactment. I fully share the difficulty which Blackburn J. felt in construing it. It is only necessary to decide

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that this pauper comes within the language of the principal enactment of section 1 of the Poor Removal Act, 1846, as amended by section 8 of the Union Chargeability Act, 1865, and not within the terms of section 1 of the Poor Removal Act, 1848. She is a person who has resided for one year in the parish of Birmingham. That being so, she cannot be removed, unless it is necessary to hold that the time during which she was living with her husband cannot be considered. There are no words in the enactment which make it necessary to adopt that view, and the contention of those who wish to remove her fails on the principle laid down by Blackburn J. in *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90, that where the wife has in fact resided sufficiently long to acquire the status of irremovability, and the husband, who has not deserted his wife, cannot be removed, whether from having acquired the status of irremovability or from there being no circumstances to render him removable—the result for the present purpose is the same—the wife cannot be removed. For these reasons I think the learned Recorder was right, and this appeal must be dismissed.

WILLS J. I have come to the same conclusion. It was admitted by counsel for the Birmingham Guardians in his able argument that unless *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90, is overruled it governs this case. It is said to be overruled by *Medway Union v. Bedminster Union* (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, because the reasoning in the former case was founded partly on *Reg. v. Glossop Inhabitants* (1848) 12 Q. B. 117; 17 L. J. M. C. 171, and to a certain extent followed the same lines, and the train of reasoning by which the decision in *Reg. v. Glossop Inhabitants* was arrived at, though not the decision itself, had been overruled by the House of Lords. If I thought that *Reg. v. St. George-in-the-East Inhabitants* had been overruled by the House of Lords, of course I should consider it no longer an authority; but the decision in the House of Lords does not go that length. The House of Lords disagreed with the view of the majority of the Court of Appeal, and adopted that of Lopes L.J., which, as explained by Lord Watson, was that where a wife has a derivative settlement from her husband, she has no capacity to acquire by residence another settlement in the same parish. That has no bearing upon the present case, which is not a case where the wife has a subsisting derivative settlement through her husband, and therefore the view entertained by the House of Lords with regard to *Reg. v. Glossop Inhabitants* does not touch the facts of this case. Under those circumstances we are driven to look at the very words of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865: those words are that no person shall be

removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for one year next before the application for the warrant. It is true that in one sense there is a difference between a wife's residence before and her residence after her husband goes away. After he goes away he himself has broken his residence, and if he goes away before having resided for twelve months she cannot tack the two periods together for the purpose of claiming to be removable because of any status of irremovability acquired by her husband, for the simple reason that, having broken the residence within twelve months, he never acquired that status. But there is no decision, and I see no reason for making a decision, to prevent a wife from tacking the residence during which, by reason of her husband having no settlement, she has acquired no settlement, to her residence after her husband goes away. That is not like the case of a wife who becomes a widow, and who, according to the decision in *Medway Union v. Bedminster Union*, cannot for the purpose of acquiring a settlement by residence add the period during which she had a derivative settlement as wife to the period of residence as a widow. The two cases are not analogous, and there being no decision which binds us to hold that the pauper in this case has not resided for the period of twelve months, it is better to follow the language of the Act, and to hold that she has resided for the necessary period. The late decision in *West Ham Union v. Holbeach Union*, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801 (affirmed, 1904, 2 K. B. 121; 2 L. G. R. 853; 73 L. J. K. B. 607) is not without its bearing upon this matter, for it decides that to complete the residence necessary to confer a status of irremovability a period of residence during which a child had a derivative settlement through its mother might be taken into account; from which it would seem to follow that the necessary period might be made up of two portions, the residence being under a different capacity during each portion. And, as there is no express enactment or decision which militates against this view, I think the residence may be considered as complete for the purpose of conferring the privilege of irremovability within the terms of the Act. I prefer to base my judgment upon this ground, because I feel that there may be a difference between the irremovability of a person who cannot be removed merely because there is no place to which he can legally be removed to, and that of a person who cannot be removed because he has acquired the status of irremovability by reason of residence in one place notwithstanding that there is another place to which otherwise he could be removed.

KENNEDY J. I am of the same opinion upon the facts, which are important, and are found thus:—The pauper is the wife of a man who

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has no settlement of his own ; the man has left her, not deserting her, but with the intention of returning, and therefore he is in one sense to be treated as still residing where he was before his departure, in the parish of Birmingham ; the pauper with her children had, before she became chargeable, resided in that parish for the statutory period which would confer upon her the status of irremovability if she could be treated as an independent personality. Under these circumstances, is she, with her children, on becoming chargeable, to be taken away to her maiden settlement at Tewkesbury, which is the settlement of her father, and which she acquired through him, or is she to be treated as chargeable to the parish of Birmingham. Now there are two important principles in this complex legislation : not to separate wife from husband ; and not to separate children from parents. It may be assumed that the Legislature has not consciously enacted anything in violation of those governing principles where it was possible to avoid so doing. But if this pauper is to be removed to the place of her maiden settlement, there is at least a grave question as to whether the children can follow her, and she will certainly be separated from her husband. If the husband had a settlement there would be no difficulty ; his settlement would be his wife's also. But where the husband has no settlement what happens ? That question is answered by Blackburn J. in *Reg. v. St. George-in-the-East Inhabitants* (1870) L. R. 5 Q. B. 364 ; 39 L. J. M. C. 90. There is no flaw to be found in the judgment in that case. Mr. Pritchett, in his able argument for the Birmingham Guardians, admitted that unless that judgment could be treated as overruled the decision of the learned Recorder in this case must stand. But it was contended that the judgment of Blackburn J. in *Reg. v. St. George-in-the-East Inhabitants* must be treated as overruled by several cases, and finally by the judgment of Lord Watson and the *ratio decidendi* of the House of Lords in *Medway Union v. Bedminster Union* (1889) 14 App. Cas. 465 ; 59 L. J. M. C. 29. I differ entirely from that view. I can see no indication that the case of *Reg. v. St. George-in-the-East Inhabitants* has been directly or indirectly overruled in any of the cases, including that in the House of Lords. On the contrary, Lord Watson's affirmance of the view of Lopes L.J. in the Court of Appeal turns upon the cardinal fact, absent in this case, that the husband had a settlement. Where that is so the wife follows her husband's settlement ; but that is not so here.

Then has the Act of 1876 modified the law as stated by Blackburn J. on the conclusions he drew therefrom ? That is not seriously suggested. So far as the case of wife and husband is concerned, no legislation has affected the statement of the law upon which Blackburn J. based his judgment, the only position which is reasonably consistent with

the great object of keeping the family together, subject to this qualification, expressly stated by the learned judge himself, that if the husband has a settlement of his own the wife must follow his settlement.

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Appeal dismissed.

Solicitors for the appellants—Redfern and Hunt, for Redfern and Son, Birmingham.

Solicitors for the respondents—Sims, Gribble, & Co., for Brookes and Badham, Tewkesbury.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

May 11.

BANNISTER *v.* SULLIVAN.

Poor Law—Maintenance of relatives—Running away and leaving children chargeable—Failure to remove children from workhouse after expiration of sentence for previous offence—Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4.

A parent who has been convicted under section 4 of the Vagrancy Act, 1824, of running away and leaving his children, whereby they became chargeable, and who has in consequence undergone a sentence of imprisonment, may be again convicted under the section of running away and leaving such children chargeable, if on the expiration of his sentence he fails to remove them from the workhouse and absconds.

CASE stated by a metropolitan police magistrate as follows:—

1. On the 15th, 22nd, 23rd, and 28th days of December, 1903, the respondent was brought before me under a warrant for his arrest granted January 22, 1903, to answer to an information laid under section 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), and section 19 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), by the appellant, the general relieving officer to the guardians of the poor of the parish of Paddington, alleging that the respondent did on December 15, 1902, unlawfully run away leaving his three children whom he is legally bound to maintain, whereby they have become and are now actually chargeable to the parish of Paddington, contrary to the statutes in that case made and provided.

2. Upon the hearing of the said information the following facts were proved on behalf of the appellant, viz., (a) In 1899 the respondent ran away from his three children, whom he was legally bound to maintain, and his children thereby became chargeable to the parish of Paddington, and they have since been maintained by the Paddington Board of Guardians at the expense of about £250 to the common fund of the parish. (b) On November 13, 1900, the respondent was convicted for running away and leaving his children on November 7, 1899, whereby they became chargeable as aforesaid, and was sent to prison for one month. When the respondent came out of prison he went to the appellant's office and was told by the appellant that he must take steps to take his children out of the Paddington Workhouse. This, however, the respondent failed to do, and the children remained in the workhouse. In January, 1903, a warrant was granted for the apprehension of the respondent for running away

and leaving his children chargeable on December 15, 1902, two years from the date of his release from prison.

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There was evidence that during this interval of time the guardians had published an offer of a reward of 20s. for the respondent's discovery, and search had been made for the respondent by the police and by the guardians, but beyond the fact that the search was unsuccessful there was nothing to show that the respondent was wilfully hiding.

3. The appellant contended that by leaving his children in the workhouse after he came out of prison the respondent had run away and left his children, whereby they became chargeable to the parish of Paddington, contrary to section 4 of the Vagrancy Act, 1824, and that he had therefore committed a fresh offence and was liable to conviction therefor under that section and section 19 of the Divided Parishes and Poor Law Amendment Act, 1876. And it was further contended, if there were no fresh offence in law, the respondent was guilty of a continuing offence day by day, until such time as he removed the chargeability.

4. I ordered the respondent to be discharged, inasmuch as I was of opinion that as his said children had been continuously chargeable since November 7, 1899, they had not become chargeable to the parish of Paddington by reason of the respondent's not removing them from the workhouse after he came out of prison; and that the respondent had committed no fresh offence; and having been convicted and punished for having run away and left his children whereby they became chargeable to the parish on November 7, 1899, he could not under the circumstances hereinbefore stated be convicted for continuing the said offence on December 15, 1902.

The question of law for the opinion of the Court was whether or not the magistrate ought to have convicted the respondent on the facts above stated.

Section 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), provides that:—

... Every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place . . . shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months

Section 19 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict., c. 61), provides that:—

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Proceedings may be taken against any person who runs away and leaves his wife or his or her child chargeable, or whereby she or they or any of them shall become chargeable to any union or parish at any time within two years after the commission of the offence, and a summons or warrant in respect thereof may be issued upon the information of any relieving officer of the guardians stating that relief has been applied for on behalf of the wife or child, and that he is informed and believes that the husband or parent, as the case may be, has left the wife or child and gone away, any law or statute to the contrary notwithstanding

Danckwerts, K.C. (R. Cunningham Glen with him), for the appellant. The learned magistrate has held that because the children were in the workhouse at the time when the respondent disappeared, he cannot be convicted. In this it is submitted he was wrong. Section 4 of the Vagrancy Act, 1824, makes it an offence for a man to run away leaving his children chargeable or to run away in consequence of which they become chargeable. The nature of the offence is explained by Erle C.J. in *Cambridge Union v. Parr* (1861) 10 C. B. (n.s.) 99; 30 L. J. M. C. 241, where he says: "Section 4 was I think, directed against persons running away in the sense of absconding or concealing themselves, or absenting themselves to a long distance and leaving their wives and children chargeable to the parish." No doubt the information was wrongly drawn. It alleged that the respondent ran away whereby the children became chargeable. It should have alleged that he ran away leaving them chargeable. But this defect is cured by section 1 of the Summary Jurisdiction Act, 1848. Section 19 of the Divided Parishes and Poor Law Amendment Act, 1876, shows clearly that it is just as much an offence to run away leaving children chargeable as to desert them so that they become chargeable.

There was no appearance for the respondent.

LORD ALVERSTONE C.J. In my opinion this case must be sent back to the magistrate to convict. On the point that the information contained the words only "run away leaving his three children, whom he is legally bound to maintain, whereby," in all probability the form ought to have been amended, but I think, as the statute and as the evidence which was given establish the offence, we ought not to give effect to the objection to the form of the information, nor do I understand it to have been the ground of the magistrate's decision. The ground of the magistrate's decision was that the respondent had been previously punished for running away, and therefore there was not another offence. With great deference to Mr. Plowden's valuable opinion, I think he was not right. It seems to me that after the respondent came out of prison his duty to maintain his children revived, if I may use that expression; but he runs away, and therefore

it is a substantive offence. When he came out of prison he asked what he would have to do. He called at the appellant's office, and he was told that he must take steps to take the children out of the workhouse, but he runs away again. The fact that they were in the workhouse at the time is no reason that he should not be punished, and there is in effect a substantive offence. The case is the same as *Cambridge Union v. Parr* (1861) 10 C. B. (n.s.) 99; 30 L. J. M. C. 241. Any other result would be rather serious, because if a man ran away once and was punished, he would get rid of any responsibility for supporting his children by simply absconding. I think the case must go back to the magistrate with a direction to convict.

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WILLS J. I am of the same opinion. I think the conviction ought to be for running away and leaving his children chargeable to the parish.

KENNEDY J. I am of the same opinion. It seems to me that there was evidence that the respondent was, within the decision of *Cambridge Union v. Parr* (1861) 10 C. B. (n.s.) 99; 30 L. J. M. C. 241, leaving his children chargeable, and the offence was not properly charged in the information. That might have been a matter for adjournment if there had been any question of surprise or the like. But it is not the point raised for our decision. The point raised is whether or not there should be a conviction, seeing that the respondent had been convicted before, and that the children remained in the workhouse, and there was no fresh state of facts. I think there was enough to justify a conviction.

Appeal allowed. Case remitted to the magistrate to convict.

Solicitors for the appellant—Collins and Cook.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

The facts in the above case suggest that there was a very serious difficulty in the way of the conviction of the respondent, which was not referred to in argument, and with which the Court did not deal.

The respondent came out of prison apparently in December, 1900, and it may be gathered that he disappeared, after having been told to take his children out of the workhouse, shortly afterwards.

When he thus disappeared he, no doubt, committed the offence of running away and leaving his children chargeable; indeed, it seems that this was the point, and the only point, that the Court really intended to decide.

The respondent was, however, not charged with having committed an offence in or about December, 1900, when he actually ran away, but with committing an offence on December 15, 1902, some two years afterwards, when he had done nothing further at all beyond remaining away and leaving his children chargeable.

There is certainly great difficulty, on the words of the section, in supposing that the offence of running away and leaving children chargeable continues after the offender has run away so long as the children remain chargeable and the

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offender cannot be found; and the language of the judgments in *Cambridge Union v. Parr* (1861) 10 C. B. n.s. 99; 30 L. J. M. C. 241; 7 Jur. (n.s.) 1303; 4 L. T. 323; 9 W. R. 636; 25 J. P. 518, and *Reeve v. Yeates* (1862) 1 H. & C. 435; 31 L. J. M. C. 241; 8 Jur. n.s. 751; 10 W. R. 779, seems inconsistent with the view that such conduct does constitute a continuing offence.

On the other hand, it would seem, though the date is not specifically stated in the case, as if the information must have been laid more than two years after the respondent actually ran away, and therefore have been out of time as regards the offence then committed by reason of the limitation in section 19 of the Divided Parishes and Poor Law Amendment Act, 1876.

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KING'S BENCH DIVISION.

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GOLDSTEIN v. HOLLINGSWORTH AND OTHERS.

May 10, 11.

Landlord and tenant—Tenant's covenant to pay rates, &c.—Impositions and outgoings—Underground bakehouse—Expenses of structural alterations required by local authority before granting certificate—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22) s. 101, (2, 8).

The expenses of structural alterations in an underground bakehouse necessary before the certificate of the suitability of the premises for use as a bakehouse required by section 101 of the Factory and Workshop Act, 1901, can be obtained, come within a tenant's covenant to pay impositions and outgoings in respect of the premises.

Where the occupying tenant of an underground bakehouse holds under a lease containing such a covenant it is therefore useless for a court of summary jurisdiction to make an order under section 101 (8) of the Act that any part of the expenses shall be defrayed by the owner; for if the owner did, under such an order, defray such expenses he could recover from the tenant under the covenant. But semble that the court of summary jurisdiction would have power under the subsection, at the request of the tenant, to determine the lease.

Monk v. Arnold, 1902, 1 K. B. 761; 71 L. J. K. B. 441, commented on.

CASE stated by a metropolitan police magistrate upon a complaint preferred by the appellant, the lessee and occupier of No. 14, Chicksand Street, Mile End, let by the respondents to the appellant as a bakehouse, that the certificate required by the Factory and Workshop Act, 1901, s. 101 (2) could not be obtained unless certain structural alterations were made as required by the Stepney Borough Council, and that the expenses of such alterations, estimated at £148 13s. ought to be borne by the respondents as owners of the premises.

Upon the hearing the learned magistrate dismissed the complaint.

The following facts were either admitted or proved :—

1. The premises, No. 14, Chicksand Street, were originally let on lease in 1892 to one Reuben Morris, and were assigned to the appellant in 1893, and were used by the appellant as a bakehouse until March 17, 1903, when a new lease of the premises for the term of 21 years was granted by the respondents to the appellant at the rental of £50 per annum, since which date the premises have continued to be used as a bakehouse.

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2. It was proved that unless certain structural alterations were made at a cost estimated at £148 13s. the certificate required by section 101 (2) of the Factory and Workshop Act, 1901, could not be obtained.

3. It was contended for the respondents that the covenant in the lease of March 17, 1903, which is to be taken as forming part of this case, that "the lessee will during the said term pay all existing and future rates duties assessments impositions and outgoings of every description for the time being payable either by landlord or tenant in respect of the said premises respectively (except landlord's property tax)" was a contract on the part of the appellant to pay the expenses mentioned in subsection (8) of section 101, in that the words "impositions and outgoings" in the above-mentioned covenant covered such expenses. On the other hand it was contended for the appellant that the covenant in question only applied to such sums of money coming under the category of "taxes rates &c." as the landlord or tenant were bound by law to pay in respect of the premises, and that the expenses referred to in the said subsection were a voluntary payment, and made merely for the purpose of enabling the appellant to carry on his business as a baker.

The magistrate upheld the respondents' contention and dismissed the complaint.

The question of law arising on the above statement for the opinion of the Court was whether the expenses mentioned in subsection (8) were covered by the words "impositions and outgoings" in the before-mentioned covenant.

Section 101 of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), provides as follows :—

(1) An underground bakehouse shall not be used as a bakehouse unless it was so used at the passing of this Act.

(2) Subject to the foregoing provision, after the first day of January one thousand nine hundred and four an underground bakehouse shall not be used unless certified by the district council to be suitable for that purpose.

* * * * *

(8) Where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a court of summary jurisdiction, and that court may make such order concerning the expenses or their apportionment as appears to the court to be just and equitable, under the circumstances of the case, regard being had to the terms of any contract between the parties, or in the alternative the court may, at the request of the occupier, determine the lease.

In the county of London the certificate referred to in subsection (2)

of section 101 must be obtained from the metropolitan borough council : see section 153 (4).

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Firminger for the appellant. These expenses are not a compulsory payment for which either landlord or tenant would be liable, and the covenant in this lease only applies to such payments as either the landlord or tenant is liable to be called upon to pay. The expenses are not an imposition or outgoing within the decision of *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499. Assuming the appellant be liable to make these structural alterations he can call upon the respondents, the owners, but they are not liable until the magistrate has made his order; and here the magistrate has made no order. In all the earlier cases the local authority compelled payment by either landlord or tenant. The covenant in this lease was never intended to carry such an expense as this. This is a very different case from either *Stockdale v. Ascherberg*, 1904, 1 K. B. 447; 2 L. G. R. 529; 73 L. J. K. B. 206, or *In re Warriner*, *Brayshaw v. Ninnis*, 1903, 2 Ch. 367; 1 L. G. R. 765; 72 L. J. Ch. 701. The Stepney Borough Council cannot order this work to be done; they can only withhold the certificate, so that as neither landlord nor tenant can be compelled to do this work, the expenses are not a compulsory payment in respect of demised premises. They are not covered by the contract because if the payment be made at all, it is as a voluntary payment not coming within the covenant.

This expenditure falls within the principle of the decision in *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31, which applied the principle laid down by *Valpy v. St. Leonard's Wharf Co.* (1902) 1 L. G. R. 305. It is a voluntary payment not covered by the covenant, and is outside the covenant; but the magistrate holds that the covenant ousts his jurisdiction. His jurisdiction is not, however, ousted at all: *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441. He has jurisdiction to apportion the expenses between lessor and lessee in such manner as appears to him just and reasonable, notwithstanding that the lease contains a general covenant to pay outgoing. It is submitted that the case must be sent back to the magistrate to exercise his jurisdiction in making a reasonable apportionment.

G. Mellor and *C. H. Perrott* for the respondents. The Act gives the magistrate a wide discretion which he has exercised in the respondents' favour. He considered that there was a contract on the part of the appellant to pay the expenses mentioned in section 101 (8), and that the words "impositions and outgoing" in the covenant covered such expenses. The sole question for the decision of the

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Court is whether these expenses are impositions or outgoing. If the covenant bears the construction the magistrate has placed on it, then he has decided the case on its merits. Moreover, where the magistrate finds such a covenant as this in a lease he must uphold it. *Monk v. Arnold* does not apply, because the Legislature has in section 101 of the Act given no general equitable jurisdiction to the magistrate; and if in the present case he did in that view decline jurisdiction he was right to dismiss the complaint.

Firminger in reply.

LORD ALVERSTONE C.J. The only doubt I have had in this case is whether we are in a position to deal with the question finally, or whether we should send it back to the magistrate. This doubt arises in my mind not upon the statement of the facts in the case, but upon the language used by the magistrate in stating the question for our decision. However, I have come to the conclusion that there is no substantial reason for our sending it back to him, and that we must take it that the only question the magistrate has left for us to decide is whether the expenses mentioned in subsection (8) of section 101 of the Factory and Workshop Act, 1901, are an imposition or outgoing within the meaning of the covenant. Now, in 1903, a lease was granted of this property for 21 years from March 17, after the passing of the Factory and Workshop Act, 1901, and after the decision of the Court of Appeal in *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, which contained the following covenant:—"The lessee will during the said term pay all existing and future rates duties assessments impositions and outgoing of every description from time to time payable either by landlord or tenant in respect of the said premises" The question is whether the expenses of these structural alterations come within the terms of this covenant. In my opinion it is quite useless for us to attempt to deal with the various authorities on the subject, for, as the Court of Appeal itself pointed out in *Foulger v. Arding*, they are not to be reconciled. But we must apply the principles laid down by the judgment of the Court of Appeal in *Foulger v. Arding* as the basis of the decision of the question now before us. We must give the words their natural meaning. Mr. Firminger contends that this was not an imposition or outgoing payable by landlord or tenant, because the payment of it is an optional or voluntary act on the part of either, and one that they might or might not make. I cannot, however, assent to this contention, for I do not think it is a fair construction to put on subsection (8) of section 101, the words of which are "where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural

alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a court of summary jurisdiction, and that court may make such order concerning the expenses or their apportionment as appears to the court to be just”

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In my opinion, if the court of summary jurisdiction had in the present case, upon the application of the appellant, made an order under the subsection that the respondents were to bear a proportion of the expenses of structural alteration, it would be impossible to say that such expenses would not be impositions or outgoings payable by the lessors. I have no doubt that these expenses are within the covenant.

Mr. Firminger asks us to send the case back to the magistrate because he has not exercised the jurisdiction given him by subsection (8). But it seems to me that the magistrate dealt with the case in the way Mr. Mellor suggests, which is, that the magistrate intended to say that if we were of opinion that the expenses came within the covenant, then his refusal to make any portion of that expense payable by the owner was to stand as his decision. I desire to say, therefore, that I see no ground for sending the case back. This is a lease for a term of 21 years made by agreement of both parties after the passing of the Factory and Workshop Act, 1901, and I cannot think that it was the intention of the Legislature, nor can I see that it would be either just or equitable, having regard to the length of the term, to cast upon the respondents, the owners of the premises, this imposition in the face of the covenant entered into by their tenant, the appellant. I do not say that in the case of a short term and of a very heavy outlay the Court might not have jurisdiction to determine the lease, but no question of this kind arises upon the present state of facts. In *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441, our decision was upon section 7 (2) of the Factory and Workshop Act, 1891, but in that section the words which we find in subsection (8) of section 101 of the Act of 1901, “regard being had to the terms of any contract between the parties,” were absent. The presence of those words, in my opinion, strengthens the position of the owner of premises. I, therefore, come to the conclusion that, having regard to the length of the term and to the covenant between the parties, no grounds have been shown to support the view that it would be either just or equitable to cast any part of the payment of these expenses of structural alterations upon the respondents. Accordingly, in my opinion, the appeal must be dismissed.

WILLS J. The question the learned magistrate has left to us is whether the expense of structural alterations necessary to obtain a

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certificate under section 101 of the Factory and Workshop Act, 1901, is an imposition or an outgoing within the covenant. That such a payment is an outgoing is, in my opinion, decided by *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499. Counsel for the appellant relied on *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441. I confess I have some little difficulty in understanding the judgment of Channell J. in that case. He appears to have said that there could be no imposition upon the landlord under section 7 of the Factory and Workshop Act, 1891, until the county court judge had so decided, and to have considered that although the payment of the expenses of works required under that section might be an outgoing, yet it might not be an outgoing for which the tenant could be sued under a covenant framed as the covenant is in the case before us. In my view it is difficult to understand how that can be so.

I think it would be futile to send the present case back to the magistrate, whether or not he is to be taken to have decided the question it would be just and equitable that the appellant, the tenant, should bear the costs of the structural alterations—and speaking for myself I think that a covenant such as we find here between the parties should only be reviewed under very exceptional circumstances—because if the magistrate, having taken all the circumstances into consideration, were to hold that it would be unjust and inequitable that the respondents should pay these expenses, then *cadit questio*, if, on the other hand, he ordered the respondents to bear a proportion of them, the latter upon paying such proportion would at once be in a position to sue the appellant for the amount under the covenant.

KENNEDY J. I am of the same opinion. I think it would be a useless proceeding to send the case back to the magistrate. I quite agree with what my brother Wills has said, that if these expenses be an outgoing there is no reason why they should not fall within the covenant. And I also confess that I also am unable to understand the distinction as to outgoing drawn by Channell J. in *Monk v. Arnold*. The only question here is whether the appellant has bound himself in law to pay this particular outgoing or not. If he has there is no use in sending the case back to the magistrate, for if the magistrate were to apportion part of the expense as payable by the respondents, the landlords, it would immediately fall within the terms of the covenant as an expense payable, as between the tenant and the landlord, by the former. As my brother Wills has pointed out, the absurd result would be that directly the apportionment took place the respondents would have a right to sue the appellant to recover the amount. As to the case, the one point of law referred to us is whether under the particular written agreement contained in this covenant the appellant has undertaken to

pay the cost of these outgoings as a charge cast on the respondents, and our answer to that question is in favour of the respondents.

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Appeal dismissed.

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Solicitors for the appellant—H. A Lovett & Co.

Solicitor for the respondents—Arthur Blott.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

The above case has been followed in *Morris v. Beal*, of which a report will appear in due course.

High Court of Justice.

KING'S BENCH DIVISION.

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May 11, 12.

REX v. KENT JUSTICES.

Highways—Diversion—Proceedings—Request to justices to view—Refusal of justices to certify—Certificate subsequently given by other justices—Resolution of District Council—Notices affixed at ends of highway—Period for which they must remain affixed—Highway Act, 1835 (5 & 6 WILL. IV. c. 50), ss. 84, 85.

It is essential to the validity of a certificate of justices for the diversion of a highway, under section 85 of the Highway Act, 1835, that the notice of the proposed diversion, required by the section to be affixed at each end of the highway, should be posted up at a date which will leave a clear period of four weeks or twenty-eight full days between the date of the posting up of the notices and the date of the issue of the justices' certificate.

Where a district council have by resolution under section 84 directed their surveyor to apply to two justices to view a highway proposed to be diverted, and the justices have refused to certify that the diversion will render the highway more commodious to the public, the resolution is not exhausted; and a second pair of justices to whom the surveyor may subsequently apply to view the highway have jurisdiction to issue their certificate notwithstanding the fact that the council have passed no fresh resolution on the matter.

Where justices certify that upon such a view they find the diverted highway will, for certain reasons then apparent, be more commodious, the fact that they go on to state additional reasons disclosed by inquiries from third persons to the same effect will not invalidate their certificate.

It is not necessary that the fact that the owner's consent to the making of the substituted highway should be stated on the certificate.

ORDER *nisi*, at the instance of the Tonbridge Rural District Council, acting under section 26 of the Local Government Act, 1894, and of Charles Eastwood, a person injured and aggrieved within the meaning of section 88 of the Highway Act, 1835, calling upon two justices for Kent to show cause why a writ of *certiorari* should not issue to remove into the High Court a certificate under their hands, dated December 7, 1903, in proceedings for the diversion of a highway, and an order of quarter sessions directing the enrolment of the same.

On April 25, 1903, Messrs. Abrey and Izard, the owners of certain lands known as the Blue Barn building estate and the Meadow Lawn building estate, gave notice to the Tonbridge Urban District Council, pursuant to section 84 of the Highway Act, 1835, that they were desirous that a public highway in the council's district, namely, a

footpath through their land leading from Douglas Road into Brook Street, should be in part diverted by stopping up a certain length thereof, and substituting therefor a new footpath in the manner stated in the section. 1904.
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At a meeting of the Tonbridge Urban District Council, held on July 1, 1903, it was resolved that the proposal and desire aforesaid then submitted to the meeting be agreed to, and that surveyors of the urban district council be directed to apply to two justices of the peace for the county of Kent, acting in and for the petty sessional division of Tonbridge, to view the highway so proposed to be stopped up and diverted.

On July 3, 1903, the surveyor applied to C. F. Kemp and R. Wingate, Esquires, two justices of the peace, to view the highway. They viewed it accordingly, but with the result that they refused to certify that the proposed substituted way was more commodious to the public.

On November 9, 1903, without any fresh application by Messrs. Abrey and Izard, or any fresh resolution by the urban district council in that behalf, the surveyor applied to A. T. Beeching and H. R. Brown, Esquires, two other justices, to view the highway. In pursuance of this application these justices, on November 11, 1903, together viewed the highway intended to be diverted, and the line of the proposed new highway, both of which were wholly situated in the parish of Tonbridge Urban. Upon this view it appeared to the justices that the highway might be diverted and turned in the manner proposed so as to make the same more commodious to the public, and on the same day the justices accordingly directed the urban district council and their surveyors to affix a notice in the form 19 of the schedule to the Highway Act, 1835, at the place and by the side of each end of the highway from whence the same was proposed to be turned and diverted, and also at each end of the new highway proposed to be made in lieu thereof.

On November 14, the surveyor affixed copies of this notice at the side of the footpath in manner directed. The notice was dated November 11, and stated that the justices' certificate would be lodged with the clerk of the peace on December 7.

A like notice was by like direction affixed on the principal door of the parish church and of another church on four successive Sundays next after the making of the view; and a like notice by like direction was inserted in the *Tonbridge Free Press*, a newspaper published on Saturdays and generally circulated in the county of Kent, for four successive weeks next after the making of the view. The notice appeared in the *Tonbridge Free Press* on November 14, 21, and 28,

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and December 5. It was also affixed on the church doors on Sundays November 15, 22, and 29, and December 6.

On Monday, December 7, the justices issued their certificate which was on the same day lodged with the clerk of the peace. This certificate recited that the justices making it had viewed the highway proposed to be diverted as well as the new highway, and had upon that view found the new highway to be more commodious to the public "because the said old highway is a mere footpath across an open field which is very wet and muddy in winter and very inconvenient . . . whilst the proposed new highway will be of the uniform width of six feet, and will be formed with a solid bottom, and with a three-inch top course of tar paving. It is understood the such six-foot footpath will eventually form part of a new 36-foot roadway to be ultimately lighted and taken over by the Urban District Council of Tonbridge." The certificate further recited that Messrs. Abrey and Izard were the owners of the Blue Barn estate, but omitted to state that they were the owners of the land on which the new footpath was proposed to be made. The justices, however, at the time they made their certificate, had evidence before them showing that the site of the new footpath was part and parcel of the Blue Barn estate. The certificate having been issued as already stated on December 7, the Tonbridge Rural District Council and Charles Eastwood, respectively, gave notice on December 23 to the Urban District Council of Tonbridge of their intention to appeal to quarter sessions upon various grounds against the proposed diversion of the highway.

This appeal was heard by the court of quarter sessions on January 7, 1904, and dismissed, and the court made an order for the certificate to be enrolled.

The appellants thereupon obtained the present rule *nisi* for *certiorari* to bring up and quash the justices' certificate and its enrolment by the court of quarter sessions upon the grounds following:—

- (a) That both were void as made without jurisdiction.
- (b) That there were no proper proceedings under sections 84 and 85 of the Highway Act, 1835, warranting procedure under section 85.
- (c) That the request of 25th April, 1903, and resolution of 1st July, 1903, having been acted on, and the justices, viewing pursuant thereto, refusing a certificate under section 85, further proceedings on the same request and resolution were incompetent.
- (d) That the justices viewing had no consent in writing at all by owners within the meaning and requirements of the said section 85 before them when viewing and before ordering notices to be affixed, &c.
- (e) That no consent by owners in accordance with section 118 of

the said Act and Schedule, form number 18, was in existence, nor was there any such consent before the justices' viewing.

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(f) That the said section 85 was not complied with as regards (i.) notices at ends of roads, (ii.) notices on church doors, (iii.) notices in advertisements in newspaper.

(g) That the certificate was made too soon after the view by the justices.

(h) That the reasons for the new path being more commodious were insufficient and bad, and [or] illegal wholly or partly.

(i) That the certificate and order of quarter sessions were; or one of them was, bad on their face respectively.

The following are the material provisions of the Highway Act, 1835 (5 & 6 Will. IV., c. 50):—

Section 84. When the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned . . . the chairman of such meeting shall . . . direct the surveyor to apply to two justices to view the same . . . Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall by notice in writing require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid . . .

Section 85. When it shall appear upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned . . . so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made (*sic*) shall consent thereto by writing under his hand . . . the said justices shall direct the surveyor to affix a notice in the form and to the effect of schedule (No. 19) to this Act annexed . . . at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up . . . and also to insert the same notice in one newspaper published or generally circulated in the county . . . for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church . . . on four successive Sundays next after making such view; and the said several notices having been so published and proof thereof given to the satisfaction of the justices . . . the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; . . .

By section 144 of the Public Health Act, 1875, the functions both of the vestry and of the surveyor under the Highway Act, 1835, are vested in the urban authority, subject to a proviso that "all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint."

Dickens, K.C., R. Cunningham Glen, and H. C. Dickens showed

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cause. The objection that the certificate was made by two justices after two other justices had refused a certificate, without a fresh resolution of the district council cannot prevail. The certificate of the justices is in no sense an order, it is a mere preliminary to proceedings to be subsequently taken at quarter sessions where the whole question as to the propriety or otherwise of the proposed diversion or stopping up of the highway can be threshed out on its merits. Proceedings under section 85 are all of them proceedings which lead up to an order to be made in quarter sessions: see per Hannen J. in *Reg. v. Surrey Justices* (1869) L. R. 5 Q. B. 87, at page 92; 39 L. J. M. C. 145.

Secondly, the Legislature does not require that the certificate should recite the consent of the owners of the land on which the new highway is to be made to its being so made on their land. Section 85 only requires the owner's consent as a fact: see per Lush J., in *Reg. v. Surrey Justices* (1872) 26 L. T. 22, at p. 24; and there was sufficient evidence of the consent of the owners of the land over which the diversion was to be made because it was the property of Messrs. Abrey and Izard, at whose instance the proceedings were instituted.

With regard to the publication of the notices:—They were in fact posted on the doors of the two churches for four consecutive Sundays following the date of the view, and were published in four consecutive impressions of the newspaper following the same date. As to the affixing copies of the notice at the ends of the highway section 85 is utterly silent as to the period that they should be affixed. It contains nothing to show that these notices are to remain up for four successive weeks, or twenty-eight days. In point of fact they were affixed for a sufficient length of time to give the public notice of the proposed diversion. They were affixed on November 14, and so remained till December 7, when the justices gave their certificate.

The certificate discloses sufficient reasons for the finding of the justices that the new footpath would be more commodious for the public. These reasons were disclosed by the view upon their own personal inspection as laid down in *Reg. v. Wallace* (1879) 4 Q. B. D. 641; the fact that they added a statement that an understanding existed that the footpath would in the near future be enlarged and incorporated in a new roadway must be treated as surplusage. It is at least immaterial. In *Reg. v. Wallace* the statement in the certificate was that the reasons of the justices were the result of inquiries; but here their reasons were founded upon personal inspection.

Danckwerts, K.C., and *Hohler* in support. There was no jurisdiction in these justices to issue their certificate at all. The resolution of July 1st of the urban district council by which they directed their

surveyor to apply to two justices to view the proposed diversion was exhausted by the view made by Messrs. Kemp and Wingate upon the surveyor's application. These gentlemen having refused their certificate, the only course open to those who desired to promote the diversion was to apply afresh to the urban district council, and obtain a new resolution that two other justices should be requested to view to give a certificate. The council ought to have had an opportunity of reconsidering the question of their consent; and this is the more important because the first two justices who viewed saw no reason for certifying that the diverted footpath would be more commodious for the public.

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As to the evidence of the landowner's consent to the diverted highway being carried over their property, it is a condition precedent to the jurisdiction of the justices that they should have evidence of such consent at the very time when they direct the surveyor to affix the notices at the ends of the highway, *i.e.*, at the date of the view, and not at the time they gave their certificate. Further, the certificate ought to state all that is required to be proved before the justices: see per Blackburn J., in *Reg. v. Harvey* (1874) L. R. 10 Q. B. 46; 44 L. J. M. C. 1. In the present case the certificate on the face of it contains nothing to show the consent of the landowners.

The notices in the newspapers were not published long enough before the issue of the certificate. The four successive weeks prescribed by section 85 mean four whole weeks, or twenty-eight days. Accordingly the justices' certificate should never have been made, until the seventh day after the issue of the last newspaper. Here the justices gave their certificate on December 7, whilst the last issue of the newspaper containing the advertisement of the notice was on December 5. Clearly if the notice had been published in a daily paper nothing less than four whole weeks would have sufficed; and this must be the same in the case of a weekly paper. Moreover, the copies of the notice were not affixed for a sufficient length of time at the ends of the highway. They were affixed for twenty-three days only when they clearly should have remained posted up for twenty-eight days. The words of section 85 "four successive weeks" apply equally to the notices at the ends of the highway as they do to the notices published in the newspaper.

Lastly, the certificate ought to have stated that the justices had derived the reasons for their finding that the proposed new footpath would be more commodious for the public solely from the view they had had of it. It was not competent to them to take into consideration an understanding which could not be enforced, as to the probable future widening of the footpath by its incorporation with a 36-foot roadway to be lighted and so on. *Reg. v. Wallace.*

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LORD ALVERSTONE C.J. I reluctantly come to the conclusion that one of the objections to the certificate of the justices must prevail. It is based upon the ground that the requirements of the 85th section of the Highway Act, 1835, have not been complied with in regard to the affixing of the notices at the end of the road or footpath to be diverted. The certificate itself shows upon its face that the notice was never affixed at the ends of the road for the space of 28 days. That it is impossible it could have been affixed for that space of time clearly appears from the notice itself, which, being dated November 11, stated that the certificate of the justices having viewed the place would be lodged at the office of the clerk of the peace on the following December 7. As a matter of fact, it turned out that the notice itself was not affixed where it should have been until November 14, so that in reality only a period of 23 days elapsed before the date of the justices' certificate of view. That it is essential to the validity of the certificate that all the formalities required by the statute should be strictly observed has been long established. The question, therefore, now before us for our decision is whether the Highway Act, 1835, requires the notice affixed at the ends of a road which is to be diverted to remain so affixed for the full period of twenty-eight days. We find it provided by section 85 of the statute that if upon the view the justices are satisfied that any public highway may be diverted so as to render the same nearer or more commodious to the public and so on "the said justices shall direct the surveyor to affix a notice in the form or to the effect of Schedule (No. 19) . . . at the place and by the side of each end of the said highway from whence the same is proposed to be . . . diverted . . . and also to insert the same notice in one newspaper . . . for four successive weeks next after the said justices have viewed such public highway." Now it is clear that if those words "four successive weeks" do not apply equally to the putting up of the notice at the ends of the highway as they apply to its insertion in the newspapers, there is no period limited by the section for the keeping up the notice at the ends of the road at all. Then the section goes on: "And to affix a like notice on the door of the church . . . on four successive Sundays next after making such view; and the said several notices having been so published," the justices shall proceed to certify and so on. In my opinion the only fair inference we can draw from the words of the section is that the Legislature intended that these different opportunities afforded to the public of becoming aware of and informing themselves of the proposed diversion should extend over precisely the same space of time, that is to say, over four completed weeks or twenty-eight days.

There was a further objection taken to this certificate, which was

that because two other justices had at an earlier period in the year viewed the footpath and refused their certificate, the resolution of the urban district council, dated July 1, directing their surveyor to apply to two justices to view the footpath had become exhausted, and that therefore a fresh resolution of the council ought to be obtained before an application to a second pair of justices could be made, which would be tantamount to commencing the whole of the proceedings over again. There is nothing, however, in my view of the statute that suggests the necessity of doing anything of the kind. That proceedings cannot be commenced without a resolution or be continued unless a certificate be obtained is no doubt the case; but in my view these proceedings are rather to be regarded as a preliminary matter, since the real merits of the diversion are afterwards dealt with by the court of quarter sessions. I am accordingly of opinion that the resolution of July 1 was sufficient to give jurisdiction to these justices to issue the certificate they did.

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Nor, again, does there appear to me to be any substance in the objection that the certificate omitted to state that the parties proposing to divert the footpath were the owners of land over which its diversion was to be made. This was unnecessary, and if authority on the point be desired, I consider that *Reg. v. Surrey Justices* (1872) 26 L. T. 22, sufficiently supports the view that it is the owner's consent as a fact that is required by the statute, and not that such consent itself should necessarily appear on the certificate.

WILLS J. I agree, and can entertain no doubt that the objection to the validity of this certificate of justices that there was no proper publication of the notice by reason of its not having been affixed at the ends of the footpath for a sufficient space of time is fatal, and is also fatal to the proceedings at quarter sessions. In practice it has always been my impression that the four weeks' interval, equalling a period of twenty-eight full days, has invariably been applied, not merely to the advertisements in the newspaper, but to the fixing of the notice at the ends of the highway to be diverted. The practice has no doubt arisen upon a very proper view as to the true construction of this section, and unless that view had been adopted there would be no time provided during which the notice was to be affixed; and it is most unlikely that the Legislature intended to prescribe no time for that purpose. The wording of section 85, "to affix a notice . . . for four successive weeks next after the said justices have viewed," is not strictly grammatical; it should rather have been "to affix and keep affixed"; but such an objection on the score of grammar cannot be weighed against the improbability of the Legislature intentionally omitting to prescribe a time.

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Mr. Danckwerts has strenuously contended that the consent of the owners of the land over which the footpath was to be diverted ought to have appeared on the face of the certificate; but, in my opinion, *Reg. v. Surrey Justices* (1872) 26 L. T. 22, is a sufficient answer to that contention.

A further point made by Mr. Danckwerts was that the certificate was bad because it did not clearly state that the reasons upon which the justices proceeded in arriving at their finding that the new footpath would be more commodious were reasons which were wholly disclosed by the view itself. He cited *Reg. v. Wallace* (1877) 4 Q. B. D. 641, as a decision which showed that if the reasons for such a finding by the justices were derived from third parties, it would be sufficient to invalidate the certificate; and in the present case the allegation was that the result of inquiries from third parties led to an understanding on the part of the justices that the new footpath would eventually form part of a new 36-feet road. In my view, however, *Reg. v. Wallace* is no authority for that proposition. I do not think it can fairly be said that if the justices certify that, upon the view they have had of the *locus in quo*, they find the new way to be more commodious for certain reasons, the fact that they go on to state certain additional reasons for their finding which have come to their knowledge or have been disclosed to them by inquiries from third parties would invalidate their certificate. It is admitted that they may make inquiries, and that being so, they should be entitled to state the fact that they have made them. Were this otherwise their certificate which told the whole truth would be bad, whilst if it told only half the truth it would not.

KENNEDY J. I entirely agree, although with reluctance, that we are bound to make this rule absolute. In my opinion the objection that the time during which these notices were affixed at the ends of the footpath was insufficient is a sound one. Unless we place the meaning upon the words of section 85 which has been given them by my Lord, it is difficult to give them any satisfactory meaning at all. I am certainly of opinion that the notice must, in the first instance, be put up at either end of the highway at a date which allows a space of twenty-eight days to elapse between the date of the putting it up and the date of the giving of their certificate by the justices. I am not, however, prepared to express any opinion as to how far the notice must remain affixed during that space of time. I should not like to be driven to hold that where the notice had in the first instance been put up at a date which would embrace the full period of twenty-eight days, the fact that it was subsequently torn down by accident or design before that time had expired would invalidate subsequent proceedings.

Doubtless in such a case it would be necessary to consider whether the fact of the notice being so torn down had been brought to the notice of interested parties, but that point does not arise in the present case. 1904.
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I quite agree with my Lord that the point taken by the applicants, that the certificate was bad because the justices who made it were the second pair of justices and not the first pair who had viewed the footpath, is not a good one. Had the Legislature really intended that only the first pair of justices who viewed the highway should have jurisdiction to make a certificate, I cannot understand why no provision should have been made for the case of the death or illness of one of them. It never could have been intended that, in the event of one of the two justices dying before signing the certificate, the whole of the proceedings would have to be recommenced and started afresh. In my opinion, all that is necessary is that two justices should certify to the court of quarter sessions that a *prima facie* case for decision exists. Section 85 contains nothing to show that they must be the same two justices.

Upon the third point, that the certificate ought to be held bad upon the ground that it fails to state that the finding of the new footpath being more commodious was based solely upon the view of the justices, I quite agree that this objection cannot be sustained. That the finding as to the new way being more commodious was based upon the view must no doubt be stated, and has been stated in the present case. But the additional statement of superfluous matters will not, in my opinion, turn a certificate already good into a bad one.

As regards the consent of the owners of the land to be taken to its being taken, I think it is quite sufficient that such a consent should exist in fact at the time the justices give their direction to the district surveyor to put up the notice. In the present case it is quite clear that the owners did in fact consent to their land being taken. It is unnecessary that proof of their consent should appear on the face of the certificate.

Rule absolute.

Solicitors for the applicants—Neve and Williams, Tonbridge.

Solicitors for the Justices—Collyer-Bristowe & Co., for Stone, Simpson, and Mason, Tunbridge Wells.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

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Re **MANCHESTER CARRIAGE AND TRAMWAYS COMPANY, LIMITED,
and THE SWINTON AND PENDLEBURY URBAN DISTRICT
COUNCIL.**

**Tramways—Purchase of undertaking by local authority—Buildings
and plant used for purposes of undertaking—Buildings outside
district of local authority—Tramways Act, 1870 (33 & 34 Vict.
c. 78), s. 43.**

Upon the true construction of section 43 of the Tramways Act, 1870, a local authority who have required the promoters of a tramway to sell so much of their undertaking as is within the local authority's district, upon paying the value of the tramway and all lands buildings works materials and plant of the promoters "suitable to and used by them for the purpose of their undertaking within such district," may be compelled to purchase a tramway dépôt of the promoters situate outside the local authority's district, if it be suitable to and used for the purposes of the undertaking; for the words "within such district" in this collocation refer to the undertaking, and not to the buildings, &c.

AWARD stated in the form of a special case pursuant to section 7 of the Arbitration Act, 1889, by the late Sir Frederick Bramwell, Bart, upon a question as to whether the Swinton and Pendlebury Urban District Council who were compulsorily acquiring the Manchester Carriage and Tramway Company's undertaking within their district, were bound to purchase one of the company's dépôts which lay geographically outside the district.

The acquisition of the tramway undertaking in question by the district council was effected under section 43 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), which provides that where the promoters of a tramway are not the local authority, the local authority may, in certain events "by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district . . ."

The material paragraphs of the case, after reciting certain provisions of the Manchester Suburban Tramways Act, 1879, and the Manchester Carriage and Tramways Company's Order, 1897, confirmed by the Tramways Orders Confirmation (No. 1) Act, 1897, were the following:—

7. The tramways company are the owners of two large depôts situate respectively in Ford Lane and Church Street, Pendleton, Salford, some distance outside the boundary of the Swinton and Pendlebury District. These depôts were originally constructed or adapted by the predecessors in title of the tramways company in 1875 to serve as depôts for a large omnibus, cab, and fly business that they carried on before the tramways were made. They were modified to some extent in anticipation of the opening of the tramways, and have been also to some extent rearranged or added to since, but they now cover the same area, and are substantially the same depôts as they were in 1877.

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8. Between the years 1877 and 1880 the said two depôts were used by the predecessors in title of the tramway company as depôts in connection with the Salford lines, of which they were the lessees, though the omnibus, cab, and fly business was still carried on there. Upon the opening of the Swinton lines in 1888 they were also used as depôts in connection with these lines, a certain proportion of the cab horses and stock being removed to make room for the additional horses and cars required for the Swinton lines. The said depôts were the only depôts used for the Swinton and Salford lines.

9. All the cars for both the Swinton and Salford lines were kept at the Church Street depôt, there being no tram lines thereto or therein. As regards the Church Street depôt, the means of access for cars from the Swinton lines is by running over the Salford lines and then over a small spur of line laid down by the tramways company. The cars so kept at the Church Street depôt were 38 in number, of which 14 were exclusively used for the through route over Swinton lines to Manchester and back, four were exclusively used on the Eccles branch, and 20 were used on the rest of the Salford lines.

12. Since the date of the opening of the Swinton lines those lines have been worked as a part of a common undertaking with the Salford lines. The tramcars have been run through and with through fares from Swinton to Manchester and back over the Salford lines, and obviously, as a matter of ordinarily prudent management, the Swinton and Salford lines would always continue to be worked together as part of one system.

13. On January 22, 1901, the Swinton and Pendlebury Urban District Council duly gave notice to the tramways company that they were required to sell to the council under the conditions and in the manner provided by section 43 of the Tramways Act, 1870, so much of the tramways works and undertaking of the tramways company as are within the urban district of Swinton and Pendlebury.

15. On April 26, 1901, the tramways company agreed to sell and the corporation of Salford agreed to purchase the whole of the tramcars

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and horses belonging to the company theretofore used upon the Salford and Swinton lines, such agreement being subject and without prejudice to the rights and claims of any local authority under section 43 of the Tramways Act, 1870. The price of the same was by further agreement in writing, dated May 1, 1901, fixed at £42,500, and the same were transferred to the corporation of Salford accordingly. The company by the said agreement of April 26, 1901, further agreed to grant to the corporation as from May 2, 1901, a lease of certain premises, including the Church Street and Ford Lane depôts, and such agreement was carried into effect by an indenture dated October 9, 1902, and made between the tramways company of the one part and the corporation of Salford of the other part, whereby the company demised unto the corporation the said two depôts (less certain excepted portions) for the term of two years from April 28, 1901, subject to a proviso that the said lease was subject and without prejudice to the rights and claims of any authority under section 43 of the Tramways Act, 1870, or any statutory modification or re-enactment thereof.

16. On the same April 26, 1901, an agreement in writing was entered into between the tramways company and the district council of Swinton and Pendlebury, whereby it was agreed as follows, that is to say:—

“ 1. The council shall take possession of the tramways so constructed as aforesaid in pursuance of the Manchester Suburban Tramways Act, 1879, and the Manchester Carriage and Tramways Company Order, 1897, respectively, on the 28th day of April instant.

“ 2. The council, in addition to the value to be paid by them for such tramways in pursuance of section 43 of the Tramways Act, 1870, and contemporaneously with the payment of such value, shall pay to the company interest at the rate of £4 10s. per cent. per annum, calculated from the 28th day of April instant to the date of payment, upon a sum which the referee, to be appointed by the Board of Trade, shall determine as the value of such tramways, possession whereof is agreed to be given by clause 1 hereof.

“ 3. The council shall not interfere with (except for the purpose of necessary repairs) or reconstruct any of the said tramways before arbitration under the said section 43 of the Tramways Act shall have taken place.

“ 4. Nothing herein contained shall be deemed to prejudice or affect the question as to what lands buildings works materials and plant (if any) of the company are suitable to and used by the company for the purposes of their undertaking within the district of the council within the meaning of the said section 43 of the Tramways Act, 1870.”

17. Since April 27, 1901, the corporation of Salford have worked both the Salford and Swinton lines as a common undertaking in pursuance of an agreement made by them in that behalf with the Swinton and Pendlebury District Council, dated July 13, 1899 (which is scheduled to the Salford Corporation Act, 1899), whereby it was agreed that forthwith after the purchase of the Swinton lines by the urban district council, the council should grant the corporation a lease thereof for the term of 21 years, that during the interval between the time when the council should have obtained possession of the Swinton lines and the date of the said lease the corporation should maintain a service of tramcars thereon, and that the lease should contain a covenant by the corporation binding them during the term of the lease to provide and maintain a service of tramcars on the tramway not less frequent or less efficient or at greater fares than the existing service of the tramways company.

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25. At the hearing of the reference counsel for the Swinton and Pendlebury Urban District Council admitted that the council were bound to purchase and pay for the actual tramways within their district authorised by the Act of 1879 and the Order of 1897, but they contended that under section 43 of the Tramways Act, 1870, they were not compellable to purchase either the Ford Lane or the Church Street depôts, on the ground that even if such depôts, or either of them, were suitable to and used by the tramways company for the purposes of the said tramways, they were both of them situated geographically without the district of the council, and the section only made it obligatory upon the local authority to purchase that which was within their district. Counsel for the tramways company contended that if such depôts were, in fact, suitable to and used with their undertaking within the council's district, the council were under the section compellable to purchase them, although the depôts themselves were outside the district. I was asked by counsel for the council to state my award in the form of a special case for the opinion of the Court on this point.

26. Now I, the said referee, having taken upon myself the burthen of this reference, and having inspected the said tramways and depôts . . . do hereby make and publish my award in writing of and concerning the matters so referred to me as aforesaid in the manner following, that is to say:—

I award and find as a fact that the Ford Lane depôt, although in a limited sense used with the undertaking of the tramways company within the district of the council, is not suitable to such undertaking; and I further award and find as a fact that the Church Street depôt was used with and is suitable to the said undertaking.

27. I therefore further award and determine that the value (exclusive

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of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramways constructed within the urban district of Swinton and Pendlebury under the authority of the Manchester Suburban Tramways Act, 1879, and the Manchester Carriage and Tramways Company's Order, 1897, and of all lands, buildings, works, materials, and plant of the Manchester Carriage and Tramways Company suitable to and used by them for the purpose of the undertaking within such urban district, authorised by the said Act of 1879 and Order of 1897, is as follows:—

(a) The value of the tramway lines, including an agreed sum of £1,250	£ 24,689
(b) The value of the land and buildings constituting the Church Street depôt and the tramway lines therein, and the tramway line in Church Street leading into the depôt	24,009
(c) The value of the fixtures and fittings in and upon the Church Street depôt (as per valuation of Messrs. More and Wallis)	308
Or a total of		£49,006

Should the Court be of opinion that the said council are not compellable to purchase or pay for the Church Street depôt, then the items (b) £24,009, and (c) £308, must be deducted from the above total, and in such event I award and determine the value aforesaid to be the sum of £24,689.

28. And I further award and direct that the expenses of the reference and award be borne and paid by the Swinton and Pendlebury Urban District Council.

Moulton, K.C., Eldridge, and E. T. Sanders for the tramway company. The whole point is as to the true construction of section 43 of the Tramways Act, 1870—whether the fact that this depot is situate geographically outside the council's district prevents the arbitrator finding that it is suitable to and used by the promoters for the purposes of their undertaking within the district. It is submitted that the Legislature intended the local authority to have the power and duty to make a clean sweep of the tramways and all that fairly went therewith. It was not contemplated in those days that tramways would be electrified, and it was most important that a local authority should take a tramway with all its equipments and buildings and plant. Since they were taking away the tramways from the company without compensation for goodwill it was a matter of plain and simple justice that all that the

company had accumulated for working that tramway should be taken off their hands at the same time. Section 43 carries this out in the simplest way. It says the "promoters shall sell to them their undertaking, or so much of the same as is within such district."—If the whole be within the district, it is the whole undertaking: if a part, then it is only the part within such district—"upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purpose of their undertaking within such district." That which is to pass is the lands, buildings, works, and materials of the promoters suitable to and used by them for the purposes of their undertaking. Both in substance and in form the section carries out the policy of the Legislature. The argument on the other side is that the words "within such district" are to be separated from "undertaking," which would exclude the case of only a part of the undertaking being within the district, and that the words "within the district" is to be applied to "lands, buildings, works," &c. Their undertaking within such district is that which is in all cases to pass. If it be the total undertaking, then the total undertaking passes. If it be a part of the undertaking it is that part that passes. The question of fact found by the arbitrator in paragraph 26 that the Church Street depôt was used with and is suitable to the undertaking is relied on, for by the expression "used with" he intended to follow the words of the section "used by them for the purposes of their undertaking."

Balfour Browne, K.C., and Rhodes for the district council. The arbitrator has made the council purchase a depôt which is not only outside their district, but a mile and a half away from it, and to which they have absolutely no right of approach, because the only approach to it is by the corporation of Salford's line over which the council have no power whatever. It is quite true that the depôt was in one sense used with the undertaking, but not within the meaning of section 43, nor are the council compellable to purchase it. The words of that section contemplate the purchase of the tramway and things within the district, and not lands situate outside it, and even then they only compel the council to buy lands, buildings, works, and so on within the district, that are suitable to and used for the purposes of the undertaking. [CHANNELL J. I am clearly of opinion that in the phrase "suitable to and used by them for the purposes of their undertaking within such district" the words "within such district" apply to the word "undertaking" and not to the words "lands, buildings, works, materials, and plant." If the buildings, works, materials, and plant are outside the district but nevertheless are in fact used by the selling company for the purposes of the undertaking within the district, and are in fact

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suitable to them, then according to section 43 the purchasers must pay the value of these things as part of the price. They have to pay as the price of what they get the value of those things outside as well as inside the district, provided they are both suitable to and used in fact for the purposes of the undertaking within the district.] This dépôt cannot be suitable if the council cannot get to it. [CHANNELL J. It is a question of fact whether it is suitable. Upon the construction of section 43, apart from the facts, assuming it to be suitable, it must be paid for notwithstanding it lies outside the district.] The Church Street dépôt contained other conveniences than those for the council's tramways, and was therefore not suitable. The arbitrator has found that the dépôt was "suitable to and used with," but not in the words of the section, which are "suitable to and used by them for the purposes of their undertaking." In *North Metropolitan Tramways Co. v. London County Council* (1895) 72 L. T. 586, it was held that in section 43 of the Tramways Act, 1870, which must be read into all the subsequent special Acts, the word "undertaking" was limited by reference to the special tramway which the promoters were empowered to construct by such special Act.

CHANNELL J. I am afraid I feel bound by the findings of this special case. I think if Sir Frederick Bramwell had been alive I should have been inclined to send it back to him. I think there is a substantial difficulty about the entirety of this big building being found to be suitable to and used for the purposes of the part of the undertaking that was purchased, when there are facts set out in considerable detail which show that it was only partly used for purposes of this part of the undertaking, and a much greater use of it was made for the purposes of the other part of the undertaking. The point that is clearly submitted to me is this, whether the purchasing local authority are bound to pay for a building which is outside their district, if as a matter of fact that building is suitable to and used by the vendors for the purposes of their undertaking. I think it is quite clear they are bound to buy the building. There might be a doubt whether they were bound to purchase the building, but if they are bound—as in my view they clearly are, upon the terms of the section—to pay for it I think it must be deemed to be part of the undertaking within the district for the purpose of the purchase. But the other point I am really quite clear about. The reason why "within such district" must refer to the undertaking, is not merely because of the position of the words in the sentence, but because with reference to the "plant" of the promoters, some of which will consist of movable things such as cars, the words "suitable to . . . the purposes

of the undertaking within the district" cannot mean the plant within the district, suitable to the purposes of the undertaking, but must mean plant suitable for the undertaking within the district, and if in connection with plant the words "within the district" refer to the undertaking, they must refer to the undertaking in reference to the buildings also. Upon that point, therefore, which the arbitrator has clearly referred to me, I have a strong opinion in favour of the view which I understand he himself took, and I must decide it in favour of the tramway company.

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Then comes the question of how to deal with the other matter. Any findings of fact that the arbitrator has made are binding upon me. Even if he wished to refer them to me under the Arbitration Act he could not do so. He has only power to state cases upon questions of law. Consequently, even if he wished to do it, I do not see that he could refer it to me. The only way in which it can be done, and sometimes is done, is this. Sometimes the Court assumes a jurisdiction which must be very near the border line by dealing as a question of law with the question of whether there is any evidence upon which the arbitrator could find as he has found. The only way, as it seems to me, in which I can deal with this point as a question of law is by considering whether there is any evidence upon which the arbitrator could find that the building in question was suitable to the undertaking. And I do not think I can say there is no evidence. Upon the evidence that he has stated, I frankly say I do not see how the arbitrator arrived at the conclusion he did about the entirety. I think he must have had some reasons which I do not fully appreciate. That is why, if it were possible, I should like to clear it up; but as it is, it does seem to me that the only possible doubt as to whether he has or has not found this as a question of fact arises from the use of the word "with" in the 26th paragraph. There he says: "I find as a fact that the depôt was used with and is suitable to the said undertaking." "With" is a shorter term than "for the purposes of," and the arbitrator has varied the words in another respect. He has varied the order in which they come. In the Act of Parliament the words are: "Suitable to and used . . . for the purposes of." Then in varying the order the arbitrator has perhaps not unnaturally substituted the word "with" for the words "for the purposes of." Otherwise the expression would have been awkward. If I could think that he meant to avoid finding that the building was used "for the purposes of" the undertaking, possibly I should say that I could not act upon the finding; but when I compare it with what he has found in the next clause, where he goes back and uses the words in the order in which they appear in the Act of Parliament, and says, "suitable to and used by them for the purposes of the

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undertaking," I think he shows on the face of this award that when he used the word "with" he meant it to be the same thing as "for the purposes of" the undertaking. Therefore, though with some reluctance, I feel bound to say, upon the point of law which is clearly referred to me, I must come to the decision I have already mentioned, and that I somewhat reluctantly decide that nothing else is open to me. The result is, I think, I must support the award for the larger figure.

Judgment accordingly. Leave to appeal.

Solicitors for the Claimants—Ayrton, Biscoe, and Barclay, for Brett, Hamilton, and Tarbolton, Manchester.

Solicitors for the District Council—Trass and Endor, for L. C. Evans, Town Clerk, Salford.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS CO.

Buildings—Metropolis—Building line—Advertisement cases fixed to front of premises—"Building or structure"—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), s. 22.

The respondents were charged before a magistrate with a breach of section 22 of the London Building Act, 1894, which in certain cases prohibits the erection, without the consent of the London County Council, of any "building or structure" beyond the general line of building in a street, in respect of certain advertising cases affixed by him to buildings in a street.

These cases were from 2 to 5 feet in width and from 7 to 5 feet in height. They were constructed of sheet iron and supported by strong wrought iron supports securely cut and pinned through the walls of the building. The outer side of each case was covered with a wooden frame carrying canvas or linen lined with advertisements, intended to be illuminated by electric light. They projected some 10 inches beyond the general line of building.

The magistrate refused to convict, and stated a case in which he stated that in his opinion the cases were not structures within the meaning of the Act, and that they were in the nature of mere excrescences which could be removed at will without injury to the fabric, and that they therefore could not be said to be a bringing forward of the main building such as was contemplated by the statute.

Held, by the majority of the Court (Lord Alverstone C.J. and Kennedy J.), Wills J. dissenting, that the magistrate's decision could not be disturbed as it did not appear that he was wrong in law.

Hull v. London County Council, 1901, 1 Q. B. 580; 70 L. J. Q. B. 364, commented on.

CASE stated by a metropolitan police magistrate, who had dismissed a summons upon an information laid on behalf of the appellants which charged that the respondents, on or about May 26, 1903, at No. 48, Cranbourne Street, Leicester Square, in the city of Westminster, in the county of London, did unlawfully erect certain structures in contravention of the provisions of Part III. of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), to wit, erect certain structures beyond the general line of buildings of a street called Cranbourne Street aforesaid, without the consent in writing of the London County Council whereby they became liable to the penalty prescribed by section 200 (3) of the said Act, as amended by the London Building Act, 1894,

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Amendment Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 6, and to have an order made against them to demolish the said structures or any part thereof.

Upon the hearing of the information the following facts were either proved before the magistrate or admitted by both parties :—

(1) In the months of April and May, 1903, the respondents erected upon the front walls of the building, No. 48, Cranbourne Street, Leicester Square, twelve advertisement cases in the positions shown by a photograph which was initialled by the magistrate for purposes of identification.

(2) The said cases were constructed of sheet iron supported by strong wrought iron supports securely cut and pinned through the front walls of the said building. The outer side of each of the cases was covered with a wooden frame carrying canvas or linen lined with advertisements, and provision was made for illuminating the interiors of the cases by electric light.

(3) The said cases varied in width from 2 feet to 5 feet, and in height from 5 feet to 7 feet. Each of the cases stood out 10 inches in front of a front wall of the said building, but each projection was less than the projection of the existing cornice over the shop which is 2 feet from face of main building.

(4) The front of each of the cases was about 10 inches beyond the general lines of buildings as determined by a certificate dated December 23, 1903, of the superintending architect of metropolitan buildings. A copy of this certificate (with plan attached) is annexed to and is to be taken as part of this case.

(5) It would be possible to move the whole of the cases (with the exception of the iron supports) in a single day without injury to the building.

(6) The respondents had not obtained the consent of the appellants to the erection of the said cases.

The appellants contended that the cases so fixed and supported as aforesaid were structures within the meaning of sections 22 and 200 (3) of the London Building Act, 1894. The respondents contended that the cases were not structures within the meaning of section 22 of the Act.

The magistrate was of opinion that the cases in question were not structures within the meaning of the Act ; that they were in the nature of mere excrescences which could be removed at will without injury to the fabric ; and that they could not be said, therefore, to be a "bringing forward" of the main building such as was contemplated by the statute. He accordingly dismissed the summons.

The question of law for the opinion of the Court was whether, upon

the true construction of the sections above referred to, the respondents on the facts above referred to, had erected a structure or structures beyond the general line of buildings aforesaid.

Section 22 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), is as follows:—

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(1) No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of building and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such a certificate to be issued within one month of the date of application therefor.

(2) This section shall not apply to any building or structure erected after the commencement of this Act upon land which either at the commencement of this Act, or at any time within seven years previously has or shall have been lawfully occupied by a building or structure.

Penalties for erecting, &c., any building or structure in contravention of section 22 are imposed by section 200 (3) of the Act as amended by section 6 of the London Building Act, 1894, Amendment Act, 1898.

Avory, K.C., and *Daldy* for the appellants. The question is whether the structures described in the case as "structures" are within section 22 of the London Building Act, 1894. It is submitted that they are such "structures" within the decision in *Coburg Hotel v. London County Council* (1899) 81 L. T. 450, where a glass and iron portico was held to be within the section. The learned magistrate was wrong in law in holding that the structures were not within the section, because they cannot be said to be a bringing forward of the main building. He applied the wrong test. It may be thought that section 73 (8), dealing with "projections" from buildings, is more apt than section 22 to meet a case of this character. But in *Hull v. London County Council*, 1901, 1 Q. B. 580; 70 L. J. Q. B. 364, it was held that "projection" in that subsection means a prominence extending from the building in the sense of coming out from the building as part of the building. *Venner v. M'Donell*, 1897, 1 Q. B. 421; 66 L. J. Q. B. 273, is not against the present contention. That was a case of the erection of temporary seating and fittings in the Agricultural Hall. If these advertisement cases here were bay windows they would clearly be within section 22, whether made of stone or wood, and all they require to turn them into windows now is the substitution of glazing for canvas. The front of each of these cases projects 10 inches beyond the

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building line, and, constructed as they are, each case would be a source of danger if a fire occurred.

Macmorran, K.C., and *Courthope Munroe* for the respondents. *Coburg Hotel v. London County Council* (1899) 81 L. T. 450, is clearly distinguishable from the present case; there the portico was a structure of iron and glass 11 feet long and 4 feet 3 inches wide, and projected about 4 feet 3 inches over the public footway. To come within section 22 the projection complained of must be something in the nature of a building; but these articles are not part of the structure at all. They are things affixed to the building. A window box is not a structure within section 22. What is a "structure" must be a question of degree: *Venner v. M'Donell* (1897) 1 Q. B. 421; 66 L. J. Q. B. 273; *Hull v. London County Council*, 1901, 1 Q. B. 580; 70 L. J. Q. B. 364; *Lavy v. London County Council*, 1895, 1 Q. B. 915; 64 L. J. M. C. 196, 262. These advertisement cases are mere excrescences to which the section has no application. Section 22 contemplates the putting up or erection of a building. The question is one of fact and degree, and the Court cannot review the magistrate's decision.

Avory, K.C., replied.

KENNEDY J. In this case, speaking for myself, I am unable to adopt the view of overruling the decision of the learned magistrate by deciding that in point of law he has gone wrong. I do not think there is much more to be said than this, that it is a question of fact and a question of degree in each case. He has asked, no doubt, a question which is put as a question of law; that is, "Whether upon the true construction of the sections above referred to"—that is, section 22 and 200 (3) of the London Building Act, 1894—"the respondents, on the facts above referred to, erected a structure or structures beyond the general line of buildings aforesaid." It seems to me that if it be a question of fact and of degree in each case it was for him to decide. He has decided that "the cases in question were not structures within the meaning of the Act, that they were in the nature of mere excrescences which could be removed at will without injury to the fabric, and that they could not be said, therefore, to be a 'bringing forward' of the main building such as was contemplated by the statute." "Accordingly," he says, "I dismissed the summons." With great respect to the learned magistrate, I do not admit the rider. We are told they are mere excrescences. I do not know what a mere excrescence is in that sense, but I cannot say that he is wrong in point of law in holding that this particular thing, which has been described very clearly more than once, and is mentioned in the case, erected over the door of this shop, is not a "structure or building" erected within the meaning of that section. I am inclined to

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agree with him that it was not. It was a thing which unquestionably, I should think—if the intention of erection or putting up is regarded—was not necessarily intended to be permanent; indeed, I should think when the respondent company contemplated leaving their shop they probably would remove it, or very likely change it next year. It is a form of advertisement. It is not, to my mind, like a bow window, or anything of that kind, which is from its nature, whether it is made of wood, tin or iron, or of stone, intended to form part of a building or structure. I agree, also, that there may be a structure such as a greenhouse, under certain conditions, which would be a structure or building, although, of course, it would be physically removable—probably a question might arise between the landlord and tenant whether it was removable or not—and *prima facie* a thing which would be intended to remain and goes beyond the building line. Here there is something up aloft on the house equivalent to a projecting ledge—a large one, I agree—but still it seems to me rather strong to consider it a “structure or building,” as a matter of law, so that the magistrate who held that it is not is wrong. Had the question arisen under the other section, as to whether this was a projection, then, unless we are hampered by the previous decisions of this Court, I should have been inclined to say there was great difficulty in saying it was not a projection; but, be that as it may, we are dealing with the other section, and I am not satisfied that the learned magistrate was wrong in point of law.

WILLS J. I have the misfortune to differ from my Lord and my brother Kennedy, and therefore I have now to express my own opinion.

Questions of this kind must always be questions of mixed law and fact, and it is not very easy to say to what extent the law ought to prevail, and to what extent the consideration of facts ought to prevail. But I am quite sure the learned magistrate did not mean us to deal with the case which he stated as if he had found as a matter of fact that this was not a structure; and therefore it seems to me to be open to us to consider whether from the natural construction of the words in the Act of Parliament it is a structure. Of course, I take my stand upon the description of it given in the second sub-paragraph of paragraph 2: “The said cases were constructed of sheet iron supported by strong wrought-iron supports securely cut and pinned through the front walls of the said building.” I need not go any further. It seems to me that it is difficult to have any amount of annexation, short of that which would prevent the tenant from removing it during the term, that would go much further than this case, and I cannot help feeling myself that, as long as it remains annexed to the building, it is a part of the building, although it may be a part that can be removed; and that, if it is not part of the building, certainly to my mind it is a structure. Put glass

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there instead of canvas and you would have a window. I think there would not be very much difficulty in saying, if that was the case, that then it was a structure.

I do not think that anything is got by attacking other parts of the Act of Parliament. I do not think it is possible with a complicated Act of this kind, in which words are more or less necessarily used in different senses at different places. I do not think there is much good done by attacking or dealing with the other parts of the Act of Parliament. I cannot help this kind of feeling, though it ought not to influence our decision, and it does not influence mine, that it is extremely unlikely that erections of this kind, whatever they are called, should be left untouched altogether by this legislation, because it is obvious that, so long as the character of the annexation remains the same, it cannot make any difference whether the breadth is ten inches or two or three or four feet, so long as the character of the annexation is the same; and it is very unlikely that that sort of thing should have been left without the Act dealing with it at all; and, if Mr. Macmorran has been successful in getting a Court to hold that a thing of this kind is not a projection—if we were at liberty to consider the matter from that point of view at all—I should say that it was a very good reason for giving an extension to other parts of the Act, as to which he has not yet been equally successful, though he is going to be equally successful in this instance. But, of course, I am only using that illustration to show how undesirable I feel it that any difficulty should be thrown in the way of the county council in dealing with matters of this kind—with what the learned magistrate calls excrescences of this kind. It may be a very serious eyesore to the street, and, of course (whether it is an eyesore to the street or not), is a matter which is very pertinent to the consideration when we are dealing with a section which prohibits building beyond the building line, which is done partly for the purpose of preserving uniformity, and partly, no doubt, for preserving sufficient light and air and ventilation. This—I do not know what to call it; I must not say “structure,” because that is begging the question—but this “thing” sins, or is quite capable of sinning, if things of this kind are permissible, and are not hit by the Act, against what the Act is intended to obviate when it is dealing with the building line, in both respects. It might be, and very often is, a great eyesore, and it might, and very often does, interfere with the proper amount of air space which should be left untouched. For these reasons, though, of course, I need not say that I doubt my own judgment when I find I am differing from my Lord and my brother Kennedy, I am bound to say that that is my opinion, and if the London County Council are very much hampered, as apparently they must be

by the decision Mr. Macmorran obtained in *Hull v. London County Council* (1901) 1 Q. B. 580; 70 L. J. Q. B. 364, about projections, their best way of dealing with it is to consider the matter when they bring forward one of the numerous Bills we see in the newspapers every day.

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LORD ALVERSTONE C.J. I agree with the greater part of what my brother Wills has said, but I am unable to arrive at the conclusion he arrived at on the reasons he has given. I agree with him entirely that we are not entitled to look at other parts of the Act for the mere purpose of construing particular words. I think entirely with him that these words have to be construed in each of the sections, and each of the groups of sections, having regard to the purview of these particular groups of sections; but I think it is legitimate to consider whether or not a particular thing is dealt with in one part of the Act or is dealt with in another; and to that extent only do I think it material to consider other groups of sections and other enacting clauses in this Act.

However, I must say my main ground of decision in this case is that I am unable to say that this learned magistrate has gone wrong as a matter of law. I do not think he meant to state it so as to say he found it as a question of fact; but I am unable to say that he was wrong in arriving at the conclusion, which is one of fact, in one sense, when he says: "I was of opinion that the cases in question were not structures within the meaning of the Act; that they were in the nature of mere excrescences which could be removed at will without injury to the fabric." I am unable to say, in my opinion, he has gone wrong in that as a matter of law. It must be taken, of course, on that finding that they could be removed by the tenant at the tenant's will—he finds so—and they are, therefore, not fixtures in the sense that a bow window would be, or that a structure of that character would be, and that they can be removed without any injury whatever to the main structure. I think all these findings of fact must be taken as being found by him with reference to these particular structures, and the question we have to ask ourselves is whether on these findings he is bound to hold that a structure erected as this is comes within sections 22 (1) or 200 (3)? I was much pressed with what my brother Wills J. has relied upon—the opening language of paragraph 2 of the case; but it seems to me, as he has rather indicated, that we cannot deal with these sort of cases by simply dealing with the way in which the thing is constructed; because we can imagine many "things," as he has properly called them—I will say many "structures," using the word in the general sense—far less substantially built, which might be a much more clear infringement of section 22 (1). I think—and this is the ground of my decision—that as a matter of law, seeing that section 22 (1) is one of the group of

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sections comprised in Part III. of the Act, which is headed, "Lines of building frontage," *prima facie* it can scarcely be denied that it relates to "buildings" or "structures" in the nature of buildings. That, of course, does not solve the question, because parts of buildings and parts of structures would come in under these words. But if we look at section 23, as to setting back when buildings or structures are taken down; if we look at the provision in section 26, that in giving their consent the council may attach a condition, "(1) that land in the front of the building or structure to such an extent as the council may think proper shall be dedicated to and left open for the use of the public; (2) that the building or structure shall be used only for such purposes as may be specified in the consent or shall not be used for any particular purposes specified in the consent unless with the further consent of the council obtained when a change of purpose is desired," those provisions seem to me to point to considerations different from those which ought to be borne in view in dealing with such a thing as this. And I supplement that by pointing out that I find in the Act a number of sections dealing with what I think this structure undoubtedly was, namely, a projection from the building.

Now, of course, I am hampered in coming to that conclusion—and I entirely feel the weight of the illustration given by my brother Wills—by the decision of Bruce and Phillimore JJ. in *Hull v. London County Council*, 1901, 1 Q. B. 580; 70 L. J. Q. B. 364. All I desire to say is that if, upon a proper statement of facts, the question does come up to us as to whether the thing is or is not a projection under section 73, I think the question how far that decision would be held to be authoritative, that things of this kind are not projections under section 73, will have to be considered by the Court, or, if possible, in some way taken to the Court of Appeal. But I am unable to see an argument for the enlargement of section 22, as my brother Wills suggested it should be enlarged. I think that all the sections in Part III. relate to a different subject matter, and that projections are still to be dealt with under other sections of the Act, and, looking at the facts, I do not think the magistrate came to a wrong conclusion in law when he found that these excrescences or things were not structures or buildings within sections 22 and 200 (3). I am, therefore, of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants—W. A. Blaxland.

Solicitor for the respondents—Maurice Moseley.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

REX v. WELLS AND ANOTHER, JUSTICES.

1904.

May 17.

Highways—Locomotives—Motor car driven at a speed or in a manner dangerous to the public—Conviction in the alternative—Duplicitly—Motor Car Act, 1903 (3 Edw. VII. c. 36), s. 1 (1).

The provisions of section 1 (1) of the Motor Car Act, 1903, prohibiting the driving of a motor car "at a speed or in a manner which is dangerous to the public" create two distinct offences; and a conviction for driving a motor car "at a speed or in a manner which was dangerous to the public" is therefore bad for duplicity.

Rule *nisi* for a writ of *certiorari* to remove into the High Court, for the purpose of its being quashed, a conviction whereby R. S. Clifford, the younger, was convicted for that he, on January 17, 1904, at Loughborough, then being the driver of a certain motor car on a certain public highway there situate did drive the same thereon at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or might reasonably be expected to be, on the highway.

The rule was obtained on the ground that the conviction was bad for duplicity.

The conviction followed the terms of the summons, which in turn followed the terms of the information.

At the hearing before the justices the defendant objected that the information and summons were bad on the ground that the section created six offences, and that the defendant was charged with four on one summons; and he contended that at any rate the prosecution must select which of the four charges they would proceed with.

The justices overruled the objection, and convicted the defendant in the manner above stated.

Section 1 (1) of the Motor Car Act, 1903 (3 Edw. VII. c. 36), is as follows:—

If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act.

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Marriott showed cause. The information and summons, and the conviction which follows them in terms, charge, in fact, only one offence, namely, that of driving in a manner dangerous to the public. It is sufficient to charge an offender in the words of the statute. The conviction is, following the words of the statute, for driving at a speed or in a manner which was dangerous to the public. These words do not involve two offences. It is not necessary to set forth in the conviction the circumstances that led the justices to find the driving dangerous to the public. In *Reg. v. Totnes Justices*, reported in the *Times* newspaper of May 9, 1879, an information had been dismissed under section 4 of the Cruelty to Animals Act, 1849, charging the defendant that he "ill-treated, overdrove, tortured, and abused" two heifers, on the ground that there were four distinct offences, and that only one offence could be included, and the Court granted a *mandamus* to the justices to hear the case on its merits. There the argument was that all the four words were used to constitute the same offence. In the present case the words of this section are indications for the justices informing them of the particular offence with which they are to deal. The whole of the words are intended to constitute the same offence, and are only used to describe it.

[LORD ALVERSTONE C.J.] The word "and" would make this proposition quite plain, but the word is "or" at a speed "or" in a manner dangerous to the public.]

Reg. v. White (1879) 49 L. J. M. C. 19, was a prosecution under sections 116 and 117 of the Public Health Act, 1875, for the sale of meat unfit for human food, in which it was held that the purpose for which the meat was deposited was properly charged in the alternative, and that consequently there was no duplicity. In the present case the conviction must be read collectively. The words only disclose one offence, and not alternative offences. All they imply is that a motor car must not be driven at a speed dangerous to the public or in any other manner dangerous to the public. The unnecessary words must be regarded as surplusage and rejected.

Avory, K.C., and *Moresby White*, in support, were not called upon to argue.

LORD ALVERSTONE C.J. I regret having to give effect to this particular objection, because I daresay there is no merit in it whatever, but there is a very important principle involved. It seems to me it is quite impossible to say that the only offence here

is "driving at such a speed as is dangerous," because the section speaks of driving "at a speed or in a manner which is dangerous to the public." I do not think we can treat the words "at a speed" as surplusage any more than the words "or in a manner." I also desire to point out that a person may be going at quite a moderate speed and yet be driving in a manner that is dangerous to the public; he may be swaying from side to side or not have proper control of the machine. Therefore, it is obvious that the justices ought not to connect the two things together, but ought to consider, in dealing with the question, whether it is dangerous, quite apart from the question of speed. That being so, I think this conviction cannot stand. The two limbs of this section really state two offences, and there being an important general question involved, the objection must prevail, and, whatever the merits of the case may be, the conviction cannot stand.

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WILLS J. I am of the same opinion. I have certainly thought for many years, as long as fifty years, that a conviction drawn up in an alternative form which involved two offences was bad, and it seems to me that Mr. Marriott's argument applies to elementary principles on this matter, but they are of great importance. It is always to be regretted, more especially in this particular instance, when probably, as my Lord says, there is no sort of merit in the objection he brings forward, that a person should escape the consequences of wrong doing; but there is something that is very much more important than that, which is, that a very serious principle of our criminal law should not be neglected or lost sight of. I thought it was the commonest knowledge that a conviction ought to specify the particular offence of which the man was convicted. Otherwise, supposing it was an indictable offence—and the same principles must apply to indictable offences as to others—and a man were charged again with one of the two alternative offences mentioned in his conviction, it would be impossible to say that the plea of *autrefois convict* would be satisfied by producing the document which contained the offence of which he had been previously convicted. The preservation of that principle is of far more importance than the result of this particular case.

KENNEDY J. I agree. It seems to me, on the face of it, clear that a different state of facts might give rise to a successful conviction according as the charge was for driving "at a speed" or "in a manner" dangerous to the public. The "or" is distinctly disjunctive. I can imagine a case where a man was driving a motor car quite slowly, for instance, as my Lord has said, going from side to side of the road, or backing down a road without

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seeing where he was going, as slowly as could be, but yet to the danger of the public.

Rule absolute. Conviction quashed.

Solicitors against the Rule—Field, Roscoe, & Co., for Freer, Blunt, & Co., Leicester.

Solicitors in support of it—Forth & Co., for Clifford, Perkins, and Clifford, Loughborough. •

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL

1904.

May 4.

REX v. HUNTON; *Ex parte* GLAMORGANSHIRE COUNTY COUNCIL.

Police—Sessional court-houses—Local Act—Cost of providing court-house for stipendiary magistrate—“Office or offices”—6 & 7 Viet. c. xlv. s. 13—Petty Sessions Act, 1849 (12 & 13 Viet. c. 18).

A local Act of 1843, authorising the appointment of a stipendiary magistrate for a certain district, empowered the quarter sessions of the county to provide a suitable office or offices for transacting the magisterial business of the district. The magistrate's salary and the expenses of providing the office or offices were cast upon rates to be levied under the local Act upon the district. Under this Act, in 1845, an office was provided, which was, in fact, used as a court. The limits of the Act of 1843 were extended by a local Act of 1868, and again by a local Act of 1894. These Acts expressly referred to the rating powers contained in the Act of 1843, but not to the power given by that Act for the provision of an office or offices.

Held—1. *That the power to provide an “office or offices” given by the Act of 1843 extended to the provision of a court for the transaction of judicial business.*

2. *That the power extended to the provision of different courts in different parts of the district from time to time.*

3. *That the power was not affected by the Petty Sessions Act, 1849, which authorises the provision of petty sessional court-houses in every county at the expense of the county generally.*

4. *That the expense of providing the new courts for parts of the district within the limits of the Act of 1843 was consequently properly charged upon the district, and not upon the county generally.*

Decision of the Divisional Court, reported 1 L. G. R. 810, reversed.

APPEAL by the Glamorganshire County Council against a decision of a Divisional Court (Lord Alverstone C.J., Wills and Channell JJ.) discharging a rule *nisi* calling upon the auditor for the South-Western Counties Audit District, comprising Glamorganshire, to show cause why a writ of *certiorari* should not issue to bring up and quash certain allowances and disallowances made by him in the accounts of the Glamorganshire County Council.

The effect of the auditor's decision was to throw the cost of providing petty sessional court-houses in the part of the county of Glamorgan comprised within the limits of a local Act of 1843, as extended by Acts of 1868 and 1894, on the county at large, whereas it was contended on behalf of the guardians of the Merthyr Tydfil Union, the objectors

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before the auditor, that under the local Acts these costs ought to be borne by the part of the county within the limits of these Acts exclusively.

The facts were as follows:—

In 1829 an Act, 10 Geo. IV. c. xcvi., was passed authorising the appointment of a stipendiary magistrate to act for the parishes of Merthyr Tydfil, Gellygaer, and Aberdare, and of a clerk to such justices. The Act provided for the levy of rates in these parishes to meet the expenses; but it gave no power to provide a court-house or any office for the use of the justice or the clerk. The Act was to remain in force for seven years. It was allowed to expire in 1836. The preamble of the Act stated that it was passed because there had been a difficulty in obtaining a sufficient number of justices to act. After the Act of 1829 expired the magisterial duties were again performed by the county justices unaided by a stipendiary justice.

At the Michaelmas Quarter Sessions, 1841, the provisions of the Police Acts were adopted, and the county was divided into four special police divisions, a separate police rate for each police division being levied, and the divisional expenditure separately charged thereto.

After Easter, 1880, the police divisions were consolidated, and a general police rate was levied over the entire county, excepting the parishes in the borough of Neath, which had its own police.

In 1843 the Act of 6 & 7 Vict. c. xlv. was passed which recited the Act of 10 Geo. IV. c. xcvi., and that it had expired, and that great difficulty was then experienced in finding a sufficient number of justices of the peace to execute their office within the district of Merthyr Tydfil and the district surrounding the same, and provided that a justice should be appointed and be entitled to the salary mentioned in the Act. It was also provided that the justice might act as a justice for the counties of Glamorgan, Monmouth, and Brecon, and that he might appoint a clerk with a salary. The fees receivable by the clerk were to be paid to the county treasurer and applied in diminution of the rates directed by the Act to be levied.

For the purpose of paying the salaries of the justice and clerk, and the other expenses mentioned in the Act, rates were to be levied on the parishes and hamlets within the limits of the Act upon warrants from the quarter sessions.

By section 13 it was provided "that it shall be lawful for the justices of the said county of Glamorgan in general or quarter sessions (if they think fit) to appropriate any lands over which they may have control within the said parish of Merthyr Tydfil for the purpose of the erection thereon of a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act, or other-

wise to purchase land or buildings suitable for the purposes aforesaid, or to erect such office or offices, or to hire an office or offices in some suitable place, as they think fit, and the expense of purchasing such lands or buildings, or of building and maintaining or of hiring such office or offices, shall be paid out of the rates to be levied under the provisions of this Act."

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Section 14 gave the quarter sessions borrowing powers, which were never exercised, to the extent of £2,000, for the purchase of land or buildings, or of erecting the office or offices, and authorised the Loan Bill Commissioners of the Exchequer to lend money to the quarter sessions to that extent.

At the Epiphany Quarter Sessions, 1845, it was resolved: "That the whole question of erection of a magistrates' room at Merthyr, either in connection with the present police-station, or on a separate site, be referred to the finance committee, and that they be requested to give their best consideration to any plan to be submitted to them with the view of making some recommendation to the Court for securing a more respectable place for despatching magisterial business than that which now exists."

At the Easter Quarter Sessions, 1845, plans were adopted, and at the Midsummer Quarter Sessions, 1845, a contract was ordered to be entered into to erect a justice room at Merthyr for the sum of £547 9s. 6d., and such further sums as the county surveyor might report as sufficient to cover all extras. The room was, in fact, built adjoining the police-station, on land which belonged to the county. The expense incurred was at the following quarter sessions directed to be paid by the treasurer and charged to the Merthyr stipendiary justice account, which was done.

At this period there was no general statutory authority empowering the quarter sessions to incur expense in providing petty sessions or justice rooms, and the sittings of the justices in each petty sessional division were usually held at one of the inns in the division. Offices for the stipendiary justice and the clerk were provided at the police-station at Merthyr.

In 1849 the question of providing petty sessional courts was first dealt with by the Legislature, and the Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), was passed, which directed that buildings or places at which petty sessions might be held should, when necessary, be provided, and the expenses thereof and attendant thereon be paid out of the county rate or borough rate as the case might be. Under this Act, accordingly, the ratepayers in the stipendiary district became liable to contribute to the costs of petty sessional courts in the rest of the county.

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After the adoption of the Police Acts, the quarter sessions in Glamorganshire appear to have built the petty sessional courts which were required, along with the police-stations, and after 1849, instead of apportioning the expenses between the police rate and the county rate, charged the whole of the police rates of the police divisions in which the courts were erected until Easter, 1880, when the police divisions were consolidated as before explained, and the cost of the police became a general charge over the whole county, exclusive of the borough of Neath.

The general county rate had always been assessed upon the parishes within the borough of Neath, but, as that borough had its own police force, the police rate for Glamorganshire had never been levied in the parishes of the borough. The effect of charging the cost of petty sessional courts to the police rate has been to allow the parishes in the borough of Neath to escape being charged therewith.

After the passing of the Petty Sessions Act, 1849, the Glamorganshire Quarter Sessions do not appear to have charged what may be termed capital expenditure in respect of the Merthyr petty sessional room to the stipendiary justice account, all such expenditure having, as shown by the minutes of the quarter sessions, been directed to be paid out of the police rates; but in the years 1887 and 1888, although the balance due to the contractor for alterations and improvements to the Merthyr police-station and court was directed, according to the minutes of quarter sessions, to be paid out of the police rate, the whole expenditure in the treasurer's account was, in the first instance, charged in the account of the Merthyr Stipendiary Justice Act, and then £492 8s. 3d. was transferred to the debit of the county rate, which in effect left £125 charged to the Merthyr Stipendiary Justice Act account. This was the only capital expenditure so charged after 1849, but between the years 1854 and 1857, during which time the Aberdare Petty Sessional Court was being built, the town hall at Aberdare appears to have been hired, and the rent paid for it charged to the Merthyr Stipendiary Justice Act account.

In 1868 the limits of the stipendiary district were extended by the addition of the ecclesiastical district of St. Margaret, in the parish of Llanwonno, by the 31 & 32 Vict. c. xxxvi. s. 1, of which, after enacting that the limits of the Act of 1843 should be extended as above stated, enacts that: "All and singular the provisions of the Act of 1843 as varied by this Act, and all and singular the powers and authorities, rights, remedies and jurisdictions referred by that Act, shall be read, construed, and applied, and exercised and enjoyed, as if the limits of the Act of 1843 had extended to and included the added limits, and as if the same provisions had been enacted, and the same powers and

authorities, rights, remedies, and jurisdictions, had been conferred with express reference to the limits of the Act of 1843 and the added limits." 1904.
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The Act also expressly extended the powers of the existing stipendiary justice and clerk to the added limits, and increased their salaries, and it contained certain provisions as to the levy of the rate under the Act of 1843 in the added area.

In 1894 the limits of the stipendiary district were again added to by the Merthyr Tydfil Stipendiary Justice Act, 1894 (57 Vict. c. xxvii.), and the salaries of the justice and clerk were increased.

By section 3 of that Act the hamlets of Garthgynid and Ysgwyddgwyn, in the parish of Gellygaer, were added to the limits of the Acts of 1843 and 1868, and it was provided that "the provisions of the Acts of 1843 and 1868 as varied by this Act and the powers authorities rights remedies and jurisdiction conferred by the said Acts shall be read construed applied and exercised and enjoyed as if the limits of the Acts of 1843 and 1868 had extended to and included the added limits and as if the same provisions had been enacted and the same powers and authorities rights remedies and jurisdiction had been conferred with express reference to the limits of the Acts of 1843 and 1868 and the added limits."

Section 4 provided that "the justice shall attend for the despatch of business at such places and upon such days and at such time within the said district as the standing joint committee of the county of Glamorgan shall from time to time appoint. Provided that he shall not be required to attend more than four days in each week."

It appears that in pursuance of the last-mentioned section the standing joint committee had directed the stipendiary justice to sit at Abercynon and Mountain Ash, and that he made arrangements for rooms in which to hold his sittings, the charges in respect of which were sent in to the county council, and were paid by the county council and charged to the Merthyr Stipendiary Justice Acts account, on the ground that they were necessary expenses incurred in complying with section 4 of the Act of 1894. The standing joint committee took no part in the provision of these rooms.

Latterly the room at Merthyr provided under the Act of 1843 could not be used as a court by reason of its defective sanitary condition, and a temporary room was hired by the county council, the arrangement being subsequently approved by the standing joint committee.

In the year 1901-1902 the Glamorganshire County Council incurred expenses amounting to £218 8s. in the hire of the above-mentioned temporary room at Merthyr; and they also incurred expenses amounting to £1,652 4s. 6d. and £405 13s. 9d. (consisting of two items of

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£57 10s. and £348 3s. 9d.) respectively, on the provision of new petty sessional courts at Mountain Ash and Abercynon.

These sums the county council charged in their accounts to what was called the Merthyr stipendiary justice account, thus charging them on the district comprised within the limits of the Act of 1843 as extended by the Acts of 1868 and 1894.

The auditor having considered the above facts in connection with the objection made on behalf of the Merthyr Tydfil Board of Guardians certified that, in the accounts of the county council of Glamorganshire for the year ending 31st March, 1902, he had disallowed as charges illegally debited to the account of the Merthyr Tydfil Stipendiary Justice Acts the above-mentioned amounts, making together £2,276 6s. 3d., and had allowed the same as charges in the general county purposes account. His reasons for making such disallowances and allowances as stated by him are set out at length in the report of the case in the Court below (1 L. G. R. 810, at p. 815). It is unnecessary to repeat them for the purposes of this report.

The present rule *nisi* for a *certiorari* to bring up and quash the above-named disallowances and allowances made by the auditor was then obtained by the Glamorganshire County Council. The guardians of the Merthyr Tydfil Union were made parties to the proceedings by order of the Court.

It appeared that the auditor had at an audit of the accounts of the county council of Glamorgan for the previous year, *i.e.*, for the year ending March 31, 1901, disallowed, as charges debited to the account of the Merthyr Tydfil Stipendiary Justice Acts, sums of £13 13s., £30, and £54 12s., making together £98 5s. representing payments charged by the county council in their accounts for the year ending on March 31, 1901, for rents paid for the hire of places for the purpose of holding petty sessional courts in the petty sessional divisions of Caerphilly Higher and Miskin Higher comprised in the said Merthyr Tydfil stipendiary justice district. For the same reasons as those for the disallowance of the £2,276 6s. 3d. in question in the present proceedings, the auditor held that this sum of £98 5s., made up of the three amounts above set out, was legally chargeable under the provisions of the Petty Sessions Act, 1849 (12 & 13 Vict. c. 18) to the county rate of the county of Glamorgan, and was not a legal charge against the Merthyr Tydfil Stipendiary Justice Acts account under the Acts of 1843 to 1894.

The county council appealed to the Local Government Board against the decision of the district auditor with regard to these disallowances.

The Local Government Board reversed the auditor's decision, giving their reasons in a letter of December 4, 1902, addressed to the auditor.

The reasons given by the Local Government Board in their letter are set out in the report of the case in the Court below (1 L. G. R. 810, at p. 817).

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The Divisional Court discharged the rule, thus upholding the decision of the auditor. The Glamorganshire County Council appealed.

Danckwerts, K.C., and *R. Cunningham Glen* in support of the appeal.

A. T. Lawrence, K.C., and *Ryde* for the district auditor.

S. T. Evans, K.C., and *S. G. Lushington* for the Merthyr Tydfil Guardians.

The arguments, which entirely turned on the construction of the sections of the statutes cited, sufficiently appear from the judgments.

COLLINS M.R., after stating the manner in which the case came before the Court, proceeded:—The question which we have to consider depends upon the construction of certain special Acts whereby a stipendiary magistrate was established in the county of Glamorgan.

The first is an Act of 1829 (10 Geo. IV. c. xcv.), entitled "An Act to provide for the more effectual execution of the office of a justice of the peace within the parishes of Merthyr Tidvil, Gellygaer and Aberdare, in the county of Glamorgan." It relates: "Whereas the execution of the office of a justice of the peace within the parishes of Merthyr Tidvil, Gellygaer, and Aberdare, in the county of Glamorgan, has become and is likely to continue very difficult and burthensome, owing to the extent of the population, and the increase of manufactures within the limits of the said parishes: And whereas a sufficient number of justices of the peace for the said county cannot be found to execute their office within the said parishes with such promptness and efficiency as the good government of the inhabitants of the said parishes and the protection of their persons and properties require, and it is therefore expedient, for the purpose of securing a more active and vigilant administration of the laws throughout the said parishes, that a justice of the peace should be appointed to act therein, and that a competent remuneration should be paid to him for his services." Then the first section enacts that "it shall be lawful for his Majesty, his heirs, and successors, immediately after the passing of this Act, and from time to time, as occasion may require, to appoint one fit and able person, being a justice of the peace for the county of Glamorgan, to execute the office of a justice of the peace within the said parishes, either by himself or together with such other justices of the peace for the said county as may think proper to attend, and the said justice so to be appointed

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shall be entitled to such salary as is hereinafter-mentioned." Section 2 provides that "the justice to be appointed by virtue of this Act shall reside within six miles of the town of Merthyr Tidvil, and shall attend in the said town for the dispatch of business three days at the least in every week (Sundays excepted) from the hour of ten o'clock in the forenoon to the hour of six o'clock in the afternoon; provided always, that the attendance of the said justice may occasionally be supplied by any other justice of the peace for the said county." Under section 4 the justice's salary was to be £600; and it was to be raised under section 5, which is as follows:—"And for the purpose of fixing the proportions and the mode in which the said sum of six hundred pounds shall be raised for the payment of the said salary, the occupiers of the following ironworks within the said parishes"—then certain ironworks are enumerated—"and the occupiers of all other ironworks that shall hereafter be erected within the said parishes shall in the first place contribute altogether one-half of the said salary, that is to say, the sum of three hundred pounds in each year, for their respective proportions of which they shall be rated in respect of the blast furnaces only in each of those several works . . . and that the inhabitants of the parish of Merthyr Tidvil shall contribute the other half of the said salary." Then the Act provides by whom the rates are to be made, and so on, and there is provision also for a clerk and payment to a clerk.

That Act was followed by an Act of 1843 (6 & 7 Vict. c. xlv.), which is entitled, "An Act to provide for the more effectual execution of the office of a justice of the peace in the parish of Merthyr Tidvil and certain adjoining parishes." The preamble refers to the passing of the Act of 1829 (the duration of which was limited to seven years), and proceeds: "And whereas, the said Act having now expired, great difficulty is now experienced in finding a sufficient number of justices of the peace to execute their office within the said parish of Merthyr Tidvil and the district surrounding the same with such promptness and efficiency as the good government of the inhabitants and the protection of their persons and properties require; and it is therefore expedient, for the purpose of securing a more active and vigilant administration of the laws within the said parish and district, that a justice of the peace should be specially appointed to act therein, with the competent powers, and that a competent remuneration should be paid to him for his services." Then it is enacted that "the limits of this Act shall be held to include the whole of the said parish of Merthyr Tidvil, the hamlet of Brithdir in the parish of Gellygaer, the parish of Aberdare, and the hamlet of Rhigos in the parish of Ystrad-y-fodwg, in the county of Glamorgan," thereby enlarging the district. Then comes the provision for the appointment of a stipendiary magistrate from time to

time, as occasion may require. Section 3 provides that "the justice so to be appointed shall reside within the parish of Merthyr Tidvil, and shall attend at some place within the said parish for the dispatch of business three days at the least in every week, and one day in the parish of Aberdare or hamlet of Brithdir (Sundays excepted), from the hour of ten in the forenoon to the hour of four o'clock in the afternoon, or oftener if necessary, provided always that the attendance of the said justice may occasionally be supplied by any other justice of the peace having jurisdiction in respect of the matters to be determined by such justice." Then there are provisions dealing with his powers, the area for which he may act, and so forth, the salary, and the appointment of the clerk. Then by section 10: "For the purpose of paying the said salaries, and also the expenses of this Act, and other expenses herein-mentioned, the justices of the said county of Glamorgan, in general or quarter sessions assembled, shall once or oftener in every year estimate the amount requisite for such purpose, and shall assess upon each parish and hamlet included within the limits of this Act, according to the proportions in which such parishes and hamlets respectively at the time contribute to the county rate of the county of Glamorgan, a fair and just sum, and the same shall be levied and raised as hereinafter provided." Then after provisions for the raising of the rate in the different parishes, hamlets, and so on, there follows the section which gives rise to the discussion in this case, namely, section 13: "And be it enacted that it shall be lawful for the justices of the said county of Glamorgan in general or quarter sessions (if they think fit) to appropriate any lands over which they may have control within the said parish of Merthyr Tidvil for the purpose of the erection thereon of a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act, or otherwise to purchase lands or buildings suitable for the purposes aforesaid, or to erect such office or offices, or to hire an office or offices in some suitable place, as they think fit, and the expense of purchasing such lands or buildings, or of building and maintaining or of hiring such office or offices, shall be paid out of the rates to be levied under the provisions of this Act." Then by section 14 there is power to borrow: "It shall be lawful for the said justices in general or quarter sessions assembled to borrow a sum of money, not exceeding two thousand pounds, for the purpose of purchasing land or buildings, or of erecting such office or offices for the purposes aforesaid, and to charge the future rates to be levied under the provisions of this Act with the amount of the loan, and with interest thereon, which sum, or any part thereof, the said justices shall have power to borrow from Her Majesty's Exchequer Loan Bill Commissioners, who are hereby authorised to advance the same: Provided

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always, that any money so borrowed shall be repaid by yearly instalments of not less than one-twentieth part of the sum borrowed, together with interest." Then follows an important provision in section 15: "And be it enacted that whenever any person charged with any offence for which he or she is liable to be summarily convicted before a justice, shall be, without the warrant of a justice, in the custody of any constable acting within the limits of this Act during the time when the police office shall be shut, it shall be lawful for such constable, if he shall deem it prudent so to do, to take the recognisance of such person with or without sureties . . ."

I pause there, because there is a considerable interval before there is any further legislation dealing specially with this particular district. What have we up to this point? We have in the first instance an ascertained want. By reason, as it is recited, of the extent of the population, and the increase of manufactures and so on, in this populous district, it has been found necessary to give that district special facilities for having its justice administered by a magistrate. It is found to be in an exceptional condition, and therefore it is treated exceptionally. The district is itself compelled or empowered to incur the expense of providing, at its own cost, this additional advantage. The magistrate is created, as I have said. There was no special provision in the Act of 1829 dealing with courts or places where the magistrate was to sit, but it was provided that he was to reside within the town. He was left exactly, as far as the place where he was to sit is concerned, in the same position as other magistrates at that time who had to find some place in which to sit and administer justice. But the expense of the clerk's salary was thrown naturally upon that part of the county which was to reap the benefit of the Act.

Then follows the Act of 1843 which I have read. After having had the experience of the seven years during which the first Act was in operation, finding that the mischief which that former Act was passed to mitigate still continued, and continued in an aggravated form, the Legislature intervenes and, adopting the main scheme of the earlier Act, enlarges the district and increases the salaries of the magistrate and of the clerk, and imposes upon the magistrate the duty of sitting not in one place only, but for one day, at all events, in a week in one or more of the added districts. That involved a larger scheme altogether, and contemplated a larger area and a larger amount of business to be disposed of, and it was natural that some provision now should be made for a want that had no doubt been felt by the experiences of the past, namely, a provision for finding a court or courts where the magistrate should be able to discharge his judicial duties—the magisterial business of the district. Hence the provision of section

13, which unquestionably provides for the erection of a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act.

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The question raised before us is, what is the fair meaning of the words "office or offices" in that connection—"office or offices for transacting the magisterial business?" The mischief that has been felt has not been in respect of administration business such as is done by magistrates in sessions; it has been in respect of the administration of the criminal law. There are sections, which I have not referred to in detail, dealing with jurisdiction in cases of assault and matters of that kind; and obviously one of the central purposes—the chief purpose, I should have thought, for which the magistrate was continued in the district—was the administration of justice, not merely what is called the ordinary routine business as distinguished from adjudications, but, in a word, although, of course, the ordinary routine business had to be done, it was judicial business also that had to be done, and these offices are to be for transacting the magisterial business of the district.

Now, to say that it was deliberately intended to leave out of the magisterial business that which—in view of the reason as stated by the Legislature itself for introducing this legislation—is the chief part of that business, namely, the adjudication in court upon offenders who are brought before the magistrate, seems to me to be a most extraordinary and far-fetched contention. One would suppose, *primâ facie*, that if provision is being made for a place where the magisterial business is to be conducted, the first thing that would enter into the mind of the Legislature would be to find some place where the magistrate would sit, and therefore, *primâ facie*, one would expect from the language which is used that that would be the intention which the Legislature was seeking to carry out. It is said that the Legislature here has used the words "office or offices," and that it cannot be inferred from those words that it was intended to justify or provide for the building of a court at all. That is the first contention. The second is that even if "office or offices" is capable of including court, still, in the context, the expression must mean one office only, or one building only which may consist of more than one chamber, each chamber constituting a separate office, and that the expression means either a building composed exclusively of one chamber in which administrative work, and not judicial work, is carried on, or one building composed of several chambers, in none of which judicial work is carried on, but where official administrative work is carried on. It is said that that is the proper interpretation of the addition of the word in the plural "offices" after the word "office," and that, therefore, in this particular case there was first of all no right to apply the funds designated for the building of

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a court in the modern sense—that is to say, a place where justice is administered; and secondly, that if the expression is capable of embracing a “court,” the section provides only for one office, and that it is evident that that “office” was the one place which was meant, and the operation of the section is exhausted, and no more can be done; that is to say, that even if “office” does embrace a court where the magistrate can sit and administer justice, if one has been built in one part of the district—though the Act deals with a district embracing more than one sub-district—the purpose of the Legislature has been exhausted, although the magistrate, who is charged with the obligation of sitting in more than one district, has only been furnished with one court in one district to sit in. That, again, is a very extraordinary result to gather from a section which is passed from the point of view which I have established by reading the words in the preamble, stating the grounds upon which the Act was passed and the mischief which it was desired to remedy.

Now, we are dealing with the period of 1843 in construing this Act, and we find, looking, as we are entitled to look, at co-temporary exposition, as it is called, of the meaning of such technical words as “office or offices,” used in connection with the discharge of the duties of magistrates, that those words were, indeed, at one time the proper words for expressing not only the place where administrative business was carried on, but the place where judicial work was transacted. We find two Acts passed in 1839, two or three years before the Act in question was passed, which shows the meaning which was attached by competent draughtsmen to the words “office or offices” in this connection. I refer particularly to the preamble to the second of these Acts, the Metropolitan Police Courts Act, 1839. Section 70 of the earlier of these Acts (the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47))—the section which is reproduced, with one exception, in section 15 of the Act of 1843, which I have just been reading—is as follows:—“And be it enacted, that whenever any person charged with an offence of which he is liable to be summarily convicted before a magistrate, or with having carelessly done any hurt or damage, shall be, without the warrant of a magistrate, in the custody of any constable of the metropolitan police in charge of any station house during the time when the police-courts shall be shut, it shall be lawful for such constable, if he shall deem it prudent, to take the recognizance of such person, with or without sureties, conditioned as hereinafter mentioned.” Now, obviously that section, it seems to me, means that where a person is in the custody of a constable, and the police-courts being shut it is impossible to take him before a magistrate, then the man’s recognizance is to be taken by the constable himself; that is to say, his recognizance that he

will appear when the court is sitting. What is the "court" referred to? Not an office where business other than judicial business is carried on, but a police-court, where you expect to find a magistrate sitting, and it is obviously to meet the case where the magistrate is not sitting within that place that this provision is made for taking the prisoner's recognizances.

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Now, taking that as the obvious, clear, unambiguous meaning of the Legislature in that section, what does it mean when it is incorporated into the Act of 1843 in this connection: "And be it enacted that whenever any person charged with any offence for which he is liable to be summarily convicted . . . shall be . . . in the custody of any constable . . . during the time when the police office shall be shut, it shall be lawful for the police-constable . . . to take the recognizance of such person . . . conditioned for the appearance of such party before the justice . . . ?" Now what happens in the police office there referred to, when it is not shut, in reference to this particular case? The office is the place where the magistrate is sitting judicially, where the person could be summarily convicted if the magistrate was there, and therefore the place where the magistrate would be sitting for the purpose of dealing with his judicial functions is necessarily, in the Act, the police office, and therefore the words "police office" embrace the word "court." That is an absolutely conclusive demonstration, it seems to me, in the very Act itself, of the meaning which the draughtsmen have attached to the word "office"—a place which, whatever else it embraces, embraces the existence of what can be properly called a court; that is to say, the place where the magistrate is sitting and administering justice.

So much for the state of the Act at this date when it was passed. Now I will deal with another criticism which has been urged in one of the two points which I have named as the points made for the respondents in this appeal. It is contended that the words in the first part of section 13 giving power to the justices to "appropriate any lands over which they may have control within the said parish of Merthyr Tydvil for the purpose of erection thereon of a suitable office or offices for transacting the magisterial business of the district," mean that the office must be in Merthyr Tydvil; and that therefore the Legislature does not contemplate the acquisition by any means, hiring a building or appropriating land, of an office elsewhere than in Merthyr Tydvil itself; and that inasmuch as an office was supplied in Merthyr Tydvil, there is no room for any further expense in providing an office in any other part of the district. However, counsel for the respondents do not press that as their main point, and they do not strenuously contend that the subsequent part of that section does

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not make it possible by other means—by building or hiring—to erect an office elsewhere; the second clause being “or otherwise to purchase land or buildings suitable for the purposes aforesaid, or to erect such office or offices in some suitable place, as they think fit, and the expense of purchasing such lands or buildings, or of building and maintaining or of hiring such office or offices, shall be paid out of the rates to be levied under the provisions of this Act.” It seems to me that, although the words “office or offices” are, perhaps, not as happily put together as they might have been, still, looking at the conditions dealt with, and the obligation imposed upon the magistrate to sit in more than one place, we ought to construe those words “office or offices,” if they are capable of bearing the meaning, as not being limited necessarily to one office only in one part of the district. It seems to me that the words “office or offices” are perfectly capable, even in their natural meaning, of embracing more than one office, and of covering offices not merely in one district, but an office in each of the two subordinate districts which together make up the whole stipendiary district. I think that that is the natural or, at all events, a perfectly possible construction of those words in that connection, and when the purpose which obviously the Legislature had in view is borne in mind, it seems to me it is absurd to suppose that the Legislature intended to impose upon the magistrate the obligation of sitting in more than one place, and deliberately to withdraw from this county the obligation of finding more than one place in the district for him to sit in. Therefore it seems to me that the words are quite compatible with the right to find more than one office. Then the fact that there are no lands which as a matter of fact they have desired to appropriate in other places does not seem to me to exclude their right of erecting a building by borrowing, or by hiring, or by any other means in some other place. The second clause of the section is large enough to enable them to build wherever they think fit—in such suitable places as they think fit.

Therefore it seems to me that taking the Act down to this date it is clear that, according to the intention of the Act, a power is given to the quarter sessions to find a suitable court for the magistrate at the expense of the district in such place within the district as they think suitable. That is my view of the construction of the Act itself.

Now it is said that all that has been altered by what took place afterwards. I may first follow out what was done with regard to this particular district in subsequent times, although, in my judgment, it does not really alter the position. In 1868 an Act was passed for enlarging the district again. It recites the earlier Acts and that “it is expedient that the limits of the Act of 1843 be extended and that the salaries respectively authorised by the Act be paid to the justice and

clerk from time to time appointed and acting under the provisions thereof should be increased." Then section 1 extends the limits of the Act by taking in a portion of the parish of Llanwonno, and goes on to provide that: "All and singular the powers and authorities, rights, remedies, and jurisdictions conferred by that Act, shall be read, construed, and applied, and exercised and enjoyed, as if the limits of the Act of 1843 had extended to and included the added limits, and as if the same provisions had been enacted, and the same powers and authorities, rights, remedies, and jurisdictions, had been conferred with express reference to the limits of the Act of 1843 and the added limits." I should have thought that would have been enough to show that the Legislature intended to put the added area in the same position as the old district *mutatis mutandis*. But the Legislature goes on *ex abundanti cautela* to make it perfectly clear, although it had already been done in general words, that the powers of raising the salaries and expenses conferred by the old Act are to extend to the new district, and that the new district is to contribute its proper share to the expenses. That is really what is done in section 7, which has been pressed upon us so much. It provides that "the 10th and 11th sections"—those are the two sections provided for raising the expenses by rates over the area comprised in the district—"of the Act of 1843 shall be read, construed, and applied, as if the increased salaries by this Act authorised and directed to be paid had been expressly included in those sections, and the same had been enacted for the purpose of paying and making provision for payment of the increased salaries, and as if the overseers of the poor of the parish of Llanwonno had been included." That is a provision which is introduced, as I say, *ex abundanti cautela* in respect of the payment of the salaries; and the argument founded upon that is that the Legislature, taking this precaution of dealing with salaries, has deliberately left out any reference to any powers for building courts, and inasmuch as it has not referred again expressly to the powers of building courts, it must be taken that it has treated those powers as having ceased to exist, and that therefore they are not in existence, and that is an argument, it is said, to show that at the time that the Act of 1868 was passed, somehow or other the power in the earlier Act which I have emphasised and dwelt upon, for supplying the courts to sit in, had lapsed and gone. It is not contended that this Act itself would have the effect of annulling it if it existed, but the argument is used in confirmation of the argument that another intervening Act, which I have not yet referred to, had annulled it. I have pointed out that no such inference can be drawn from this section of the Act of 1868, that it is simply inserted *ex abundanti cautela*

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dealing with the part of the Act which was thought to require extra emphasis, and that it does not annul anything already provided for in the general words by which the powers of the Act of 1843 are extended to the district created by the new Act. The only other Act referring to this particular district is the Act of 1894, which again provides for the extension of the district and is on the same lines as all the previous Acts and renders the provisions of these Acts applicable to the extended district. And section 4 of the Act of 1894 provides that "the justices shall attend for the dispatch of business at such places and upon such days and at such times within the said district as the standing joint committee of the county of Glamorgan shall from time to time appoint. Provided that he shall not be required to attend more than four days in each week." That is an enlarged provision for securing sittings in more than one place.

That is the whole of the special legislation with respect to this district, and so far as that special legislation goes, it seems to me that the powers conferred as to building courts and charging the expenses of that upon the district are clearly established—that is to say, courts in which the justices can sit and administer criminal or magisterial justice.

But it is said that the burden of providing a court for the justice to sit in which is imposed by the whole of that elaborate machinery on the district which theoretically gets the primary benefit of it, and upon which, without question, the expenses of the justice's salary and of that of his clerk are thrown, has, by an intervening public Act, been taken off that special district, and thrown on to the county at large. The Act in question is the Petty Sessions Act, 1849, which is a general Act "for the holding of petty sessions of the peace in boroughs, and for the providing of places for the holding of such petty sessions in counties and boroughs." It is important to see what the scope of that Act is, and it appears by the preamble which is, "Whereas certain meetings of the justices of the peace called petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales called petty sessional divisions, and important duties have lately been assigned to the justices attending at such petty sessions, and to their clerks, by certain Acts of Parliament, and it is desirable to declare and enact that the sittings of justices of the peace, or of a stipendiary magistrate in and for every city, borough, or town corporate having a separate commission of the peace, or for any part thereof, shall be deemed a petty sessions of the peace within the meaning of such Acts, and that buildings or places at which such petty sessions may be holden shall, where necessary, be provided." Then section 1 of the Act enacts:

“Every sitting and acting of justices of the peace, or of a stipendiary magistrate, in and for any city, borough, or town corporate having a separate commission of the peace, or any part thereof, within England or Wales, at any police court or other place appointed in that behalf, shall be deemed a petty sessions of the peace; and the district for which the same shall be holden shall be deemed a petty sessional division, within the meaning of any Acts of Parliament, already made or hereafter to be made, having relation to such petty sessions or to any business to be transacted thereat.” Then section 2 provides that: “In all cases where at present there are not, or where hereafter they shall not be, any fit or proper place for the holding of such petty sessions within any such petty sessional division as aforesaid, in any county, riding, liberty, or division within England and Wales, or within any city, borough, or town corporate within the same, it shall be lawful for the justices of the peace for any such county, riding, liberty, or division, in general or quarter sessions assembled, and for the council or other governing body or any such city, borough, or town corporate having a separate commission of the peace, respectively, if they shall respectively think fit, from time to time to direct that fit and proper places be hired or otherwise provided for the holding of such petty sessions of the peace within any such petty sessional division as aforesaid, and that the expenses thereof and attendant thereon be paid out of the county rate or borough fund respectively, as the case may be.”

The argument is that here is an express provision in the general Act whereby the expenses of hiring courts for the magisterial business are thrown upon the county, and therefore the inhabitants of this special stipendiary district of Merthyr Tydfil in Glamorganshire are bound to contribute to the general county rates for the purpose of erecting these buildings, and therefore it is a glaring injustice that while these persons are liable to that obligation to contribute to these courts throughout the whole county, they should be called upon to provide specially, at their own expense, courts for themselves too, and that it cannot be the meaning of the Legislature, and that therefore it must be taken that all these elaborate provisions of the particular Acts are repealed. The simple answer to that is, it seems to me, that this Act which I have just read deals with a different set of cases altogether. The particular district that we have to deal with is not a petty sessional division; a part of it is in one petty sessional division, and a part of it is in another, but, as a whole, it is not co-extensive with any particular petty sessional division. Moreover, it is quite clear from this Act that what the Legislature is dealing with is the sitting by the justices attending petty sessions; and when you come to examine what are created petty sessions for the purposes of this Act, the particular jurisdiction of the

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stipendiary in this district as it is, does not fall within the definition of "petty sessions" for whom these faculties are provided by the Act, and therefore it has no special application, it seems to me, in theory to the particular stipendiary district which we have to deal with in respect of this Act. That is clear enough in theory; but in fact and in truth the injustice which they rely upon does not exist, because the courts which have been found in other parts of the county and to which it is alleged the obligations of the persons in the stipendiary district extends, thereby creating the injustice, have not been constructed in whole or in part at the expense of the inhabitants of this stipendiary district. They have been constructed out of another and different fund to which this district does not contribute at all; and therefore in fact there has been no injustice, and in theory it seems to me that this Act does not make any or provide for anything that could be an injustice. This district has got a particular benefit by reason of the special conditions applicable to it alone, and it seems to me to be perfectly consistent with justice, and evidently to have been so regarded by the Legislature, that the district which got that particular benefit should itself bear the burthen of it.

It seems, to me, therefore, that the decision of the Court below was wrong. I do not think they have given sufficient attention to the scheme enunciated in the series of Acts creating the special district, and throwing upon that special district the burthen of its own expenses. Then having got that as the clear intention of the Legislature, even if this Act were not, as I consider, shown not to be capable of applying to this particular district, I think it would be a very strong thing to say that the general words of the general Act could be taken impliedly to repeal the special words of the distinct Act, passed for a special purpose. The authorities that could be cited are very numerous on that point, but I need not refer to them further than to say that the principle seems to me to be quite clearly stated in the cases of *Thorpe v. Adams* (1870) L. R. 6 C. P. 125; 40 L. J. M. C. 52; and *Kutner v. Phillips*, 1891, 2 Q. B. 267; 60 L. J. Q. B. 505, referred to by Mr. Glen.

Upon these grounds I am unable to agree with the decision of the Court below, and therefore I think the appeal ought to be allowed.

ROMER L.J. The question which we have to consider upon this appeal as to the true construction of the Act of 1843 is, to my mind, a curious one, and I cannot say I am surprised that there has been a difference of opinion about it. The difference of opinion is somewhat remarkable. The auditor came to one conclusion upon the question and his conclusion was reversed by the Local Government Board. The matter then came before the Divisional Court, and, as I gather,

upon one part of the case the Lord Chief Justice differed from Mr. Justice Wills as to it, although in the result upon another part of the case all the judges of the Divisional Court agreed in considering that the position of the auditor was correct. It now comes before us, and I gather we are all agreed that the decision of the Divisional Court was wrong. In that state of things I think I ought to state my reasons for the conclusion which I have arrived at, although after what the Master of the Rolls has said I can do so somewhat briefly.

In my opinion, the words "office or offices," as used in section 13 of the Act of 1843, are words large enough to include a room or court where the stipendiary magistrate may sit to hear the cases brought before him. The words used in the section are "suitable office or offices for transacting the magisterial business of the district." Seeing that the most important part of the magisterial business of the district which had to be transacted was that of the magistrate himself when he sat to hear the cases brought before him, it certainly does appear to me to be extremely difficult, if not almost impossible, to suppose that the section would, in authorising the erection of a suitable office or offices, intend to exclude any place where the magistrate could sit to hear the cases brought before him; and I think the section did contemplate that amongst the office and offices which might be provided, there should, if the justices of the county of Glamorgan thought fit, be provided a suitable room or court for the magistrate to sit in. It could not be, I think, that if the justices had sanctioned a building to contain the offices, it would have been *ultra vires* on their part under the section if they had expressly sanctioned a building designed so as to contain a room for the magistrate to sit in for hearing his cases; and yet, if the view I am taking were not the correct one, it could well be contended, and I think would have to be held, that the erection of such a building for such a purpose would be *ultra vires*. I can only say that to my mind there is nothing sufficient to justify this Court in cutting down the meaning of the words "office or offices" as contended for by the respondents before us; and on this part of the case I agree with my brother Wills in what he said in the court below.

The next point is whether the section only contemplates or sanctions the provision of one building, and whether or not, that building being provided, it has to be provided once for all time, so that when it is once provided the powers of the section come to an end. In my opinion that is too narrow a view to take of the operation of section 13, and it is, moreover, in my opinion, not the correct view. The section speaks of "offices" in the plural, and if the section is looked at, and the Act generally, to my mind there is nothing sufficient to justify the Court in cutting down the general word "offices," and saying that it must mean

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offices under one roof or in one building. Nor is there anything sufficient in the Act, to my mind, to justify the Court in holding under section 13 that, when once a building has been resolved upon by the justices and erected or provided, the whole of the powers of the section are ended. Nor can it, in my opinion, be contended that the one building, which it is urged by the respondents alone can be erected, must be erected in Merthyr Tydfil. It is true that in the earlier part of section 13 you find that the justices of the county have power to appropriate for the purposes of the offices lands over which they have control within the parish of Merthyr Tydfil, and no other parish is mentioned. But that may possibly be—I know not—because the justices had in that parish lands which might be particularly available for the purposes of offices. But when the rest of the section is looked at, it is clear that the power to purchase land and to erect offices is in no wise limited by reference to the parish of Merthyr Tydfil. The section proceeds to authorise the justices to purchase land or buildings suitable for the purposes aforesaid, and those purposes are the transacting of the magisterial business of the district. It then further proceeds to give the justices power to erect such office or offices without any limitation. And then come these words: "Or to hire an office or offices in some suitable place as they think fit." Is there anything in the use of the words, "in some suitable place," in such a context, sufficient to justify the Court in holding that it could only be one place? To my mind, looking at the section as a whole, certainly not. I think what it means is that as to each office, if there is more than one office, it must be in a suitable place; but the whole of the powers of this section are governed by the use of those words, "as they think fit," and those words, to my mind, are very important. It appears to me, therefore, in the first place, that the powers are not limited to the erection of one building only. Nor, in my opinion, can it be the true view that if a suitable office or offices are once provided, then the whole power conferred by the section is at an end, even though, in the opinion of the justices, it was necessary for the purposes of transacting the magisterial business of the district that another office should be erected in a suitable place. To my mind, so to limit the section would be, to a great extent, to render it unworkable, and certainly, to my mind, such a narrow view, as I think it is, is not justified by the language used. Take, for example, the hiring of an office, which is one of the means contemplated in the section of providing an office. Supposing they had resolved to hire, and had hired, a building containing several rooms, suitable, as they thought at the time, and sufficient, as they thought at the time, for the magisterial business of the district, what is to be done if the hiring comes to an end? Can it be

said that they had no power then, when that emergency arose, to again exercise the powers conferred by the section and to hire again? In my opinion, certainly that could not be so. Suppose the buildings erected by them were burnt down, could it be that they could not under the powers then erect fresh buildings, and, if they could erect fresh buildings, could it be said that even although the old place had turned out to be inconvenient, and another place would be far more suitable, they must erect the new buildings on the old site? To my mind, it cannot be that that is the view to be taken of this section, having regard to the language used. To my mind, the view I am taking of the section is borne out by the provision in section 3 of the Act, which expressly provides for the attendance of the stipendiary magistrate, not only at Merthyr Tydfil, but also on one day of the week in the parish of Aberdare, or the hamlet of Birthdir. It appears to me that section 13 ought not to be construed so as to limit the powers of the justices so that they could not, however necessary they thought it to be, provide a proper office, for example, at Aberdare, for the magisterial business necessary to be transacted there. I can only say that for the reasons I have given I have come to the conclusion that the section is not limited in the way that it was considered to be by the auditor and by the Divisional Court.

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I will only add that, having come to this conclusion on the true construction of the Act of 1843, it is, to my mind, clear that that Act has not been repealed by the Act of 1849, as contended for by the respondents. It certainly has not been expressly repealed, nor has it, to my mind, been impliedly repealed. As was pointed out by the counsel for the appellants, the Act of 1849 and section 13 of the Act of 1843 are not dealing with the same subject matters, and those who have to exercise the powers conferred by the two statutory provisions respectively have not to consider or to determine, in exercising those powers, the same question or condition of affairs. Nor can I find in the subsequent legislation anything which would lead to the supposition that the powers conferred by the Act of 1843 have been curtailed or destroyed. It follows that those powers are in existence.

I think, therefore, that the decision of the auditor was wrong, and that the decision of the Local Government Board was right, and that this appeal ought to be allowed.

MATHEW L.J. I am of the same opinion. The difficulties that have arisen in this case, I think, would have been removed if due attention had been given to the scheme of legislation upon this subject, and to the plain language of the Act of Parliament. I cannot entertain the doubts and difficulties which have been suggested as to what Parliament intended to do.

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The first Act is the Act of 1829, and from that down to the Act of 1894 there is a clear indication of the intention of the Legislature as to the object of the Acts, and that object is to be gathered from the preamble to the Act of 1829. The object was: "Whereas a sufficient number of justices of the peace for the said county cannot be found to execute their office within the said parishes with such promptness and efficiency as the good government of the inhabitants of the same parishes and the protection of their persons and properties require," there must be a special jurisdiction and a special official assigned to the district. A great deal was made of the fact that in that Act of Parliament no provision was made for a suitable place for the discharge of the magisterial functions, and we are asked to assume that there could have been no such place. I confess that I should arrive at a different inference from the language of section 10 of the subsequent Act. It was said that in the remote times when this Act of Parliament of 1829 was passed the justices had nowhere to administer justice, and that they were compelled to have recourse to some room, which was generally furnished at an inn, where the magisterial business was transacted. I do not think it is at all likely that that was the state of things at Merthyr Tydfil, and if it were known when this Act was passed that there was a place over which the justices had control, and where they might have assembled, I could well understand its not being considered necessary to have any special legislation on the subject. The last thing I should infer, in the absence of any special provision on the point, would be that it was not intended that there should be anything in the nature of a court for the magistrate. What had by that time been clearly established was that the convenient way for magistrates to administer justice was to sit in a court and to have the case brought before them and to have the case formally discussed.

It is not necessary, after what the Master of the Rolls and Lord Justice Romer have said, to dwell further upon the original Act. The important question in the case arises upon the second Act, for the same purpose, the Act of 1843. That contains a preamble of the same sort, the main object being to extend the district and to provide for the magistrate having jurisdiction over the whole district. Section 3 provides: "That the justice so to be appointed shall reside within the parish of Merthyr Tydfil and shall attend at some place within the parish for the dispatch of business three days at the least in every week." Then comes the important provision as to the district which was annexed—"and one day in the parish of Aberdare or hamlet of Brithdir (Sundays excepted) from the hour of ten in the forenoon to the hour of four o'clock in the afternoon or oftener if necessary." Section 10 provides that for the purpose of paying the salaries and the other expenses of this Act rates are to be levied in the district. The

next important section is section 13: "It shall be lawful for the justices of the said county of Glamorgan in general or quarter sessions (if they think fit) to appropriate any lands over which they may have control within the said parish of Merthyr Tydfil for the purpose of the erection thereon of a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act." Apparently there was some land over which they had some control, and those provisions are in reference to the use of that land. Then the section goes on: "Or otherwise to purchase land or buildings suitable for the purposes aforesaid"—that is to say, for the magisterial business of the district—"or to erect such office or offices, or to hire an office or offices in some suitable place, as they think fit, and the expense of purchasing such lands or buildings, or of building and maintaining or of hiring such office or offices, shall be paid out of the rates to be levied under the provisions of this Act." Can there be any question that what was contemplated was the creation of a proper office for transacting the magisterial business of the district? No one can doubt that it was intended to do what has been done elsewhere in the United Kingdom, that is, to provide a suitable court in which the magistrate could sit, and in which those who were charged with offences could be properly brought up. Then section 14 contains a power to borrow money, and the extraordinary conclusion which has been drawn from the language of section 14 is that there could be only one court erected. Why that should be supposed to have been the intention of the Legislature I do not know—to coerce, as it were, the magistrates not to commence the construction of any suitable courts unless they wanted £2,000. It was the duty of the magistrates to borrow as little as they could, and if they only wanted £500 it is ridiculous to suppose that it was meant that their power of borrowing was taken from them at the moment when, in the exercise of their proper discretion, they asked for no more than they really wanted. Then comes the last important section, namely, section 15, and reading that, no one can doubt for a moment that it was intended there should be an office and a police office—or a court in the ordinary sense and in common language—in which the work of the magistrate could be conducted. It provides that if the police office should be shut, the constable having charge of the person who was proposed to be brought up, should have the power of taking recognisances. That, it was said, was quite consistent with the view that there was only to be one place, at a place in Merthyr Tydfil, despite the language of the preceding sections, which allowed the creation of courts in the outlying districts. But is it reasonable to suppose that it was intended under that section of the Act of Parliament, to compel a policeman who had charge of a prisoner, to take that person to Merthyr Tydfil to ascertain whether or not the

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court there was shut up? Surely it contemplated that the prisoner should be taken to the nearest place in the district to which he belonged, and if it turned out that the magistrate was not there, and that the court was shut up, the policeman should have the power conferred upon him by that section. All the language of the Act seems to me to be decisive. The intention was that there should be courts, first a court at Merthyr Tydfil, and a court at Aberdare, and in the other place mentioned in the Act of Parliament.

Now that was the state of the law as regards this district up to the time of the passing of the Petty Sessions Act, 1849. It is said that the effect of that Act was to throw the expenses in question upon the county, and therefore to repeal the previous special legislation with reference to this district. It seems to me it would be a most extraordinary conclusion to arrive at that this general legislation repealed the special and careful legislation with reference to that particular district; but, for the reasons given by my Lord, when the Petty Sessions Act is carefully examined, it has no application to a district of this sort, which was not a petty sessional district. Upon that ground alone that argument disappears.

That being the condition of things in this district, we come to the Act of 1868, which once more repeats in its preamble the object of the appointment, and which points out the importance of adding to the district, and then, in section 1, contains this clear provision, which is wholly inconsistent with the notion that there had been any repeal of the special legislation: "All and singular the provisions of the Act of 1843 as varied by this Act and all and singular the powers and authorities, rights, remedies, and jurisdictions, conferred by that Act, shall be read, construed and applied, and exercised and enjoyed, as if the limits of the Act of 1843 had extended to and included the added limits." Is that the language which would be used if the important provisions with reference to the liability for these expenses had been repealed by the Petty Sessions Act, 1849? It seems to me that there is no ground whatever for any such suggestion. The intention of the Legislature was to carry on and maintain the jurisdiction given by the original Act, and extend it to the added area.

Then we come to the Act of 1894. There is the same intention of the Legislature clearly manifested, with the same preamble, and the same provision for maintaining the rights, remedies and jurisdictions conferred by the earlier Acts. Now is it conceivable that that phraseology would have been adopted if the Legislature knew, as they must have known, that the special legislation was altered? A further point was made with reference to the Act of 1894, that there was another ground upon which it must be taken to have repealed the special legislation, and that was the refined and legal argument upon

section 11 of the Act of 1868, repeated, curiously enough, in the Act of 1894. Section 7 of the Act of 1868 provides that: "The 10th and 11th sections of the Act of 1843 shall be read construed and applied as if the increased salaries by this Act authorised and directed to be paid had been expressly included in those sections, and the same had been enacted for the purpose of paying and making provision for payment of the increased salaries, and as if the overseers of the poor of the parish of Llanwonno had been included in section 11 of the Act of 1843." It is said that that provision, which is a special provision as to salaries, implied that the special legislation was repealed. I cannot accept that. That section, upon which we heard so much argument, is repeated in the Act of 1894 with the same abundant caution which characterises sometimes the legislation with regard to subjects of this sort.

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That being the condition of things, it appears to me that the language of the Act concludes the question, and that there is no ground for saying that the word "offices" does not mean the court where the magistrate is to sit and exercise his jurisdiction, and there is no foundation whatever for the assertion that the special legislation was repealed either by the Petty Sessions Act or by section 11 and the corresponding section in the Acts of 1868 and 1894.

I agree, therefore, that this appeal must be allowed.

COLLINS M.R. I had intended to add a reference to 2 & 3 Vict. c. 71. I did refer to the earlier chapter, but unfortunately I forgot to refer to the second one—section 1 particularly of that Act, and also, I think, section 1 of the earlier Act.

Appeal allowed with costs.

Ryde. There is one other point with regard to the auditor's costs. The auditor is directed by the statute, which provides for these proceedings, to appear here and support his disallowance, and the costs are to be reimbursed in the manner provided by the statute unless the Court otherwise orders. I apprehend your Lordships will say that this was a proper case in which the auditor might bring the matter up here.

COLLINS M.R. Yes, certainly.

Cunningham Glen. That is not against us.

Ryde. I do not know what the effect of the Act is.

Solicitors for the County Council—Cheston and Sons, for Mansel Franken, Clerk to the Council.

Solicitor for the District Auditor—F. J. Thairwell, for W. and W. B. Hunton, Richmond, Yorkshire.

Solicitors for the Merthyr Tydfil Guardians—Wrentmore and Sons, for F. T. James, Merthyr Tydfil.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1903.

July 1.

TOWERS v. BROWN.

Bye-laws—Buildings—Application of bye-laws to floors of warehouse buildings—General clause to secure adequate strength.

Where the bye-laws of an urban authority lay down rules as to the strength of timbers for floors of certain kinds, and do not provide in detail for all possible modes of construction, but contain a general clause requiring suitable materials and adequate strength, a floor constructed partly of timber and partly of steel is subject to such general clause, and not to the rules applicable to floors constructed wholly of timber.

CASE stated by the stipendiary magistrate for the city of Leeds, who had dismissed an information preferred by W. Towers, the appellant, building inspector and surveyor of the city of Leeds on behalf of the corporation, against W. Brown, the respondent, for that he on September 10, 1902, did commit a breach of a certain bye-law, to wit, bye-law 58 of the bye-laws relating to new streets and buildings then being in force in the city aforesaid. The bye-laws had been made by the council under section 23 of the Public Health Acts Amendment Act, 1890, and had been confirmed by the Local Government Board.

The following statement of facts was set out at paragraphs 4 *et seq.* :—

In the month of May, 1902, a portion of an extensive tannery, situate at Bramley, in Leeds, aforesaid, of which the respondent is the occupier, was destroyed by fire, and with a view to the rebuilding of the premises so destroyed plans were deposited with the Leeds Corporation on June 20, 1902. At the time when the said plans were being prepared there were not in force any bye-laws or regulations as to the strength and construction of the floors of new buildings then being erected or intended to be erected within the said city; but two days before the actual deposit of the plans, that is to say, on June 18, the bye-laws under which the information was laid were allowed by the Local Government Board, and thereupon came into operation. A copy of such bye-laws is exhibited hereto, and forms part of this special case. (Par. 4.)

The plans as deposited under bye-law 116 were approved by the corporation under bye-law 117 on June 27, 1902, and the respondent forthwith commenced the operations necessary for rebuilding in accordance with the said plans. In the month of September, 1902,

the appellant intimated to the respondent that in his opinion the construction of certain floors in the buildings then in course of erection was not in compliance with the bye-laws, but the respondent, being advised to the contrary effect, continued the work, alleging that the buildings conformed to the bye-laws in all respects, and were being erected in accordance with the approved plans. Accordingly on November 18 the present information was laid charging that the respondent "being a person who erected a new building (being a building of the warehouse class), to wit, workshops and drying-rooms, abutting upon the west side of the tanyard of the Hough End tannery, situate at Hough End, Bramley, in the said city, unlawfully did not construct the first, second, and third floors in accordance with the requirements of bye-law 58 of the bye-laws with respect to new streets and buildings in the city of Leeds duly made and allowed and then in force, to wit, did construct the said floors with commons joists of less depth than is required by the said bye-laws, and did not cause the said several joists to be of at least the same strength as is required by such bye-law, contrary to the said bye-laws." (Par. 5.)

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The planks or boards of the floors referred to in this information rested on a structure consisting of beams or girders made of steel, with superincumbent wooden joists, the distance between the steel girders from centre to centre being nine feet, while the distance between two adjacent girders in clear bearing was from eight feet to eight feet six inches. The wooden joists were respectively five and a half inches in depth and three inches in thickness, and were laid at a distance of fifteen inches apart measured from the middle of one joist or to the middle of the next or to the nearest wall. (Par. 6.)

The appellant contended that bye-law 58 required that each of the joists should be eight inches in depth and three in thickness. The respondent contended that bye-law 58 was in express terms confined to floors made of timber, and was not applicable to floors resting on steel girders; and further, that the bye-law regulating the construction of the floors in question was bye-law No. 60, which does not prescribe any specific dimensions for the girders or joists, but requires the floors to be "properly constructed of sound and suitable materials and of adequate strength." There was no information exhibited in respect of any alleged breach of bye-law 60, but the respondent tendered evidence to prove, and did by such evidence establish that the requirements of that bye-law had in fact been complied with. It was further pointed out on behalf of the respondent that if the construction of the floors were to be regulated by bye-law 58, as the appellant contended, and not by bye-law 60, the provisions of the former bye-law could apply only to the tier of wooden joists, while the subjacent

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metal girders upon which the stability of the whole structure depended would not be in any way subject to the control of the local authority. (Par. 7.)

The material parts of bye-law 58 are as follows :—

“TIMBERS OF FLOORS OF ORDINARY CONSTRUCTION.

“58. Every person who shall erect a new building and shall construct any floor in such building :—

With joists or joists and beams or girders of good sound fir or pine laid on edge in the ordinary way ; the joists being laid at a distance of fifteen inches apart measured from the middle of one joist to the middle of the next or to the nearest wall ; the beams or girders being laid at a distance of ten feet apart measured from the middle of one beam or girder to the middle of the next or to the nearest wall, and the joists being covered with boards, shall cause the several common joists in such floor and the several beams or girders supporting the same and not supporting any wall, pier or other such load to have a sufficient bearing at each end and to be in every part of not less depth and thickness than are hereinafter prescribed.”

The bye-law then prescribed the dimensions required for the various joists, beams and girders in the different classes of buildings, such dimensions being dependent on the length of the joist, beam or girder thus :—

“COMMON JOISTS (WAREHOUSE BUILDINGS).

“(2) Subject as hereinafter provided such person shall if such building be a building of the warehouse class, cause every common joist to be of not less depth and thickness than the following, that is to say :— . . .

Length six feet to nine feet.

“(c) If the length of such joist be more than *six feet* but not more than *nine feet* its depth shall be *eight inches* and its thickness *three inches*.”

* * * * *

“BEAMS, &c. (WAREHOUSE BUILDINGS).

“(6) Subject as hereinafter provided such person shall if such building be a building of the warehouse class, cause every beam or girder supporting such wall, and not supporting any wall, pier, or other such load, to be in every part of not less depth and thickness than the following, that is to say :—”

Then follow directions as to the depth and thickness for timbers

of varying lengths, and the bye-law concludes with a proviso allowing (i.) a variation in the dimensions of the timbers on condition that the strength (*i.e.*, the product of the square of the depth multiplied by the thickness) remains constant, and (ii.) a diminution in the strength in case the timbers are laid at less distances apart. But it is stipulated that in no circumstances shall the thickness be less than two-thirds of the thickness hereinbefore specified; and on behalf of the respondent the stipulation was relied upon as affording a clear indication that the bye-law contemplated the use of timber only, and not the employment of steel or wrought iron in the buildings to which its provisions were sought to be applied. The terms of the proviso hereinbefore referred to are as follows:—

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“ FLOORS (JOISTS AND BEAMS, &c.).—PROVISO FOR TIMBERS
OF THE SAME STRENGTH.

“ Provided that:—

“(1) The foregoing requirements of this bye-law as regards the depth and thickness of joists and beams or girders shall be deemed to be complied with if the person erecting the new building shall cause the several joists and beams or girders to be of at least the same strength as is required by the bye-law; and the thickness of the joist, or of the beam or girder, to be in no case less than two-thirds of the thickness hereinbefore specified.”

“ AND FOR TIMBERS OF A LESS STRENGTH.

“(2) If the joists and beams or girders be laid at a less distance apart than that specified in this bye-law, they may be of proportionately less strength than is required by the bye-law; but the thickness of the several joists and beams or girders shall in no case be less than two-thirds of the thickness hereinbefore specified.” (Par. 8.)

Bye-laws 59 and 60 are as follows:—

“ TIMBERS OF CERTAIN FLOORS NOT WITHIN THE PRECEDING
BYE-LAW.

“ 59.—(1) Every person who shall erect a new building and shall construct any floor in such building with joists or joists and beams or girders laid at a greater distance apart than that specified in the foregoing bye-law, but otherwise in the manner specified in such bye-law, shall cause such joists, or joists and beams or girders to be of proportionately greater strength than is required by such bye-law; and

“(2) Every person who shall erect a new building and shall construct any floor in such building as a framed floor, or as a floor formed with beams at short distances apart, and covered with battens, deals, or planks, without joists, or with joists covered with boards, where

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the joists, or joists and beams or girders are of any kind of wood not being good sound fir or pine, shall cause the several timbers of such floor to be of such depth and thickness as to secure proper stability."

" FLOORS (PUBLIC AND WAREHOUSE BUILDINGS).

" 60. Every person who shall erect a new public building, or a new building of the warehouse class, shall cause every floor of such building, not being a floor to which any of the foregoing bye-laws apply, to be properly constructed of sound and suitable materials, and of adequate strength. He shall in the case of a public building, cause the floor of every lobby, passage, corridor, or landing therein, which is not intended solely as a means of access to any private apartment to be constructed of incombustible materials, and carried by supports of incombustible material." (Par. 9.)

It was proved in evidence before the magistrate that floors may be and sometimes are constructed of joists covered with floor boards without any beams or girders; and further, that by reason of the superior rigidity of the steel girders the floor in question was of greater stability than it would have been if it had rested on wooden beams of the dimensions required by bye-law 58 for beams of buildings of the warehouse class. (Par. 10.)

It was also contended on behalf of the respondent that bye-law 58 was invalid by reason of ambiguity inasmuch as it did not show clearly, positively or definitely the obligations imposed thereby. (Par. 11.)

The magistrate was of opinion that where a floor of a new building of the warehouse class is constructed entirely of timber, the construction is regulated by bye-laws 58 and 59, but that where the floor of such building is constructed with joists resting on girders of steel or of other materials differing from timber in strength, weight and elasticity, the construction is regulated by bye-law 60. The magistrate therefore dismissed the information without expressing any opinion as to the alleged invalidity of bye-law 58. (Par. 12.)

The question upon which the opinion of this honourable Court is desired is whether upon the above facts the magistrate came to a correct decision in point of law. If the Court should be of that opinion, then the said order of dismissal is to stand; if of a contrary opinion, then the case is to be remitted to him with a direction to convict the respondent, or with such other direction as to the Court may seem fit. (Par. 13.)

Macmorran, K.C., and *Leslie* for the appellant. This is a short point on building bye-laws. It is contended by the respondent that bye-law 58 does not apply unless the joists be made of good sound

fir or pine laid on edge at distances of fifteen inches apart, &c.; but
bye-law 58 was intended to meet the case of floors of ordinary construction, whether on beams or girders. Ordinary construction means floors mentioned in the earlier part of the bye-law, and joists where they occur in floors are to be of the thickness prescribed by the bye-law, and they must all be composed of good sound fir or pine laid on edge and so on. The proposition is that bye-law 58 is intended to apply to any floor so long as it is made with joists and beams, and notwithstanding the floor rests on beams or girders made of steel.

Tindal Atkinson, K.C., and E. O. Simpson for the respondents. The magistrate was right. This floor is perfectly adequate under bye-law 60, and it is found in paragraph 7 of the case that the respondents established this by evidence. The object of these bye-laws is to secure the public safety against fire, and when a floor such as this is found to be constructed of sound and suitable materials, and of adequate strength in the terms of bye-law 60, the provisions of bye-law 58 do not apply. Indeed, that bye-law is of limited application, for it applies only to cases where the best timber is used, and does not prohibit other kinds of material. The bye-law is ambiguous, and is void for uncertainty.

LORD ALVERSTONE C.J. We are unable to interfere with this decision. No one can say that the bye-laws are clear, because hypothetical cases can be put which do not seem to be covered by them; but the only possible construction which would support Mr. Macmorran's contention is that bye-law 58 is to be read as if it said "joists where they occur on floors are to be of a certain thickness and size." I think when we look through all these bye-laws, and when we look at bye-law 59, which sums up the duty where the floor does not comply with the exact conditions laid down by bye-law 58, it seems to me that they are really intended to refer to the timbers of floors not within the preceding bye-laws. I know that clause 59 is in the nature of a sub-clause, but the subject matter which is there described seems to me compendiously to speak of what has been dealt with at length in bye-law 58, and that being so, I think that the only reasonable construction is that bye-law 58 is intended to relate to floors which are constructed in the ordinary way, both with the beams and girders of timber and the joists of timber, and that this building does not come within that clause; and, as the stipendiary magistrate said, if it were within the bye-laws at all it was within bye-law 60. The fact that there are omissions of cases in such bye-laws when the matter comes to be discussed is not an uncommon occurrence, but I do not think any argument can be founded on that against the obvious meaning of bye-law 58.

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WILLS J. I think it is reasonably clear that both bye-law 58 and bye-law 59, but bye-law 59 especially, are intended only to deal with wooden beams and joists and girders, or whatever they may be. I think the stipendiary magistrate came to a right conclusion.

CHANNELL J. I agree.

Appeal dismissed.

Solicitor for the appellant—Robert E. Fox, Town Clerk, Leeds.

Solicitors for the respondent—Simpson & Co., Leeds.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

This case occurred in 1903, and by an oversight on the part of the reporter was not reported at the time. So far as we are aware the case has not been elsewhere reported.

The validity of the bye-law No. 58, though raised in the case stated by the magistrate, was not pressed in the High Court, and the whole case went off on the minor issue whether bye-law 60, which was in very general terms, and did not prescribe details of construction, applied to the particular composite floor, formed of timber and steel, over which the issue was raised. It appears that the Leeds Corporation had adopted model clauses taken from a work on model bye-laws (Mackenzie and Handford), and the bye-law 58 represented bye-law 8 of that series. On taking this bye-law before the magistrate the corporation were met with the difficulty that the bye-law does not in express terms require that every person erecting a building shall use good, sound timber of certain prescribed scantlings according to the length of the timber. The bye-law, on the other hand, provides that if a person constructs a floor with joists of good sound fir or pine, laid 15 inches apart, &c., he shall cause the several common joists in such floor to be of thicknesses set forth in the bye-law. The Leeds Corporation, as a result of the decision of the stipendiary magistrate in the above case, repealed their bye-law, and made fresh bye-laws based on a model that has been largely adopted throughout the country at the suggestion of the Local Government Board, and was drafted by the present Editor and published by Messrs. Knight & Co. in 1891. The corresponding clause of this model imposes a distinct obligation on the person erecting a building to comply with the rules therein prescribed as to the scantlings of timbers. The effective part of the bye-law in that model is as follows:—

"FLOORS.—7. Every person who shall erect a new building shall, as regards the structure of every floor of such building, comply with such of the following rules as may be applicable to such building, that is to say:—

"WAREHOUSE BUILDINGS.—JOISTS.—(iii.) He shall, in the construction of the floor of a building of the warehouse class, cause every common bearing joist to be of not less than the size and strength following:—

"Length up to three feet.—(a) If the joist does not exceed three feet in clear bearing, it shall be four and a half inches in depth and three inches in thickness.

"Length three to four feet.—(b) If the joist exceeds three feet, and does not exceed four feet in clear bearing, it shall be six inches in depth and two and a half inches in thickness," &c., &c.

It will be observed that this bye-law cannot be evaded by the use of material of inferior quality, whereas the original Leeds bye-law 58 and the model from which it was taken do not apply unless the floor is constructed "with joists or joists and beams or girders of good sound fir or pine laid on edge in the ordinary way; the joists being laid at a distance of 15 inches apart measured from the middle of one joist to the middle of the next or to the nearest wall; the beams or girders being laid at a distance of 10 feet apart measured from the middle of one beam or girder to the middle of the next or to the nearest wall, and the joists being covered with boards."

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May 17.

Gas—Recovery of gas rent—Arrears due from outgoing tenant—Rights of company against incoming tenant—Gasworks Clauses Act, 1847 (10 & 11 Viet. c. 15), s. 16—Metropolis Gas Act, 1860 (23 & 24 Viet. c. 125), s. 39—Gaslight and Coke Company's Act, 1872 (35 & 36 Viet. c. xxiii.), s. 18.

Section 18 of the Gaslight and Coke Company's Act, 1872, which provides that where a consumer leaves premises where gas is supplied to him by the company, without paying the rate due from him, the company shall not require payment of the arrears from the incoming tenant except in certain special excepted cases, but shall, notwithstanding such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant on request as required by the Act, does not enable the company to recover payment of arrears from the incoming tenant in the special excepted cases, but merely enables the company in these cases to refuse to supply the incoming tenant with gas until the arrears are paid.

Decision of the Court of Appeal, 1903, 1 K. B. 593; 72 L. J. K. B. 308, reversed.

Gas Light and Coke Co. v. Mead (1876) 45 L. J. M. C. 71, approved and followed.

APPEAL by the brewery company from an order of the Court of Appeal, reversing an order of the King's Bench Division, whereby an appeal from the judgment of his honour Judge Edge, given at the trial of the action in the Clerkenwell County Court in favour of the defendants, the present appellants, was dismissed with costs.

The action was brought by the respondents (as plaintiffs) in the High Court against the appellants to recover the sum of £10 rs. 3d. for arrears of charges for gas supplied by the defendants from March 8 to June 7, 1901, to J. R. Lowles, the then tenant of No. 388, Harrow Road, Paddington, who had since assigned his leasehold interest in those premises to the appellants. The action, by an order of Jelf J., dated November 11, 1901, was remitted to the Clerkenwell County Court for trial.

At the trial of the action, in the county court, the following facts were proved or admitted. The respondents supplied gas to James Roberson Lowles, the lessee and occupier of No. 388, Harrow Road, Paddington, from March 8 to June 7, 1901, and there was due from Lowles to the respondents, for the gas so supplied, the

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sum of £10 1s. 3d., which was never paid by him to the respondents. Lowles had a lease of the premises for the term of 21 years from November 16, 1892, which he mortgaged to C. H. Thorne & Company, Limited. The mortgagees, who were never in possession of the premises, having demanded the mortgage debt, and not having been paid the same, advertised the premises for sale under their power of sale as mortgagees, and Lowles afterwards at their request signed an agreement for the sale of the lease to Henry Leonard Hardy. Hardy afterwards agreed with the appellants that, in consideration of the sum of £50 to be paid to him by them, the appellants should be substituted for him as purchaser under the agreement. By an indenture, dated June 18, 1901, in consideration of £337 paid by the appellants to the mortgagees, at the request of Lowles, and of £50 paid by the appellants to Hardy, the mortgagees, C. H. Thorne & Company, Limited, conveyed and released, and Lowles conveyed and assigned, to the appellants, the leasehold premises and the goodwill of the trade of a grocer then carried on upon the premises. At the completion of the sale, cheques for sums amounting to £337, payable to the order of Lowles, were signed by the appellants, and were then endorsed by Lowles and handed to the mortgagees, who afterwards received the amounts thereof from the appellants' bankers. Lowles did not receive any part of the purchase-money. Certain rates and taxes and preferential debts, due in respect of the said premises, were paid by the mortgagees out of the £337, but the sum of £10 1s. 3d., due to the respondents for gas supplied to Lowles, was not paid. After the completion of the sale on June 18, 1901, the appellants, by their manager, carried on the business of grocers on the premises. The respondents having demanded the arrears of gas due from Lowles, the appellants refused to pay or to take any gas from the respondents.

At the trial the gas company contended that they were entitled to recover the sum claimed for gas supplied from the appellants under the provisions of section 18 of the Gaslight and Coke Company's Act, 1872 (35 & 36 Vict. c. xxiii.). The defendants, the brewery company, submitted that under the circumstances the section did not give the plaintiffs any right to recover from them arrears for gas supplied to the outgoing tenant.

The learned judge took time to consider the effect of his findings of fact, and gave his considered judgment on the questions of law, in which he held that the case of the *Gas Light and Coke Company v. Mead* (1876) 45 L. J. M. C. 71, was a binding authority in point against the respondents, and ordered judgment to be entered for the appellants (the defendants) with costs, and gave leave to the respondents to appeal.

The respondents appealed to the Divisional Court, consisting of Lord Alverstone C.J. and Darling and Channell JJ., who, upon the authority of *Gas Light and Coke Company v. Mead*, dismissed the appeal with costs, but granted leave to appeal. 1904.
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The gas company appealed, and the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) allowed the appeal, dissenting from the opinion expressed by Blackburn and Lush JJ. on the construction of the statute in *Gas Light and Coke Company v. Mead*.

The brewery company appealed to their Lordships' House.

C. A. Russell, K.C., and *A. H. Spokes* for the brewery company.
Danckwerts, K.C., and *R. E. Vaughan Williams* for the respondents.

The House took time to consider.

LORD MACNAGHTEN. My Lords, in this case the respondents, the Gas Light and Coke Company, sued the Cannon Brewery Company for arrears of gas rates. The Court of Appeal supported the claim and gave judgment in favour of the gas company. The arrears were not attributable to any default on the part of the brewery company. The brewery company had no relations with the gas company in the past. They do not propose or desire to have any relations with them in future. The debt they have been adjudged to pay is not their debt in any sense. It is a debt of the outgoing tenant, whose interest in the premises supplied with the unpaid gas they have purchased, and whose trade or business they are now continuing. The claim was made on the strength of the following section of the Gaslight and Coke Company's Act, 1872:—Section 18. "In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession or to the outgoing tenant of such premises, a consideration for so doing, but the company shall notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him to do so."

The grounds on which the Court of Appeal proceed are these:—Their view is that when the Act says that the gas company shall not require from an incoming tenant payment of arrears left unpaid by the outgoing tenant unless one or other of two conditions is fulfilled, it is

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necessarily implied that if either of those conditions is fulfilled such payment may be required. Now, it is admitted that the second condition has been fulfilled in the case of the brewery company. The gas company, therefore, they say, are authorised by this Act to require payment of the arrears from the brewery company. Then comes the question, What is the meaning of the word "require"? To solve that question the learned judges of the Court of Appeal turn to the last sentence of the section. And there they find an absolute obligation on the part of the gas company to supply gas to an incoming tenant notwithstanding the existence of arrears owing by his predecessor in title. The next step is easy enough. As the obligation to supply the incoming tenant is, in their opinion, absolute and unconditional, it would be idle to tell the gas company that they may require payment of arrears unless power is given to enforce compliance with the demand. Hence it follows that the word "require" imports liability on the part of the incoming tenant, and confers a right of action on the gas company. The result is certainly startling. Gas companies in the Metropolis alone, of all traders, corporate or unincorporate, are privileged in certain cases to collect debts due by defaulting customers from persons who have never been and never mean to be customers of theirs. The learned judges in the Court of Appeal, in deciding against the brewery company, advisedly overruled a decision of Blackburn and Lush JJ., which was in point, and directly contrary to their view. I refer to the case of *Gas Light and Coke Company v. Mead* (1876) 45 L. J. M. C. 71. There is, however, as Mr. C. A. Russell pointed out, a flaw in the reasoning of the Court of Appeal. The learned judges have overlooked a few words in section 18. The obligation on the part of the gas company to supply gas to an incoming tenant is not absolute or unconditional. It is qualified by the words "as required by this Act." When the history of gas legislation in the Metropolis is borne in mind, those words are very significant, and the difficulty created by a provision, at first sight indirect and obscure, vanishes altogether. Originally gas companies in the Metropolis were free to extend their works as they pleased. The system of separate districts was unknown. The service of gas was left to the ordinary laws of supply and demand. At length, "in order to economise capital and avoid the too frequent opening of the public streets," the principal companies, including the Gas Light and Coke Company, agreed to confine their supply of gas to separate districts. This agreement was confirmed and regulated by the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125). "Districting," to use an expression found in the Act, made a great change in the position of the gas companies. In its own district each company obtained a monopoly. It was, therefore, necessary in the interests of consumers to place certain

restrictions on dealings between gas companies and intending customers.

Subject to the provisions of the Metropolis Gas Act, 1860, every gas company was still left free to enter into any contract with any owner, occupier, or local authority for the supply of gas "in such manner and on such terms and conditions" as the parties might agree (section 19). But by section 21 no contract for the supply of gas was to contain "any term or condition contrary to any of the provisions" of the Act. And then came section 39, which is word for word the same as section 18 of the Gaslight and Coke Company's Act of 1872, except that the latter section introduces for the first time the conditions about the incoming tenant continuing the trade or business of the outgoing tenant. Now the Gasworks Clauses Act, 1847, the Metropolis Gas Act, 1860, and the several Acts of the Gas Light and Coke Company, by incorporation and reference, all form one code, and the expression "this Act," in section 18 of the Act of 1872, includes them all. The result is that if the brewery company, on taking over the premises, had required a supply of gas, they and the gas company might have entered into any contract in relation to such supply not contrary to any of the terms and conditions of the code. As a condition of such supply, the gas company, under the circumstances, might have required from the brewery company payment of the arrears left unpaid by the outgoing tenant. But inasmuch as the brewery company do not require the gas company to supply them with gas, section 18 of the Act of 1872 does not apply, and the gas company are not in a position to require arrears of payment from the brewery company. I am, therefore, of opinion that the decision in *Gas Light and Coke Company v. Mead* was quite correct, and that the order of the Court of Appeal in the present case ought to be reversed, with costs, both here and below, and I move your Lordships accordingly.

LORD DAVEY. My Lords, I think that the decision in the case of the *Gas Light and Coke Company v. Mead* (1876) 45 L. J. M. C. 71, was right, though the reasons for it are not very fully or clearly expressed in the reported judgments of the learned judges. In my opinion, the question for our decision turns exclusively on the proper construction to be put on section 18 of the Gaslight and Coke Company's Act of 1872, but in order to understand and apply that section it is necessary to consider the law regulating the relations between the gas company and their customers at that date. Without troubling your Lordships with going through the sections of the various Acts to which reference has been made, the situation may be summed up thus: The occupier of any premises within the district had a right to require a supply of gas to the premises, subject to his entering into a contract, if so required by the gas company, to pay gas rates for such supply for two years, and

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subject to his giving security, if required (see sections 14 and 15 of the Metropolis Gas Act, 1860). The remedies of the gas company for recovery of the gas rates were by summons or action against the consumer to whom the gas had been supplied, and the company was empowered to stop the gas from entering the premises of such person by cutting off the service pipe (section 16 of the Gasworks Clauses Act, 1847). Section 18 of the Gas Company's Act of 1872 deals with the case of a change in the occupation of the premises. In its original form this section is first found in the Metropolis Gas Act, 1860, section 39 of which is identical with this section, except that the words, "unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid . . . a consideration for so doing," are omitted. It reappears in the same form in the Gas Company's Act of 1870, where it is found after a group of clauses (12 to 14) enabling the company to require a contract to be signed at any time, and to require an incoming tenant to give security, as well as the person to whom the supply was originally made, and in each of these cases the remedy of the company was to discontinue the supply of gas and remove the meter, and providing also that where the occupier is an agent or servant of some other person such last-mentioned person shall be liable to pay gas rent to the company in the same manner and to the same extent as the occupier.

My Lords, I am of opinion that it would be contrary to sound principles of construction to imply from such negative words as you find in section 18 of the Gas Company's Act of 1872, an affirmative enactment giving a right of action against an incoming tenant coming within the excepted description for his predecessor's debt if some other construction can be found for the words. I am of opinion that there is another construction which does less violence to the words, and is the right construction. The Master of the Rolls expressed the opinion that the learned judges would not have decided *Mead's* case as they did, had they not thought that the gas company had a right to cut off the supply as against the incoming tenant till the arrears owing by the outgoing tenant were paid. If they thought so, I am not so certain as the Master of the Rolls is that they were wrong, for the words "premises of such person" may be construed as descriptive only of the premises in respect of which the supply of gas has been made. But it is not, in my opinion, necessary to decide this question for the purpose of construing section 18 of the Act of 1872. I think that the words "the company shall not require from the next tenant of the premises payment of the arrears so left unpaid" are amply satisfied by referring them to the conditions of supply to the new tenant, and mean that the company shall not require payment of the arrears as a condition of continuing such

supply or before entering into a contract for the same. And I construe the words at the end of the sentence, "but the company shall, notwithstanding any such arrears . . . supply gas to the incoming tenant," as meaning a tenant within the protection of the section, or (in other words), I read the words of exception "unless, &c.," as applicable to the whole of the section. The right, therefore, from which an incoming tenant who is within one of the two excepted descriptions is excluded is that which other incoming tenants enjoy, of being entitled, notwithstanding the arrears, to a supply of gas by the company if required by him.

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This seems to me to give an harmonious, consistent, and rational construction to the whole section without doing any violence to the words or making any such implication as that of a right of action against one person for another person's debt. The construction which I have thus put on section 18 appears to me to be favoured by the context in which the corresponding clause is found in the Act of 1870 in two respects. In the first place, it gives the company the same remedy against the excepted persons as they have against an incoming tenant who refuses to sign a contract, or to give security, and in the next place, in section 14 of the Act of 1870, where it was intended to make one man liable for another's debt, it is properly done by express words.

The result is, that, in my opinion, the appellants, coming within one of the excepted descriptions of incoming tenants, if they require a supply of gas will have to pay the outgoing tenant's arrears before they can obtain it, but if they do not require a supply they are under no liability, and cannot be sued for the arrears.

I am, therefore, of opinion that the appeal should be allowed with costs here and below.

LORD JAMES OF HEREFORD. My Lords, the correct construction to be placed upon the statute under which an obligation is sought to be cast upon the appellants presents to my mind considerable difficulty. The plaintiffs in the suit remitted for trial to the Clerkenwell County Court sought to recover a sum of £10 1s. 3d., arrears due for gas supplied by them to one Lowles whilst lessee and occupier of some premises situated in Paddington. Those premises after the arrears had become due vested in the appellants, who proceeded to carry on a business upon the premises. No gas was required by or supplied to the appellants. The claim of the respondents is founded upon the provisions of the Gaslight and Coke Company's Act, 1872, s. 18.

It will thus be seen that the respondents seek to make one person liable for the debt of another, without the former receiving any benefit in return for discharging another's liability. It may be that the Legislature intended that this burden should be imposed, but before

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determining that such is the case distinct words of obligation free from any doubt in their construction must be found.

Upon considering the provisions of the 18th section of the Act of 1872 I can find no such words. Such would be the result upon my mind if this statute stood alone, but it has to be read by the light of previous statutes affecting the question involved. In section 18 the words relied upon to create the appellants' liability are not positive but of a negative character only, and although this in itself would not determine the question, yet when reference is made to section 39 of the Act of 1860, which is the foundation of the legislation we are discussing, including the Acts of 1870 and 1872, it seems to me that the real intention of the section is not to be found in the exceptions but in the commencement and conclusion of it.

It was also strongly urged at the Bar that section 14 of the Act of 1870 affords a good example of the direct expression of the creation of a liability where it was intended so to do.

The conclusion I have arrived at is in accordance with the judgment in the *Gas Light and Coke Company v. Mead*, a case which appears to me to have been rightly decided.

The result is that so long as the respondents do not seek to deal with the gas company by taking a supply of gas they will not be liable for the arrears now sought to be recovered.

LORD ROBERTSON. My Lords, as is justly observed by Lord Justice Stirling, "it is an unusual piece of legislation to make a person who has not incurred a debt liable to pay for it." The facts of the present case give peculiar point to that remark. The appellant company have no sort of relation to the respondents, have never used their gas, and want none of it. They have merely bought the business of a customer of the respondents', who left owing them for his gas. On no doctrine or principle of law or ethics can it be suggested that apart from statutory enactment there is any obligation on the appellants to pay this account. This being so, the respondents can only succeed by showing some positive enactment that A. shall pay B.'s debt.

Now I have never been able to see, in the section relied on, either the form or the substance of such an enactment. The main proposition of the section is negative, that is to say, it prevents the respondents doing something, which it assumes them to have the power to do. This seems to me to furnish the key to the enactment. Before looking at the exceptions we have got to find out what it is to which they are exceptions. We have got to find out something which the respondents had, antecedently, the right to require, for it is this which (with the exceptions stated) the Act is going to prevent. Well, now, two competing theories are put forward. The one is that the word "require"

means require as a condition of supplying gas. It seems to me that this is clearly the meaning of the word, at all events in the Act of 1860, in which, as section 39, this section first appears. That Act deals with the question what are to be the contractual relations between the gas company and its customers, and what may, and what may not, be the conditions of the contract. Among other things, the company may not require from a new occupier payment of his predecessor's arrears, and so on. Now it is difficult to suppose that when this section was put into subsequent Acts it was intended to have a new and different meaning, and, in the absence of anything to the contrary, I should read it in the Acts of 1870 and 1872 just as I read it in the Act of 1860. The main proposition in the section, as ultimately framed (section 18 of the Act of 1872), is interrupted to express the exceptions, but it is resumed in the latter part of the section. The initial and the concluding words are correlative and co-extensive. With the exceptions stated, says the Act of 1872, the company shall not require payment of arrears, and notwithstanding non-payment, gas shall be supplied.

This construction is supported when the exceptions are looked to. The main enactment being in the interests of the customer, to prevent a new occupier being coerced, by the pressure of monopoly, into a contract to pay other people's old scores, it is fair enough that this protection should not be given in the specified cases.

The competing theory, adopted by the Court of Appeal, is that the word "require" is made to extend to persons not contracting or seeking to contract with the company. Now it is quite certain that, before this clause was enacted at least, they had no right to sue the successor, and the theory, therefore, is that the main enactment forbids the exercise of a non-existent power. Accordingly, the only operative part of the section on this theory would be the exceptions, and in the exceptions to a negative the respondents find the statutory enactment of liability for a third party's debts. This seems to me a grave infringement of principle in statutory construction, and I say so with the less hesitation, because the learned judges do not discuss this difficulty, and accordingly have done nothing to remove it.

Where a new liability is to be created the Legislature does it by direct enactment, and Mr. Spokes pointed with great force to section 14 of the Act of 1870, as showing that this rule is observed in the very *catena* of statutes now before your Lordships, and in a matter closely germane to the present question. The exception to a prohibition is *primâ facie* the conservation of the existing state of things. We were not referred to any illustration in legislation of pecuniary liability being imposed on a class of the community by such circuitous methods. It is in vain to appeal to solecistic or conversational slovenliness as

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justifying far-reaching implication in statutes imposing liability, and it is to be remembered also that this is not even a case of contract or statutory contract when individual parties are dealing with their own rights. In the present case I think the true meaning of the section is sufficiently ascertained, and presents an intelligent and coherent enactment ; but, even if the matter had been left more obscure than it is, I should have declined to affirm the liability of the appellants.

Appeal allowed.

Solicitors for the appellants—Boulton, Sons, and Sanderman.

Solicitors for the respondents—Bedford, Monier - Williams, and Robinson.

Reported by Erskine Reid, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

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In re ALLEN AND DRISCOLL'S CONTRACT.

June 23.

Streets—Private street works—Charge on premises—Time when charge commences—Sale of leaseholds—Outgoings until completion—Payment as between vendor and purchaser—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

The charge upon premises given by section 257 of the Public Health Act, 1875, for expenses incurred by the local authority in executing private street works under section 150 of the Act, first arises upon completion of the works, and not upon the local authority entering into an agreement with a contractor for their execution.

Where, therefore, as between vendor and purchaser, outgoings in respect of premises to which such a charge attaches are payable by the vendor up to a given date and by the purchaser after that date, the expenses are payable by the purchaser if the works are not completed till after that date, though at that date an agreement for their execution has been entered into by the local authority and the works are in progress.

Decision of Byrne J., 1904, 1 Ch. 493; 2 L. G. R. 512; 73 L. J. Ch 382, *affirmed*.

Stock v. Meakin, 1900, 1 Ch. 683; 69 L. J. Ch. 401, *followed*.

Tubbs v. Wynne, 1897, 1 Q. B. 74; 66 L. J. Q. B. 116, *distinguished*.

Per Romer L.J. *In re* Highett and Bird's Contract, 1903, 1 Ch. 287; 72 L. J. Ch. 220, *explained*.

THIS was an appeal from a decision of Byrne J., reported, 1904, 1 Ch. 493; 2 L. G. R. 512; 73 L. J. Ch. 382.

The facts are fully stated in the report of the case in the Court below, *ante*, p. 512. It is sufficient for the purposes of this report to state that by an order made in the vendors' action for specific performance it was provided that the purchasers were to pay to the vendors on or before September 29, 1903, the sum of £4,440 in settlement of the purchase-money and interest due in respect of eleven leasehold houses at Acton, the vendors by their counsel undertaking to make a good title to the leasehold houses and to assign the same to the defendants, and the defendants by their counsel undertaking to accept the houses so assigned in their then present condition, and the vendors were to receive the rents and pay the outgoings in respect thereof up to September 29, 1903.

In February, 1903, a notice under section 150 of the Public Health Act, 1875, had been served by the district council on the vendors to

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pave and make up the roadway in front of the houses. The vendors made default in complying with the notice, and on July 7, 1903, the district council entered into an agreement with a contractor to execute the works specified in the notice. The works were partly executed, and some payments on account were made to the contractor by the council before September 29, but the whole work was not completed till after September 29.

In these circumstances the present summons, under the Vendor and Purchaser Act, 1874, was taken out by the purchasers for the determination of the question whether the expenses of the works were to be paid by the vendors or by the purchasers.

Byrne J. thought that the case was governed by the decision of the Court of Appeal in *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401, and made a declaration that the vendors were not liable to pay for these works.

The purchasers appealed.

Cozens-Hardy for the appellants. Under sections 150 and 257 of the Public Health Act, 1875, these expenses ought to be borne by the vendors. Under section 257 the charge on the premises comes into existence as soon as the liability is incurred by the local authority, that is at the date of the contract between themselves and the contractor, or at the latest when the work is done, and if that is the true date, then it must be ascertained what portion of the work was done by September 29. The observations of the judges in *Tottenham Local Board v. Rowell* (1880) 15 Ch. D. 378, 392; 50 L. J. Ch. 99, 103, and *West Ham Corporation v. Grant* (1888) 40 Ch. D. 331, 335; 58 L. J. Ch. 121, 123, are in point. Byrne J. thought the case was governed by *In re Bettesworth and Richer* (1888) 37 Ch. D. 535, 538, 540; 57 L. J. Ch. 749; *Stock v. Meakin*, 1900, 1 Ch. 683, 691; 69 L. J. Ch. 401, and *Surtees v. Woodhouse*, 1903, 1 K. B. 396, 401; 1 L. G. R. 227; 72 L. J. K. B. 302, where it was held that the liability to pay attached to the premises on the completion of the work, and not at the time the apportionment was made; but the point there in question was really a different one from the point in question in the present case.

These expenses were in the nature of an incumbrance which the vendors were bound to clear: *In re Highett and Bird's Contract*, 1903, 1 Ch. 287; 72 L. J. Ch. 220. They were an "inchoate liability," which the vendors were bound to discharge as an "outgoing" under the terms of the contract: *Tubbs v. Wynne*, 1897, 1 Q. B. 74; 66 L. J. Q. B. 116; *In re Boor, Boor v. Hopkins* (1889) 40 Ch. D. 572; 58 L. J. Ch. 285.

Norton, K.C., and *Ashton Cross*, for the respondents, were not called on.

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VAUGHAN WILLIAMS L.J. The question raised by this appeal is at what date the expenses incurred by the local authority under the Public Health Act, 1875, in the execution of paving and other works executed by them under section 150 first become a charge on the premises in respect of which they were incurred within the meaning of section 257. There are some other points in the case with which I will deal later; but that is the first point, and Byrne J. held that these expenses first became a charge from the date of the completion of the works, and it has been suggested upon the cases that that judgment of Byrne J. is wrong.

It appears that in February, 1903, notices under the Public Health Act, 1875, s. 150, to pave were served upon the vendors by the Acton Urban District Council, and, default having been made in complying with these notices, the urban district council on July 7, 1903, entered into an agreement with a contractor for the execution of the works specified in the notices. The whole of the works specified in the notices were not completed by September 29—the day fixed for completion of the purchase, which is also important as being the date up to which the plaintiffs were to receive the rents and to pay the outgoing. It is common ground here that the works comprised in these notices had not been completed when the time for completion of the purchase arrived. If the rule is that the charge under section 257 of the Act of 1875 does not arise until the completion of those works, then, apart from any question which was raised as to the word “outgoings” in this case, it is plain that the vendor is not liable to bear these expenses, but that the purchaser must bear them.

I do not propose to go into the cases upon this point. I entirely agree with the judgment of Byrne J., and it is sufficient to say that I agree not only that it was laid down in *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401, that the date when the charge arises is the date of the completion of the works, but I agree further that there are a series of cases, beginning with *Tottenham Local Board v. Rowell* (1880) 15 Ch. D. 378; 50 L. J. Ch. 99, agreeing with *Stock v. Meakin* and *Surtees v. Woodhouse*, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, in which it is laid down that the date of the arising of the charge is the date of the completion of the works. Counsel for the appellants has said, and I think to a certain extent he was right in saying, that the exact point of the date of the arising of the charge did not expressly arise in any one of these cases. It seems to me that in each of these cases, and certainly in *Stock v. Meakin*, it clearly

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was essential to that which the Court had to determine to ascertain this date; and in *Stock v. Meakin* the suggestion being that the charge did not arise until the final apportionment among the owners, it was held that that was not so, but that it arose at an earlier period. What was the earlier period at which the charge did arise? The answer, as stated in the judgment of the whole Court, was that the charge did arise upon the completion of the works. In my judgment we are bound by that decision. I also think that it was quite right.

Counsel for the appellants suggests that where a notice to pave has not been complied with, and the local authority in the exercise of their powers have entered into a contract for the doing of those works which they are under the statute entitled to do in case the owner of the property upon whom the notice has been served does not avail himself of the opportunity given to him to do it himself, the charge ought to arise from the moment that a contract is entered into by the local authority with the contractor for the execution of the works. Now, there appear to me to be infinite difficulties in the way of such a construction; if for any reason the contractor could not perform the contract, and someone else had been engaged to do it—in some cases it may be at much larger expense—it would be impossible to work out the provisions of the Act of 1875 as to creating a charge if the right date were the date when the local authority entered into this contract or that. Then it was said, if that was not the date, then the charge arose as each portion of the works was done—in other words, as each brick was delivered on the ground or put into place. It seems to me quite impossible that the Legislature could have intended any such thing. It seems to me that the only practical way of working out the provisions of the Act is by saying that the charge takes effect on the completion of the works.

Two other points have been taken in support of this appeal. In the first place, it was said that the vendors had under this contract to convey free from incumbrances, and could not make a good title unless he cleared off all incumbrances; and it is said that there was an inchoate incumbrance on the property by reason of the notices not having been complied with. I do not agree. I think that the object of the notice is to give the owner an opportunity to do the work himself, and if he does not do it in a limited time, then to authorise the local authority to do it. I think that there is no incumbrance of any sort or kind until the completion of the works. Then, as a last point, it is said that these expenses were "outgoings" which the vendors were bound to clear. It is said that they are outgoings because there was an inchoate liability from the moment of the service of the notice to do these paving works. I say again there was no liability,

inchoate or otherwise, until the local authority had done the works. Therefore I am of opinion that that point fails, too, under the circumstances.

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I will only add a word upon *Tubbs v. Wynne*, 1897, 1 Q. B. 74; 66 L. J. Q. B. 116, and *In re Boor, Boor v. Hopkins* (1889) 40 Ch. D. 572; 58 L. J. Ch. 285, which were cited as some sort of authority that after the date of the service of the notices there was an inchoate liability which would throw on the vendors the obligation of discharging the premises from the expenses subsequently incurred as an outgoing. With reference to these cases I will only say that they seem to me very plainly to point out the difference between a case where there has been a magistrate's order to do certain works and default is made in doing them—in which case there may be ground for saying the expenses are an "outgoing"—and a case like the present, where there has been merely a notice served on the owner giving him an opportunity of doing the work himself. In my opinion the judgment of Byrne J. was quite right, and this appeal ought to be dismissed with costs.

ROMER L.J. I agree with all that my Lord has said, and with all that was said by Byrne J. in the Court below, and they have dealt so fully with every part of this case that I have hardly anything to add myself to what they have said. In the course of the argument, *In re Hightt and Bird's Contract*, 1903, 1 Ch. 287; 72 L. J. Ch. 220, was cited to us, and as I was a party to the decision of that case in the Court of Appeal I wish to say two words about it. The vendor in that case, by his counsel in the argument before us, did not call our attention to the precise terms of the contract of sale, and certainly did not call the attention of the Court to the fact that in that contract itself there was no express agreement by the vendor to show a good title; and so far as the Court, or at any rate I can certainly say so far as I was concerned in that case, the arguments proceeded on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title, and the case was decided on that footing, and is not an authority for any proposition, except in a case of such a contract as I have indicated, and is not, I think, to be taken as an authority concerning a contract to sell, where there is in the circumstances of the case, in other respects, an absence of an express contract by the vendor to make a good title.

COZENS-HARDY L.J. I agree. It seems to me that *Stock v. Meakin*, 1900, 1 Ch. 683; 69 L. J. Ch. 401, does really decide the point before us, for although it is true that that case arose under the Private Street Works Act, 1892, the judgment proceeded upon the view that it was a charge created like a charge under the Public Health Act, 1875.

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The Court of Appeal, in giving judgment there, said it became necessary to consider from what date the charge took effect, and the decision there was that the charge became effective only as from the completion of the works. I think the principle is this, that under section 150 of the Public Health Act, 1875, an option is given to the owner or occupier—either do it yourself, or if not, the local authority will do it. There is nothing wrong in the owner or occupier not doing the work. If he does not do it, the local authority may do it, and when the work is completed a charge for the first time arises. The case of *Tubbs v. Wynne*, 1897, 1 Q. B. 74; 66 L. J. Q. B. 116, depended on the breach of a positive order by a magistrate that certain works should be done upon the premises. There was nothing of the kind in the present case, and it is impossible to suggest that these expenses were outgoings which the vendors had contracted to discharge.

Appeal dismissed.

Solicitor for the appellants—T. Blanco White.

Solicitors for the respondents—Taylor, Wilcocks, and Lemon.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

HAGMAIER v. WILLEDEN OVERSEERS.

May 3.

Jury lists—Revision—Justices in special petty sessions—Court of summary jurisdiction—Power to state case—Juries Act, 1825 (6 Geo. IV. c. 50), s. 10—Juries Act, 1862 (25 & 26 Vict. c. 107), s. 8—Summary Jurisdiction Act, 1857 (20 & 21 Vict., 43), s. 2—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11).

Justices sitting in special petty sessions, appointed to be held by section 10 of the County Juries Act, 1825, for the purpose of revising jury lists, do not form a court of summary jurisdiction within the definition contained in section 13 (11) of the Interpretation Act, 1889, and have no power to state a case for the opinion of the High Court.

CASE stated by justices of Middlesex sitting in special petty sessions appointed for the reviewing and allowance of jury lists. The question raised by the case was whether or not a veterinary surgeon was exempt from serving as a juror, upon the ground of professional privilege; but in stating the case the justices themselves raised a preliminary point as to whether they sitting merely in such special petty sessions had jurisdiction to state it at all. They therefore stated the case subject to the decision of the Court as to their jurisdiction. Their reasons for doubting their power to state a case were, in the first place, that there was no hearing and determination of any information or complaint before them, as required by section 2 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43); and in the second place, that sitting in special petty sessions appointed for settling jury lists they were not a court of summary jurisdiction within the meaning of section 33 (1) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). That section 13 (11) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), defined court of summary jurisdiction as follows, viz.: "The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." The justices conceived that the definition must be governed by the words "to whom jurisdiction is given by, or who is authorised to act under the Summary Jurisdiction Acts," for were this otherwise, the words at the end of the subsection would mean

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justices acting in any capacity whatever. In the present case their jurisdiction was not given to them under the Summary Jurisdiction Acts, but under special Acts of Parliament relating to jurors. The Juries Act, 1825 (6 Geo. IV. c. 50), s. 10, provided that they could only sit in special petty sessions within the last seven days of September, and section 8 of the Juries Act, 1862 (25 & 26 Vict. c. 107), only empowered them to adjourn this special petty sessions for another seven days. *Boulter v. Kent Justices*, 1897, A. C. 556; 66 L. J. Q. B. 787, was referred to by the justices in their statement.

Morton Smith for the appellant. The justices have raised the preliminary objection that they, sitting in special petty sessions to revise jury lists, are not a court of summary jurisdiction, and have consequently no power to state a case; but it is submitted that special petty sessions fall within the expression "court of summary jurisdiction" as defined by section 13 (11) of the Interpretation Act, 1889. This court for revision of jury lists is a court of summary jurisdiction because the justices are sitting as such in special petty sessions. The old term was court of special petty sessions; in the present day justices sitting in such a court are called a court of summary jurisdiction. These justices sit as a court by virtue of section 10 of the Juries Act, 1825. *Boulter v. Kent Justices*, 1897, A. C. 556; 66 L. J. Q. B. 787, is distinguishable. That was a licensing case, where it was held that licensing justices were not a court of summary jurisdiction. This was followed in *Reg. v. Bird* (1898) 62 J. P. 309, when Wright J. remarked it was unfortunate that there was not some means for licensing justices to state a case. *Re Bethell* (1899) 63 J. P. 453, a decision under the Lunacy Act, does not apply.

On the other hand, *Fourth City Mutual Building Society v. East Ham Overseers*, 1892, 1 Q. B. 661, shows that justices sitting to hear an application for the issue of a distress warrant for enforcement of the poor rate can inquire into the objections and state a case for the Court. Here the overseers attend before the justices assembled at the special petty sessions to support their jury lists and to contest the right of any person who applies to have his name removed to its removal. The justices, therefore, are not merely acting ministerially, but exercise such judicial functions as to constitute a court of summary jurisdiction, and to be entitled consequently to state a case.

The respondents did not appear.

LORD ALVERSTONE C.J. The point before us raised by the justices themselves is not free from difficulty. They consider that they have no power to state a case. By section 10 of the Juries Act,

1825, "justices of the peace in every division in England and Wales shall hold a special petty sessions for the purposes herein mentioned, within the last seven days of September in every year. . . ." Their power to state a case depends on section 33 (1) of the Summary Jurisdiction Act, 1879, under which "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case." The words "or other proceeding" are wide and an extension of earlier legislation. Section 13 (11) of the Interpretation Act, 1889, enacts that "the expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate . . . to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." The question now before us comes to this, whether justices sitting in special petty sessions under section 10 of the Juries Act, 1825, are sitting as a court of summary jurisdiction. This cannot be answered by saying that as they were sitting in special petty sessions, therefore they were sitting as a court of summary jurisdiction. Section 13 (11) of the Interpretation Act, 1889, makes no reference to justices sitting in special petty sessions; and had it been intended by the Summary Jurisdiction Act, 1879, to enact that justices sitting in special petty sessions should be a court of summary jurisdiction, and empowered by section 33 of that Act to state a case, it would have been perfectly easy for the Legislature to have said so. Looking at the provisions of section 10 of the Juries Act, 1825, it seems to me that the jurisdiction there given to the justices cannot rightly be described as a jurisdiction within the contemplation of the Summary Jurisdiction Acts, or within the definition of court of summary jurisdiction given by section 13 (11) of the Interpretation Act, 1889. In the case of jury lists, the procedure seems to be this—the overseers have to attend before the justices in special petty sessions, and bring in and sign the list, and the justices can strike out a man's name on various grounds, and they may order certain notices to be given and declarations to be made; but in my opinion the exercise of that class of jurisdiction by justices in special petty sessions is not aptly described as acting or sitting as a court of summary jurisdiction. In revising jury lists justices are not bound by the ordinary laws of evidence, and in my opinion nothing has been shown to us which would justify us in coming to the conclusion that these special petty sessions held for the review of jury lists,

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and limited to one particular week in the year, fall within the class of court properly described as a court of summary jurisdiction. I am therefore of opinion that the justices were right in deciding that they had no jurisdiction to state the case, and that it must be struck out.

WILLS J. I am of the same opinion.

KENNEDY J. I agree.

Case struck out.

Solicitor for the appellant—G. Thatcher.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

UXBRIDGE UNION v. WINCHESTER UNION.

1904.

July 8.

Poor Law—Settlement—Order of justices effective as a judgment in rem—Abortive appeal—Appeal dismissed on technicality—Estoppel.

An order of two justices, adjudging the settlement of a pauper to be in a particular union, is effective as a judgment in rem and conclusive as to the settlement of the pauper at the time; and an abortive appeal against it does not rob the order of its effect as a judgment in rem, notwithstanding the fact that such appeal has not been heard upon its merits, but has been dismissed merely upon a technical ground.

CASE stated by the Recorder of Winchester upon an appeal against an order of two justices for the removal of Bertha Forester Timmins from the Winchester Union to the Uxbridge Union as the place of her last legal settlement.

1. On March 3, 1896, upon complaint made to two justices for the county of Devon, they, upon the sworn testimony of John Champion, clerk to the Guardians of St. Thomas's Union, in the county of Devon, showing that one Harry Timmins acquired a settlement in the parish or precinct of Norwood, in the said Uxbridge Poor Law Union, and had done no subsequent act to gain a settlement elsewhere, adjudged the settlement of the said Bertha Forester Timmins, wife of the said Harry Timmins, to be in the parish or precinct of Norwood aforesaid, and directed the guardians of the Uxbridge Union to pay to the guardians of the St. Thomas's Union, in Devonshire, the sum of £19 17s. 2d. for past maintenance and for examination of the said B. F. Timmins, and the weekly sum of 8s. 6d. so long as the said B. F. Timmins should continue to be maintained at the Exminster Asylum.

2. The said order having been duly served upon the clerk to the Uxbridge Guardians on April 10, 1896, he on April 30, 1896, applied by letter to the clerk of the guardians as is customary for a copy of the depositions upon which such order was made, but on the following day received it back with an intimation that the application should not have been sent to the clerk to the guardians but to the clerk to the justices. On the next day, viz., May 1, he forwarded such application to the clerk of the justices, and on May 16 notice of appeal by the Uxbridge Guardians against the order was duly given.

3. On June 30 the appeal was heard at the general quarter sessions for the county of Devon, held at Exeter, and was dismissed for want of form, the ground being that inasmuch as the application for a copy of

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the depositions was made one day late, namely, on May 1 instead of on April 30, 1896, the notice of appeal was out of time, and the same could not be heard and dealt with upon its merits. But the Recorder of Winchester was asked to assume for the purpose of argument that the pauper's legal proper settlement at the date of the order of March 3, 1896, was in the parish of St. Luke's, in the borough of Chelsea, in the county of London.

4. On July 16, 1896, the said B. F. Timmins was transferred to the asylum of the Uxbridge Union at Wandsworth, Surrey, and remained confined there till December 9, 1899, when she was discharged as cured and returned to the house of her brother, Henry John Lamb, at 272, King's Road, Chelsea, where she remained and was maintained by her brother until the month of August, 1900, when she again became a lunatic and wandered from the custody of her brother.

5. On August 24, 1900, the said B. F. Timmins having been found wandering at Winchester an order was made for her reception into the county asylum of Fareham, within the county and union of the respondent guardians, and she was received and kept there until November 28, 1902. The Winchester Guardians, having heard of the order made by the Devon justices and of the abortive appeal above referred to, applied to the Uxbridge Guardians to accept chargeability of the lunatic, which application was refused on the ground that the said B. F. Timmins had obtained a settlement as a deserted woman at Chelsea.

6. On November 13, 1903, upon the application of the respondent guardians, an order was made by two justices for the city of Winchester adjudicating the settlement of B. F. Timmins to be within the district of the appellant guardians (the Uxbridge Union) upon the ground that, as was duly proved in evidence before them, the same had already been so adjudged by the above-mentioned order of justices of Devon, dated March 3, 1896, against which order no appeal was successfully prosecuted, and upon the ground that the pauper was not shown to have done any act subsequent to such order to gain a legal settlement elsewhere.

On December 17, 1903, notice of appeal against such last-mentioned order of March 3, 1896, was duly given, and on February 4, 1904, such appeal was heard before the Recorder of Winchester. The appeal was argued solely upon the question of law whether in the circumstances above set out the order of the justices of Devon, dated March 3, 1896, was effective as a judgment *in rem*, and conclusive as to the settlement of the pauper at the time. The learned Recorder held that the said order was so conclusive and that the above-mentioned abortive appeal, not heard on its merits, did not rob the said order of such effect, and

dismissed the appeal, but at the request of the appellants' counsel, agreed to state this case.

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The question was whether the order of the justices of Devon dated March 3, 1896, in spite of the fact that notice of appeal was given against the same, was conclusive as to the settlement of the pauper at that date, and estopped the appellants from showing that the said B. F. Timmins was then legally settled in the parish of Chelsea.

The appellants' notice of appeal to the Winchester quarter sessions was as follows :—

“ Take notice that the guardians of the Uxbridge Union intend, at the next quarter sessions for the city of Winchester, to commence and prosecute an appeal against an order of the justices for the city of Winchester, of November 13, 1903, whereby it was adjudged that the last legal settlement of Bertha Forester Timmins, otherwise Emma Lamb, a pauper lunatic, was in the parish of Norwood, in the Uxbridge Union, and whereby the guardians of the Uxbridge Union were ordered forthwith to pay to the guardians of the Winchester Union £3 6s. 8d. and £25 15s. 8d. alleged to have been paid by the guardians of Winchester Union in respect of the said B. F. Timmins, otherwise E. Lamb, and also to pay a certain sum, to wit, 9s. 11d. weekly, for her lodging, maintenance, medicine, clothing, and care in a certain asylum at Fareham, in the county of Southampton, on the grounds—

1. That the order is bad and defective on the face thereof.
2. That the order is erroneous in law, and cannot be supported.
3. That the lunatic was not legally chargeable to the common fund of your said union at the time she was sent to the lunatic asylum.
4. That the lunatic was not at the time of her being so sent to the asylum, nor hath she been at any time, nor is she now, settled in any parish in the Uxbridge Union.
5. That the parish of Norwood is not, as is alleged, the place of the last legal settlement of the lunatic.
6. That the said lunatic is settled in the parish of St. Luke's, in the borough of Chelsea, by residence as a deserted woman in that parish for three years and upwards previous to the month of July, 1894, by the provisions of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 3, of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 17, and the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, and has not since acquired a settlement in any other parish by residence or otherwise. Such residence in the parish of St. Luke's, Chelsea, being in such a manner and under such circumstances in each of such years as would render her irremovable.

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7. That the said order was made and proceeded on the ground that the settlement of the pauper lunatic had been formerly adjudged to be in the said precinct of Norwood by an order under the hands and seals of two justices of the county of Devon, dated March 3, 1896, against which no appeal was successfully prosecuted.

8. That an appeal was entered against the order of March 3, 1896, to the next general quarter sessions of the peace for the county of Devon, which came on for hearing on June 30 following, and not entertained by the court, and was not heard on the merits and was dismissed by reason of the fact that the notice and ground of appeal had not been delivered within the time required by law.

9. That the order of March 3, 1896, was not conclusive of the matters therein, and was not binding on the justices who made the order of November 13, 1903, nor on the present appellants.

10. That the order of March 3, 1896, was not confirmed on the merits of the case.

11. That the order of March 3, 1896, was bad on the face of it.

12. That the order of March 3, 1896, was erroneous in law.

CHARLES WOODBRIDGE,

Clerk to the Guardians of Uxbridge Union."

Ricketts for the appellants. The appeal against the order of March 3, 1896, has never been heard or determined upon its merits. Such a decision of quarter sessions as this does not make the matter *res judicata* when none of the material facts have been brought to the attention of the court: *Heath v. Weaverham Overseers*, 1894, 2 Q. B. 108; 63 L. J. M. C. 187. The original order was in fact appealed against, but the application for a copy of the depositions had been made one day out of time, and the appeal was dismissed upon that ground, and not upon the merits which were never gone into. In *Rex v. Woodchester Inhabitants* (1742) Burr. S. C. 191, Chapple J. said that "an order of removal confirmed by sessions upon the merits is conclusive against everybody." But the order here has not been confirmed on its merits. The appellants cannot be held to be estopped as the appellants were in *Rex v. Silchester Inhabitants* (1766) Burr. S. C. 551, for they have not neglected to appeal. An order unappealed from removing a father is no proof of the settlement of a son who is neither mentioned in nor removed by it: *Rex v. Southwram Inhabitants* (1786) 1 T. R. 353, though it is otherwise if the order has been confirmed on appeal: *Rex v. Catterall Township* (1817) 6 M. & S. 83.

In this case the appellants have not acquiesced in the decision of the Devon justices in a way to make it binding by way of estoppel. Unappealed against means acquiesced in. Here there was no acquiescence, for the case finds that the appellants wrongly applied for a copy of the depositions to the clerk to the guardians instead of to the clerk to the justices. It is here desired to set up a settlement the pauper had acquired for herself.

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Macmorran, K.C., R. H. Simonds, and W. Grantham for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. Mr. Ricketts has put his point most clearly and fairly. In cases where the suggestion is that a right exists which has not been dealt with as in *Rex v. Catterall Township* (1817) 6 M. & S. 83, it may be possible to contend, as it was there contended, on the authority of *Rex v. Southowram Inhabitants* (1786) 1 T. R. 353, that an order unappealed from is not conclusive as to the settlement of a person not named in it when that person is emancipated. But no distinction of the kind exists in the case before us, and since the contention failed in the *Catterall* case, and the order was there held to be conclusive, I think the principle of that decision goes further, and decides that once an order is made it is a judgment *in rem*. *Rex v. Corsham Inhabitants* (1809) 11 East 388, is also an authority entirely against Mr. Ricketts' contention. There it was decided that an order of removal executed and unappealed against was conclusive as to the settlement of the pauper at the time of such order, even as between parishes not parties to the order.

It would, in my opinion, be a dangerous thing to alter the law as it has been hitherto laid down by authority, and to allow orders that are good and unappealed against to be a further subject of appeal, so that the question as to why they were made in the first instance can be re-opened. I am clearly of opinion that the learned Recorder was quite right in considering that he could not go behind the order of the Devonshire justices, of March 3, 1896, and upon the authority of *Rex v. Corsham* that the order as it stood unappealed or not effectively appealed against was a judgment *in rem*. The appeal must, therefore, be dismissed.

KENNEDY J. I agree.

PHILLIMORE J. I agree.

Appeal dismissed.

Solicitors for the appellants—Woodbridge and Sons.

Solicitors for the respondents—Church, Adams, and Prior, for Faithful and Day, Winchester.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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July 11.

KING'S BENCH DIVISION.

HARRIS AND OTHERS v. SCURFIELD.

Sewers—"Drain" or "sewer"—Premises within the same curtilage—Group of houses with common access and common accommodation—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

A group of a considerable number of houses are not "premises within the same curtilage" within the meaning of that expression as used in the definition of "drain" in section 4 of the Public Health Act, 1875, though they have a common access by means of a court, and certain accommodation such as ashpits and water-closets in common. A conduit for the drainage of such a group of houses is therefore a "sewer" and not a "drain" within the meaning of that Act.

St. Martin-in-the-Fields Vestry v. Bird, 1895, 1 Q. B. 428; 64 L. J. Q. B. 230, *followed*.

CASE stated by justices for the city of Sheffield, who had ordered the appellants to abate a nuisance, as follows:—

1. An information was preferred on March 23, 1904, by Harold Scurfield (hereinafter called the respondent), medical officer of health for the said city under the Public Health Act, 1875, against George Wyatt Douglas Harris, William Alexander Colyer, and William Alexander Francis Colyer (hereinafter called the appellants), that the following nuisance existed, namely, a nuisance arising from certain defective surface channels at Nos. 7 to 25 in No. 1 Court, Eyre Lane, Sheffield, and that the said nuisance was caused by the default of the appellants, the owners of the said premises, and that on January 22, 1904, the appellants had notice from the respondent specifying the works to be done in order to abate the nuisance, and that the appellants had neglected to comply with such notice.

2. The said information was heard and determined by the magistrates on April 8 and 15, 1904, the said parties respectively being then present, and upon such hearing they ordered the appellants within twenty-eight days from the service of the order, or a true copy thereof according to the said Act, to abate the nuisance, and for that purpose to abolish the said surface channels and substitute properly constructed pipe drains with water-tight joints, and all necessary traps and connections thereto, so that the same should no longer be a nuisance, and also ordered the appellants forthwith to pay to the respondent the sum of 8s. 6d. for costs.

3. The appellants being dissatisfied with the determination and order, as being erroneous in point of law, duly applied to the magistrates in writing to state and sign a case for the opinion of the Court, and have duly entered into the recognisance as required by the statute in that behalf in pursuance whereof this case is now stated and signed.

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4. Upon the hearing of the said information the following facts were admitted or proved in evidence before the magistrates, and, with the consent of both parties, they had a view of the houses and channels situate in No. 1 Court, Eyre Lane, as aforesaid :—

(a) The appellants are the owners of eighteen dwelling-houses, Nos. 7 to 25 in No. 1 Court, Eyre Lane, in the city of Sheffield. The said houses are back-to-back houses, and Nos. 7 to 13 thereof form part of a block, and Nos. 14 to 25 are in one block. Nos. 7 to 13 face Nos. 14 to 19, and between them is an open space of ground with a pavement on either side. Nos. 20 to 25 face the boundary wall on the south-east side of the court, and between them and the said boundary wall is also an open space of ground with a pavement on the side thereof. The main entrance to the court is from a partially enclosed space of ground to which an entrance is obtained from one of the main thoroughfares. The court can also be entered by means of two narrow passages made between certain of the said Nos. 7 to 13 of the houses.

(b) There are two ashpits in the court which are situate therein at the north-eastern boundary.

(c) There are also situate in the court at the north-eastern boundary thirteen water-closets for the use of the tenants.

(d) On January 22, 1904, the respondent, being the medical officer of health for the city (on behalf of the council of the city, being the urban sanitary authority for the city), served a notice upon the appellants to abolish the surface channels and substitute properly constructed pipe drains with water-tight joints, and all necessary traps and connections thereto. The appellants failed to comply with the said notice. The said surface channels are open, and not covered in or enclosed in any way.

(e) The slop water from the sinks of each house is carried by a separate channel (hereinafter called the "cross channel"), cut in the pavement at right angles to each house, into a long channel (hereinafter called the "side channel") at the side of the pavements in the court. There is, therefore, a separate cross-channel for each house, and a number of these cross-channels drain into each side channel, and the drainage is by these side channels carried into two gullies in the court, and thence into the main sewer outside the court.

(f) The use of the said side channels and cross-channels in manner aforesaid constitutes a nuisance within the meaning of the Public Health

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Act. The said side channels and cross-channels have apparently been in existence for many years.

5. The respondent contended that each of the side channels and cross-channels was a drain as defined by section 4 of the Public Health Act, 1875, by reason, as he contended, of all the said houses being premises within the same curtilage, and that the appellants were, therefore, bound to do the work required by the notice.

6. The appellants contended that each of the said side channels was a sewer as defined by the said statute, as each was used for the drainage of more than one building, and that the premises were not within the same curtilage.

7. The magistrates were of opinion that the said side channels, although used for the drainage of more than one building, were drains and not sewers, and were of opinion that the houses drained were premises within the same curtilage.

8. The question for the opinion of the Court is whether upon the above statement of facts the magistrates came to a correct determination in the point of law that the side channels were drains and not sewers within the meaning of the Public Health Act, 1875, and, if not, what should be done in the premises.

Danckwerts, K.C., and Bedall for the appellants. These channels are not "drains" within the definition in section 4 of the Public Health Act, 1875, but "sewers," which it is the duty of the local authority under section 19 to keep so that they shall not be a nuisance or injurious to health: *Wilkinson v. Llandaff and Dinas Powis Rural Council*, 1903, 2 Ch. 695; 2 L. G. R. 174; 73 L. J. Ch. 8. The justices held that the channels were drains on the ground that the houses they served were "premises within the same curtilage" within the meaning of the definition of "drain" in section 4 of the Public Health Act, 1875, whereby "drain" is defined as meaning "any drain of and used for the drainage of one building only, or premises within the same curtilage" and made merely for the purpose of communicating therefrom with a sewer or a cesspool or similar receptacle. On this point the case is governed by the decision of the Court of Appeal in *St. Martin-in-the-Fields Vestry v. Bird*, 1895, 1 Q. B. 428; 64 L. J. Q. B. 230, commonly called the *Lowther Arcade* case—a decision upon section 250 of the Metropolis Management Act, 1855. There a construction ran down the central passage of the arcade to a main sewer outside, receiving in its course the drainage of a number of shops and houses on either side; and it was held that it was not a drain of, and used for the drainage of, one building only or premises within the same curtilage. In the later case of *Pilbrow v.*

St. Leonard, Shoreditch, Vestry, 1895, 1 Q. B. 433; 64 L. J. M. C. 130, the Court of Appeal held by a majority that two blocks of flats belonging to the same owner, separated by a causeway 20 feet wide, of which one end was closed by a wall and the other opened into a public thoroughfare, were premises within the same curtilage. Rigby L.J., however, dissented, on the ground that there could not be a curtilage common to two messuages. In the present case the appellants are the owners of eighteen messuages, which at once distinguishes *Pilbrow's* case. It has never been held that eighteen messuages can be considered to be included in one curtilage.

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Waddy (*Montagu Lush, K.C.*, with him) for the respondent. These were clearly premises within the same curtilage, and the facts set out in paragraph 4 of the case show plainly that the court constituted a curtilage within the definition. The present case differs widely from *St. Martin-in-the-Fields Vestry v. Bird*, 1895, 1 Q. B. 428; 64 L. J. Q. B. 230, for the *ratio decidendi* of that case was that the passage down the Lowther Arcade was locked at night. The question of curtilage or no curtilage is purely one of fact, and the present case really falls within the reasoning of the judgment of Lord Esher M.R. in *Pilbrow v. St. Leonard, Shoreditch, Vestry*, 1895, 1 Q. B. 433; 64 L. J. M. C. 130. Here there was one curtilage, there were houses within it, and the inhabitants were afforded various accommodations in common, as found in paragraph 4 of the case *Wilkinson v. Llandaff and Dinas Powis Rural Council*, 1903, 2 Ch. 695; 2 L. G. R. 174; 73 L. J. Ch. 8, differs so much from the present case upon the facts that it is not in point.

LORD ALVERSTONE C.J. I have come with some reluctance to the conclusion that this decision of the justices cannot be supported. In the case before us the authorities cited by Mr. Danckwerts for the appellants have removed any doubts that may have existed in my mind as to these structures being sewers, and show that channels such as these which carry away water may be sewers. The justices were of opinion that they were drains because the premises they served were within one curtilage. Mr. Waddy for the respondent has been unable to cite any authority to us showing that this combination of houses can be properly included in the expression curtilage, and, apart from authority, it is impossible for us to hold that these sixteen or eighteen houses were situate within the same curtilage. There is no definition of curtilage to be found which covers the case of a number of houses separately occupied by different people simply because there happens to be a common access and, in a measure, common accommodation. The Court of Appeal, in deciding *Pilbrow v. St. Leonard*,

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Shoreditch, Vestry, 1895, 1 Q. B. 433; 64 L. J. M. C. 130, expressly distinguished the *Lowther Arcade* case (*St. Martin-in-the-Fields Vestry v. Bird*, 1895, 1 Q. B. 428; 64 L. J. Q. B. 230), and supported it, and the reasoning of that case clearly covers the state of things presented to us in the findings of the present case. I am, therefore, of opinion that these houses were not within the same curtilage; that these channels were not drains, but sewers within the definition in section 4 of the Public Health Act, 1875; and that section 19 has cast the duty of attending to them upon the city council. The appeal must, therefore, be allowed.

KENNEDY J. I am entirely of the same opinion. This case is certainly not a stronger case than the *Lowther Arcade* case, but it clearly falls within that decision.

PHILLIMORE J. I agree. I cannot understand how it can possibly be contended that these houses are within the same curtilage. I am clearly of opinion, entirely in agreement with the judgment of Rigby L.J. in *Pilbrow v. St. Leonard, Shoreditch, Vestry*, that the word curtilage cannot be applied to anything which is common to more than one messuage, and that two separate houses occupied by two different sets of people so as to be separate and independent dwellings cannot be premises within the same curtilage.

Appeal allowed.

Solicitors for the appellants—R. F. and C. L. Smith for H. Sayer, Sheffield.

Solicitors for the respondent—Colyer and Colyer.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

A similar decision on almost precisely similar facts was given in *Rhundell v. Price*, *Loc. Govt. Chron.* 1898, 512.

High Court of Justice.

KING'S BENCH DIVISION.

KING *v.* SPENCER.

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July 12.

Weights and Measures—Fraudulent use of scale—Paper added to goods pan when weighing tea—Custom or trade usage—Weighing carried out in customer's presence—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49) s. 26.

In proceedings against a grocer, under section 26 of the Weights and Measures Act, 1878, for being unlawfully and wilfully a party to the commission of a fraud in using a certain scale by adding paper to the goods pan when weighing tea, evidence of a custom or trade usage to weigh tea with paper is admissible as bearing on the question whether there has been a wilful commission of a fraud.

The offence in question may be committed where tea is weighed with paper though the weighing is done before the customer's eyes, if it is so done as to suggest to the customer that the nett weight of the tea alone is being ascertained.

CASE stated by justices of Lancashire, before whom the appellant had been convicted upon an information preferred against him under section 26 of the Weights and Measures Act, 1878, charging that he on March 3, 1904, at the township of Litherland, in the said county, was unlawfully and wilfully a party to the commission of a fraud in using a certain scale by adding paper to the goods pan when weighing tea, contrary to the statute.

1. The appellant is a grocer carrying on business at Litherland, in the county of Lancaster, and the respondent is an inspector of weights and measures for the county.

2. On March 3, 1904, Stephen Hopkins went to the appellant's shop to purchase, amongst other things, for and on behalf of the respondent, four ounces of tea.

3. Stephen Hopkins asked for four ounces of tea, and one of the appellant's assistants who was serving in the shop thereupon put some tea into a paper wrapper and weighed the tea and paper wrapper together in the presence of Stephen Hopkins, and then handed it to him with the other articles he had purchased. The gross weight, that is to say, the weight of the tea and the paper wrapper in which it was weighed, was 4 oz. 20 gr.; and the nett weight, that is to say, the weight of the tea without the paper wrapper, was three drachms less than four ounces. The difference between the gross weight and the nett weight was the weight of the paper wrapper, which weighed 3 dr. 20 gr.

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4. The scales in which the tea was weighed in the paper in the presence of the purchaser were perfectly just and accurate, and gave the gross weight of the tea and paper wrapper correctly. When the purchaser asked for four ounces of tea he stated that he expected to be served with four ounces of tea nett weight, and not 4 oz. 20 gr. gross weight of tea and paper, and there was no evidence to show that he knew of the existence of any trade custom, namely, that he must expect that the weight of the paper would be included in the weight of the tea served in accordance with his order.

5. The appellant stated that it was the custom or usage in the grocery trade to weigh tea in the paper wrapper in which it was delivered to a purchaser, and there was no intention on his part or on that of his assistant who sold the tea to Stephen Hopkins to defraud the purchaser.

6. Evidence was tendered on behalf of the appellant to prove that it was the custom or usage in the trade for grocers to weigh tea in the paper wrapper in which it was sold, and that the paper used by the appellant was suitable and proper paper for that purpose. The justices declined to allow any such evidence to be given, holding that the respondent had not obtained or been served with four ounces of tea, which he had asked for, the nett weight of the tea which was served to him being three drachms short of the four ounces. It was admitted by the appellant that when his tea was sold in packets previously made up, and the packets were marked, "Tea, nett weight without the paper," the weight of the paper was not included; but that when it was weighed in one of his shops on a purchaser's demand he had instructed his assistant that the weight of such paper was to be included as a portion of the purchase—as weight.

7. It was contended on behalf of the appellant that weighing tea in the paper wrapper in which it was sold and delivered, the scales being just and accurate, and the gross weight, that is to say, the weight of the tea and the paper wrapper being correct, did not constitute an offence under section 26 of the Weights and Measures Act, 1878, and that the said section was not applicable to the facts of the case. That there was no evidence at all of any fraud wilfully committed in using the scales. That evidence was admissible to prove that it was a custom or usage in the trade to weigh tea in the paper wrapper in which it was sold, and that the paper used was suitable and proper for that purpose.

8. It was contended on behalf of the respondent that weighing the tea in the paper wrapper in which it was sold in itself constituted an offence under section 26 of the Weights and Measures Act, 1878, and that whether there was any custom or usage in the trade or not, to

weigh tea in the paper wrapper in which it was sold was immaterial, and that such evidence was not admissible.

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9. The justices were of opinion that evidence of a custom or trade usage to weigh tea in the paper wrapper was inadmissible, and, under any circumstances, irrelevant and immaterial, and they therefore declined to receive any such evidence. They held that weighing the tea in the paper wrapper, notwithstanding that the weight of the whole or gross weight was correct, and that such weighing was done in the presence of the purchaser, and that it was claimed to be customary in the grocery trade and without any intention to defraud the purchaser, constituted a fraud wilfully committed in using the scales, and the justices therefore convicted the appellant of being a party to such fraud under section 26 of the Weights and Measures Act, 1878.

10. The questions for the opinion of the Court were—

(1) Whether the justices were right in refusing to admit the evidence to prove that it was a custom or usage in the trade to weigh tea in the paper wrapper in which it was sold, and that the paper used was suitable and proper for the purpose.

(2) Whether upon the facts stated they were right in law in convicting the appellant of the offence charged.

The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), contains the following provisions :—

Section 25. Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited.

Section 26. Where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and the weight measure scale balance or steelyard shall be liable to be forfeited.

Section 27. A person shall not wilfully or knowingly make or sell, or cause to be made or sold, any false or unjust weight measure scale balance steelyard or weighing machine.

Every person who acts in contravention of this section shall be liable to a fine not exceeding ten pounds, or in the case of a second offence fifty pounds.

Avory, K.C., and Bonsey for the appellant. Sections 25 and 26 must be read together in this Act. Section 25 makes it an offence to have any unjust measure or scale in use for trade. Then the Legislature thought it necessary to provide for the case of a vendor who, although his scale is perfectly just, commits some fraud in the use of it which makes it unjust to the purchaser, such as the old-fashioned fraud of depressing one side or other of the beam as it may suit his

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purpose. If a purchaser asks for four ounces of tea, and sees the vendor take the bag up and put the tea in it, and then put the bag on the scale, the latter commits no wilful fraud under section 26. The question under this Act is not one of the special knowledge of the inspector, but of the knowledge of the ordinary purchaser, and the point as to whether there is not a recognised custom in the trade becomes of great importance. When the vendor is weighing tea in the way it is ordinarily weighed in a grocer's shop, he does it in accordance with the ordinary custom of putting the paper bag on the scale. The moment it becomes a question of the ordinary purchaser, then the custom must be admitted. This is not a question under the Sale of Food and Drugs Acts, where the sale is to the prejudice of the purchaser, for the question here is, Was the vendor committing a wilful fraud? In *Harris v. Allwood* (1892) 57 J. P. 7, Mathew J. said that this custom was so well known that it was ridiculous to call it a fraud. Section 26 has no application to such a case as this, but only to cases of wilful fraud in the use of scales. Neither under this Act nor any other is it an offence to sell short weight, though such an act might give rise to an action. Section 26 is the corollary to section 25, and is meant to apply where the vendor tampers with the use of a machine which is otherwise just. To constitute wilful fraud on the part of the vendor it is not sufficient to show the state of mind of the purchaser. Apart from custom, the fact that the weighing is done in the presence of the purchaser negatives the intention on the part of the vendor to defraud him. Even in *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8, a decision on section 25, it was admitted that there was no fraud within the meaning of section 26. In the present case, apart from the question of custom, it is impossible to say there was a wilful fraud in the use of the machine. It cannot be a wilful fraud in the use of the machine to put tea into a bag in the presence of the customer, because if the customer objects to the tea being weighed with the paper he is entitled to say so. When it is done actually in his presence and without objection on his part, it is not a case contemplated by section 26 nor a wilful fraud. It is submitted that upon this ground the present conviction cannot stand.

Gordon Hewart for the respondent. The justices were right both in convicting the appellant under section 26 and in refusing to admit evidence of the so-called custom. The admissions of fact in the case are important. It is admitted that Hopkins did ask for four ounces of tea, and that he received as and for four ounces of tea, for which he paid, something less by three drachms. On this admission the *Star Tea Company v. Whitworth*, 1904, 2 L. G. R. 1000, is in point. The circumstances of the present case amount to fraud,

and to fraud wilfully committed, under section 26, for it cannot be suggested that what the appellant did was done either carelessly or accidentally (see paragraph 6 of the case). Sections 25, 26, and 27 should be read together, and they make a perfect whole. Section 25 hits the person who uses or has in his possession for use an unjust scale. Section 27 hits a person who wilfully and knowingly makes or sells an unjust scale. Then section 26 comes in between these two, and hits the person whose scale indeed is just, but who uses it in such a way as to produce the fraudulent result. The purchaser is not bound to use diligence to see that the paper is not weighed. He may well assume that the shopman is putting in enough tea to compensate for the weight of the paper. Having asked for four ounces of tea, the purchaser is entitled to expect that he will get it. It is true that in *Harris v. Allwood* (1892) 57 J. P. 7, it was held there was no fraud, but then it was expressly stated that the purchaser was aware of the custom. All that case decided was that if the purchaser knows of the custom he is not defrauded, but it does not apply if the purchaser does not know of the custom. In *London County Council v. Paine* (1903) 2 L. G. R. 184, it was held that the knowledge of the purchaser does not assist the vendor in his defence. With reference to the allegation that there is a custom, that contention was put forward without success in *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8: see judgment of Ridley J. at p. 677. It would be a ridiculous result if a man were to be liable under section 25 where he put the paper under the scoop, although the purchaser knew it was there, and if at the same time under section 26 he could produce the same result with impunity by putting the paper on the top of the scale. The custom alleged seems to be a custom to sell something less than an ounce of tea as if it were an ounce. If it were to prevail it would be uncertain and unreasonable. A universal usage not according to law cannot be set up to control the law: *Meyer v. Dresser* (1864) 16 C. B. (n.s.) 646; 33 L. J. C. P. 289. The appellant has two classes of tea, one of which is already weighed of full weight in packets, and one which is to be weighed in the presence of the customer, and is not full weight. Yet apparently his caprice is to determine whether a purchaser shall have a packet of full weight weighed beforehand or less than full weight weighed in the customer's presence. It is submitted on these grounds that the justices were right.

LORD ALVERSTONE C.J. I think this case must go back to the justices. I think there are two points which require to be further considered. The summons was under section 26 for wilfully committing a fraud in the using of a scale or balance, and not in

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respect of any other offence, either at common law or under any statute. The only facts before us are that the purchaser asked for four ounces of tea, and saw weighed before him a bag with tea in it, which turned out to be less than the four ounces of tea when delivered to him. I do not wish to say that there can be no offence because what is done is done before the eyes or in the presence of the purchaser. It seems to me that it might depend upon how the scale was used, and if the scale were used so as to make the purchaser believe that the tea, and nothing but the tea, was being weighed, there might be an offence under the statute. I do not think it is necessary that the scale should be actually a bad scale, so that it will not weigh fairly, in order to make it an offence under this section, because I think the fraud aimed at is a fraud committed in the using of any scale, which may be a perfectly proper scale. I do not think, as at present advised, that there would be sufficient evidence of fraud if the purchaser knew that the weight of four ounces was put in the one scale and tea and paper into the other, because I think, whether he is an ordinary purchaser or not, it would be a transaction taking place before his eyes. I wish to say upon this part of the case that I do not think that the fact that the purchaser is an inspector makes any difference. The point is, what an ordinary purchaser would have judged from what was going on under his eyes. Therefore, upon that part of the case I think it requires further examination as to whether what was done amounted to a wilfully fraudulent use of the scale.

Upon the other part of the case, I cannot see why the evidence of custom should not have been admitted. I can quite understand that if the demand was, "I want to have four ounces of tea nett weight," then a question might arise as to whether any evidence of custom is admissible at all. But if a purchaser asks for "four ounces of tea," and there is a custom recognised by all purchasers—so universally known as to be taken to be known to all customers—that in the case of a sale over the counter the tea is weighed in a bag, it might, to my mind, have a very material bearing on the question of whether there has been a wilful commission of a fraud. Of course, I do not for a moment mean to say that a man is justified in insisting on delivering paper and tea if the purchaser has asked for nett weight of tea, but when he has simply asked for four ounces of tea, and the seller before his eyes has weighed the tea and the paper, and it is not suggested that there is any other improper use of the scales, I think the custom as to the way in which tea is weighed may be material. In any event, I think the case must go back for those two points to be considered before this conviction can be properly affirmed.

KENNEDY J. I am of the same opinion, and will only just add a very few words. 1904.

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It seems to me that it may be very difficult to make out any custom to which a magistrate would properly attach any value, because there is this curious state of things in this case—that where the tea is sold in packets made up, apparently no such custom prevails. If the buyer is lucky enough to buy a packet made up, he gets one bearing the statement: "Tea, nett weight without paper." But if the packet is not handy, and the tea is weighed at the time of being sold, he gets four ounces of tea *plus* paper weighed in with the tea. At any rate, for what it is worth, I agree with my Lord that the evidence should not be excluded, for this reason, that if it be a worthless custom, still it appears to me possible and just that in considering a question of wilful fraud, a practice which the seller wrongly thinks to be binding upon the buyer by custom, may nevertheless, if its existence in his mind is proved, go some way to negative fraudulent intent on his part. For that purpose I think the magistrates ought to have heard the evidence as to custom. With regard to the other point, I wish to guard myself, as my Lord has done, from expressing any opinion, if the facts show that the purchaser either said or did something equivalent to saying, "I require four ounces of weighed tea," that it would not be a fraudulent use of a scale if, as it were, the vendor appealed either by word or gesture, or by necessary inference, to the instrument he was using, as one that he had been using to give a fair weight, the real weight of the article asked for, whereas in fact he had only given the weight of the article *less* the weight of the paper.

PHILLIMORE J. I entirely concur in the opinion expressed by my Lord and my brother.

Case remitted.

Solicitors for the appellant—Neve, Beck, and Kirby, for J. W. Wall, Bootle.

Solicitors for the respondent—Snow, Fox, and Higginson, for A. H. Wilson, Preston.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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May 19.

LITTLE HULTON URBAN DISTRICT COUNCIL v. JACKSON.

Highways—Extraordinary traffic—Recovery of expenses—Action commenced before repair effected—Expenses “incurred”—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1).

An action under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover expenses of highway repairs occasioned by extraordinary traffic or excessive weight, brought before the repairs have been executed, is premature and must be dismissed.

APPEAL by the defendant from a judgment of the judge of the county court of Lancashire holden at Bolton in favour of the plaintiffs.

The plaintiffs' claim was for extraordinary expenses incurred by them in repairing a main road within their district, by reason of the damage caused by excessive weight passing along the same, and extraordinary traffic conducted thereon by or in consequence of the defendant's orders.

The traffic in respect of which the claim was made took place between May, 1901, and February, 1903.

The surveyor's certificate was as follows:—

“To the Little Hulton Urban District Council.

“Gentlemen,—I hereby certify that having regard to the average expenses of repairing highways in this neighbourhood, extraordinary expenses have been incurred by you in repairing the highway or main road known as Manchester Road, within your district, by reason of the damage caused by the excessive weight and extraordinary traffic, namely, a traction engine and waggons loaded with stone, passing along the same by or in consequence of the order of Mr. James Jackson, Edge Fold Quarries, Middle Hulton, Bolton, and that such extraordinary expenses amount to the sum of £35, thirty-five pounds.”

It was admitted before the learned county court judge, by counsel for the plaintiffs, that although the damage to the road claimed for was caused before action brought, no part of the repairs sued for had in fact been done before action and no money spent before action.

Counsel for the defendant submitted that the plaintiffs should be nonsuited, (1) on the ground that the certificate was not in accordance with section 23 of the Highways and Locomotives (Amendment) Act, 1878;

(2) that as no repairs were done and no money expended before action no expenses had been incurred by the plaintiffs in repairing the road before action.

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The county court judge overruled both objections, holding that the certificate was sufficient, and that the expenses were "incurred" when the damage was done to the road.

Section 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), provides that :—

Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid . . .

Section 12 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29), provides that :—

(1) Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows :—

(a) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court.

(b) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work.

(c) There shall be substituted for the words "by whose order" the words "by or in consequence of whose order."

J. Overend Evans for the defendant. The cause of action in this case was not complete until the repairs had been actually executed by the plaintiffs. The certificate of the surveyor was bad and untrue, because no extraordinary expenses—indeed, no expenses at all—had been actually incurred at the time it was given. [He was stopped.]

H. Cunliffe for the plaintiffs. It is submitted that the learned county court judge was right. The road in question is a main road which the plaintiffs have undertaken to maintain. As soon as the damage was done the plaintiffs were bound to make it good; and it is not unduly stretching the language of the section to say that at that moment the plaintiffs had "incurred" the expense of reinstating the road. The

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certificate of the plaintiffs' surveyor is good on the face of it, and the Court cannot go behind it except for the purpose of seeing whether the local authority are in a position to sue.

LORD ALVERSTONE C.J. It seems to us that it is quite clear this action has been brought too soon. It cannot seriously be suggested, that this certificate of the surveyor is binding and must be obeyed, whether it tells the truth or whether it does not. This is not a case in which the surveyor's certificate is of itself binding so as to make the defendant liable to pay the sum stated to have been expended in repairs before that amount has been expended. Counsel for the plaintiffs admits that these expenses were not incurred before the action was brought. No one can be made liable in such an action as this to pay an amount which he knows has never, up to the time of the issue of the plaint, been incurred. The amount of expenses claimed to have been incurred as the expenses of repairs, rendered necessary in consequence of extraordinary traffic, must have been incurred before action brought. No action will lie to make the defendant pay a sum of money not spent.

WILLS J. I am of the same opinion. The consequences would be intolerable if persons using highways could be called upon to pay extraordinary expenses of repairs what had never been effected.

KENNEDY J. I agree.

Appeal allowed.

Solicitor for the plaintiffs—F. W. Coope, Bolton.

Solicitors for the defendant—Russell and Russell, Bolton.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

FARTHING v. PARKINSON.

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May 5.

Adulteration—Warranty—Notice of intention to rely on warranty—Copy of warranty—Copy containing words added to original warranty after delivery of goods—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20.

The appellant bought butter under a verbal contract, one of the terms of which was that the vendor should give upon the invoice a full warranty of the purity of the butter. The invoice sent by the vendor to the appellant with the first instalment of butter delivered under the contract bore the words "we guarantee all butters sold by us to be absolutely pure." The appellant not being satisfied with the terms of this warranty, requested the vendor, after the whole of the butter had been delivered, to strengthen the warranty. The vendor then added upon the original invoice the words "guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887." A sample of some of the butter in question was bought of the appellant for analysis, and found to be adulterated; and a summons under section 6 of the Sale of Food and Drugs Act, 1875, was served on the appellant. The appellant gave notice to the prosecutor and to the vendor that he had bought the butter with a warranty of which the following was a copy:—"We guarantee all butters sold by us to be absolutely pure guaranteed pure butter, in accordance with the 3rd and 7th sections of the Margarine Act, 1887." Under these circumstances, the justices held that the appellant was precluded from relying on the defence that he had bought the butter with a warranty, because he had not complied with the provisions of section 20 of the Sale of Food and Drugs Act, 1899, whereby a warranty or invoice is not available as a defence in proceedings under the Sale of Food and Drugs Acts, unless the defendant has sent a copy of such warranty or invoice to the purchaser and to the person giving the warranty.

Held, that under the particular circumstances, the justices were wrong in refusing to hear the defence set up by the appellant on the merits.

CASE stated by three of His Majesty's justices of the peace in and for the petty sessional division of Bury, in the county of Lancaster, as follows:—

1. An information was on October 26, 1903, preferred by William James Parkinson (hereinafter called the respondent) against Fred. Farthing (hereinafter called the appellant) under section 6 of the Sale of Food and Drugs Act, 1875, for that the appellant (who carries on the business of a grocer and provision merchant under the style of the City Tea Company in Radcliffe, in the said division), on October 5, 1903, did, at his shop, by John Ogden, one of his employees, unlawfully and wilfully sell to William James Parkinson and to his prejudice

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as butter a certain article of food which was not of the nature, substance, and quality of the article of food demanded, the same containing 18.75 per cent. of water, contrary to the said statute and the regulations of the Board of Agriculture.

2. The said information was heard and determined by the justices at a petty sessions holden at Radcliffe on November 30, 1903, the parties respectively being then present, and upon such hearing the justices convicted the appellant of the offence so charged, and fined him £1, and ordered him to pay five guineas costs to the respondent.

3. The appellant, being dissatisfied with the said determination as being erroneous in point of law, duly applied to the justices in writing to state a case for the opinion of this Court, and has duly entered into recognisances as required by the statute in that behalf, in pursuance whereof this is now stated.

4. Upon the hearing of the information it was admitted by the appellant that the respondent on the date named in the summons purchased from him a pound of butter for analysis, and that the respondent had in connection with such purchase complied with all the requirements of the Sale of Food and Drugs Acts, 1875 and 1899, in relation to a purchase for analysis. Furthermore, the appellant did not dispute the analyst's certificate showing that the butter contained 18.75 of moisture, being 2.75 in excess of the standard fixed by the Board of Agriculture in the Sale of Butter Regulations, 1902, and he relied for his defence upon a warranty under section 25 of the Sale of Food and Drugs Act, 1875, as amended by section 20 of the Act of 1899.

5. Before the defence was opened the respondent took the objection that such defence was not available to the appellant, inasmuch as his notice of intention to rely upon the warranty did not comply with the requirements of section 20 of the Sale of Food and Drugs Act, 1899, as it was not accompanied by a copy of the invoice or alleged warranty relating to the butter purchased by him.

6. The following is a copy of the notice sent by the appellant in respect of which the above objection was taken:—

“Dear Sir,—With reference to the summons issued by you on October 26 against Fred. Farthing, of 323, Ainsworth Road, Radcliffe, for selling you adulterated butter on October 5, and which summons was served upon our client on October 30, we beg to give you formal notice that our client purchased the same butter with a written warranty from George Little, Ltd., general provision merchants, of 84, Corporation Street, Manchester. The following is a copy of the warranty in question:—

‘We guarantee all butters sold by us to be absolutely pure guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887.’

"The defendant sold the butter in question in the same state as purchased, and at the time when he sold it had no reason to believe that it was otherwise. 1904.
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"The defendant intends to rely on the foregoing as a defence to this summons.

Yours faithfully,

PICKSTONE AND JONES.

Mr. Wm. Jas. Parkinson."

The following is a copy of the whole invoice or warranty at the time of sale given in respect of the purchase of the said butter by the appellant:—

"84, Corporation Street, Manchester,
August 4th, 1903.

Messrs. City Tea Company, Radcliffe Bridge,
Bought of George Little, Limited, General Provision Merchants,

3	Bales Stott plain M.W. 52						
	58/9 Nett	6 : 1 : 19	64/6	20	15	3	
2	$\frac{3}{4}$ Sids v Sino	3 : 16	8	3	6	8	
12	W. Shdrs.	1 : 1 : 6	41/	2	13	5	
2	— Eggs & G. L. L. Blue	24	7/	8	8	0	
1	c/— 2 Crown Red	12	4/9	2	17	0	
4 & 5" 20	Firkins Butter—Listowel Roses						
Nos.		Nos.					
1	3 : 10	14	11	3 : 5	15		
2	3 : 3	15	12	2 : 27	14		
3	3 : 1	14	13	3 : 0	14		
4	3 : 1	14	14	3 : 4	15		
5	3 : 6	15	15	3 : 3	15		
6	3 : 1	15	16	3 : 5	15		
7	3 : 5	14	17	3 : 5	15		
8	3 : 1	15	18	3 : 5	14		
9	3 : 3	14	19	3 : 2	14		
10	3 : 4	15	20	3 : 2	15		
7 : 3 : 7		7 : 3 : 2					
1 : 1 : 5		1 : 1 : 6					
6 : 2 : 2		6 : 1 : 24					
		= 12 : 3 : 26		83/	53	17	6
					91	17	10

We guarantee all butters sold by us to be absolutely pure.

GEO. LITTLE, Limited.

GEO. W. LITTLE.

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7. Before giving their decision upon the said objection, the justices decided to hear the appellant's case.

8. In support of the defence the following facts were admitted or proved in evidence to their satisfaction :—

(a) That the appellant in due time, as required by the said sections of the statutes, by his solicitors sent to the respondent and to Messrs. George Little, Limited (the wholesale merchants from whom the appellant purchased the butter) the letter, a copy of which is set out in paragraph 6, *supra*.

(b) That the appellant, on August 4, 1903, in the ordinary course of his business called upon Messrs. George Little, Limited, at their warehouse in Manchester to buy some Irish butter, that he was shown by Mr. Little certain Irish butter, that the appellant cut and tasted the same, and then and there asked Mr. Little whether the firm would give him a warranty with the butter in question. Mr. Little replied that he would give him the fullest warranty, such warranty to be put upon the invoice. The appellant, relying upon this undertaking, thereupon agreed to and did purchase 20 firkins of the said butter.

(c) That on the same day, August 4, in the ordinary course of business, the invoice for the 20 firkins of butter (a copy of which is set out in paragraph 6 of this case) was made out and sent to the appellant, together with six of the same 20 firkins of butter.

(d) That the appellant, being dissatisfied with the warranty as originally written upon the invoice, upon his next journey into Manchester the following week, but after delivery of the butter described in the invoice, personally took the original invoice back to Messrs. Little, Limited, and told them it was not as full as he had expected, and that he should prefer to have it strengthened.

(e) That thereupon Messrs. Geo. Little, Limited, endorsed upon the original invoice the further words (appearing on the original invoice within square lines) following, that is to say :—

“Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887. In case of samples being taken for analysis, show this warranty to the inspector.

GEO. LITTLE, Limited.”

(f) That the remainder of the 20 firkins of butter were delivered to the appellant on August 6, 1903, prior to the said invoice being altered by the addition of the words set out in sub-paragraph (e) of this paragraph.

(g) That the pound of butter purchased by the respondent as mentioned in paragraph 4 was out of the 20 firkins so purchased by the appellant from Messrs. Geo. Little, Limited, and was comprised within and covered by the same warranty or warranties upon which the

appellant made his purchase as aforesaid, and that the appellant had purchased it as the same article in nature, substance, and quality as that demanded of him by the respondent on October 5, 1903, and that he sold it to the respondent in the same state as purchased by him, and that he had no reason to believe at the time when he sold it to the respondent that it was otherwise.

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9. On the close of the appellant's case the respondent again contended :—

(a) That the defence of warranty under section 25 of the Sale of Food and Drugs Act, 1875, was not available to the appellant, as the letter of November 2, set out in paragraph 6, was not a sufficient compliance with the terms of section 20 of the Sale of Food and Drugs Act, 1899, inasmuch as it was not accompanied by a copy of the invoice or warranty relating to the purchase; and the respondent also contended :—

(b) That the copy warranty contained in the said letter of November 2 was not a correct copy, because it included words of warranty which were not originally upon the invoice at the time the property in the goods passed, or when the same were delivered, and which words, having been reduced into writing after the date of the said purchase, were not available as a warranty under section 25 of the Act.

10. The appellant, in reply, contended :—

(a) That the general warranty originally upon the invoice was sufficient without regarding the supplemental warranty endorsed afterwards.

(b) That the original warranty being a general one, the letter of November 2 was a sufficient compliance with the said 20th section of the Act of 1899, without sending a copy of the invoice as well.

(c) That the supplemental warranty endorsed under the circumstances set out in paragraph 8 was good and available as a warranty within the meaning of section 25 of the Sale of Food and Drugs Act, 1875, as it was, he contended, not necessary for a warranty which is, in fact, contracted for, as in this case, to be reduced into writing at the time of the contract.

(d) That if the respondent's objection to the supplemental warranty was good, the fact that the words of it had been included in the letter of November 2 did not prevent such letter from being a good notice of the original warranty.

11. The justices were of opinion that the appellant had proved what would have been a good warranty had it been available as a defence, but being also of opinion that the letter of November 2 was not a good notice within the meaning of section 20 of the Sale of Food and Drugs Act, 1899, they considered the appellant was debarred from relying upon it as a defence, and accordingly convicted the appellant upon the information, and fined him as stated.

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12. The question for the opinion of the Court is whether upon the above statement of facts the justices came to a correct determination in point of law, and if not, what should be done in the premises?

Section 20 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), provides that:—

(1) A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person.

Avory, K.C., and *Biron* for the appellant. It is submitted that the justices were wrong in holding that the letter of November 2, 1903, was an insufficient compliance with section 20 of the Act of 1899. The invoice, as originally sent to the appellant with the butter, contained the words, "We guarantee all butters sold by us to be absolutely pure." These words constitute a sufficient warranty for the purposes of section 25 of the Act of 1875, and constitute such a warranty none the less because they were put on the invoice in compliance with a verbal contract to give a warranty: *Irving v. Callow Park Dairy; Bacon v. Same* (1902) 18 *Times* L. R. 573. The letter of November 2 quotes these words, and is not vitiated by the addition of other words which really add nothing to the force of the warranty, and which were added to the invoice after the delivery of the goods. In short, the objection to the notice is that it is too ample. The notice might have omitted the added words, but it cannot be rendered a bad notice because these words are included. [They were stopped.]

Gordon Hewart for the respondent. It is submitted that the justices were right in holding that the appellant had not complied with section 20 of the Act of 1899. That section makes it a condition, where the defendant purposes to rely on a warranty, that he should give the particulars of the warranty. This the appellant has failed to do. He relies upon a warranty in the words, "We guarantee all butters sold by us to be absolutely pure"; but he gave notice that he was going to rely on a warranty in different and more ample terms. It is most important that the provisions of section 20 should be strictly complied with. If the appellant wished to rely alternatively on the warranty as originally given and as amplified after the sale of the goods, he could in his letter have explained that the latter words of the warranty were added at a subsequent period. *Irving v. Callow Park Dairy*, and *Bacon v. Same* (1902) 18 *Times* L. R. 573, were entirely different from the present case. There it was held that if a correct

copy of the actual warranty, which in those cases took the form of a label on a churn of milk, was sent to the prosecutor and the wholesale dealer, section 20 of the Act of 1899 was complied with, though no copy was sent of the correspondence forming and relating to the contract under which the sale was made. Here the objection is that what purports to be a copy of the warranty contains words which were added as an afterthought after the transaction was over. Further, in the copy sent the words of warranty are divorced from their context. Had a complete copy of the invoice been sent, it would have been known that the butter was "Listowell Roses."

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Avory, K.C., in reply.

LORD ALVERSTONE C.J. Some points have been discussed in this case which, in my opinion, do not arise, and on which I do not intend to express any opinion. If, for instance, under section 20 of the Sale of Food and Drugs Act, 1899, the person setting up the warranty has thought fit to add words which would alter the character of the warranty which was given so as to make it more in his favour, and the magistrates are satisfied that the words are added for the purpose of putting something into the warranty which it did not contain at the time, I do not say whether or not they ought to allow the defence to be set up. Section 20 of the Act of 1899 is a procedure section amending section 25 of the Act of 1875 giving certain protection to prosecutors and certain rights to the wholesale vendor who is called in by virtue of the warranty. Section 25 of the Act of 1875 provides that "if the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence." That left it to a certain extent in doubt as to what the prosecutor was to be told. Then came section 20 of the Act of 1899, which undoubtedly was partly framed upon section 7 of the Margarine Act, 1887, which had also provided that a person should be allowed to set up a written warranty or invoice. The words "or invoice" came from that Act, and there are cases in which the warranty is only to be implied from the invoice. The amending section deals with the Act of 1875, which speaks of a warranty, and the Act of 1887, which speaks of a warranty or invoice. The section provides that: "A warranty or invoice

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shall not be available as a defence . . . unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice . . .” Construed reasonably the section means that if the defendant relies on a warranty under section 25 as a warranty, he must send a copy of the warranty; if he relies on an invoice he must send a copy of the invoice. I desire to repeat what I said in *Bacon v. Callow Park Dairy Co.* (1902) 18 *Times* L. R. 573—and the argument in the present case has not made me think I went too far—that the section means that what is to be sent is a copy of that which entitled the defendant to believe that the article was the same in nature, substance, and quality as that which is demanded. *Primâ facie*, what is to be sent is a copy of the terms of the warranty on which the defendant bought. In this case I think the appellant may be quite entitled to say that he bought the goods on the terms of the written warranty; but as to whether that involves both documents or only one I express no opinion. I only say he may be entitled to say, when the case comes to be dealt with, that the only warranty was that on which the goods were bought and which contained the words, “We guarantee all butters sold by us to be absolutely pure.” At present I have not been able to understand, though I have read the sections as carefully as I can, the meaning of the added words, “guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887.” I do not understand that they add anything at all to the words “absolutely pure.” Therefore I view this case as one in which, even if the two sets of words are taken together, the warranty remains exactly the same. It is not suggested that there was any fraud, or that the defendant did not mean to set up the warranty. He has told the prosecutor the name of the person from whom he bought the butter, and that he bought it under a warranty—that was this warranty: “We guarantee all butters sold by us to be absolutely pure.” And he meant also to rely upon the written warranty, “Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887.” The ground of my decision is that the magistrates ought not as a preliminary objection to decide the point as to what was the warranty under which the goods were sold. They have got to deal with it when they come to the substantive defence under the provisions of section 25 of the Act of 1875, referring to the article being the same in nature, substance, and quality as that demanded. Then there might be a case for determination by the magistrates.

A point was made by Mr. Hewart which I certainly was unable to follow. Contending that the invoice ought to have been sent as well,

he said that had that been done the prosecutor would have found that the butter was "Listowell Roses." I desire to point out that not one single word in this case has been proved, directly or indirectly, as to Listowell Roses giving any information for the purposes of a warranty, and I cannot help thinking that is an argument introduced to meet a case that certainly was never made in the court below.

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Now I come to a point which developed in the course of the case. Before the case was opened the prosecutor said that the appellant had not complied with the requirements of section 20 of the Act of 1899 as to sending "a copy of such warranty or invoice." Then at the close of the case he contended, again, that the notice given by the appellant was not a proper notice because it was not accompanied by a copy of the invoice or warranty relating to the purchase, and then that the copy was not a correct copy, because it included words of warranty which were not upon the original invoice at the time the property in the goods passed. If those additional words did not form part of the contract, or of the warranty, or if they added something, then when the magistrates come to deal with this case they will have to say that the goods were not bought with these additional words; but I cannot think it right, under section 20 of the Act of 1899, that a man cannot *bonâ fide* set up the defence of warranty on giving a full copy of what he intends to rely upon, especially as subsection (2) of the same section allows the person to come and give evidence. I think, therefore, the magistrates ought to have heard the case on the warranty before they decided it.

WILLS J. I have come with some hesitation to the same conclusion, and my concurrence in the judgment which has been delivered is upon the ground that I think section 20 of the Act of 1899, which requires a copy of the warranty to be delivered to the complainant, does not mean to say that under all circumstances the warranty must be correctly set out where there is room for contention as to what the warranty actually was under which the goods were sold. It seems to me that to say that would in many cases deprive the defendant of a perfectly good defence, because he might be wrong in his construction of what the intention actually was. I think the section did not mean to deprive him of the power of saying that, in his view and intention upon the evidence, the warranty was such as he had set out in his copy, although it might prove to be erroneous when the matter came to be contested. Of course, I assume for the purpose of anything I am saying that what has been done has been *bonâ fide*. If it is not *bonâ fide*, then *cadit quæstio*. No one feels more strongly than I do that it would never do to say anything which should encourage a person who has bought under a warranty to improve that warranty

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for the purpose of stopping a prosecution, because it might very well be that if he were at liberty to add terms which he alleged were part of the original warranty which at the time were not in writing, it would stop the prosecution, whereas if he had simply given a copy of that which was in existence at the time the article was bought, it would not have had that effect. If anything of that kind could possibly be the case, then I should say the Act certainly was not complied with. In this case the added words have really added nothing, and therefore the substance and effect of the warranty is perfectly truly set out in that which is said to be a copy. As long as the added matter really adds nothing, it certainly is not open to any of the objections which I have pointed out, of which I fully feel the force, and to which in a proper case I should be prepared to give full effect. Therefore it comes to this, that the case must not be stopped; the magistrates must inquire what the warranty was upon which the appellant bought. If he has bought upon a written warranty which is to all intents and purposes exactly the same, I do not see that any harm has been done by the addition of the words complained of. It will remain for the magistrates to inquire under section 25 of the Act of 1875 whether the actual written warranty under which the goods were bought is a good and sufficient one—whether it comes up to the terms of the section.

KENNEDY J. I think this is a difficult case, and I share my brother Wills' feeling that it is a case in which certainly the magistrates should not take it that we are deciding any question of law as to the sufficiency either of the document as it stood before the alteration or after the addition of other words. What I think is that it is right to adopt a liberal construction of section 20 of the Act of 1899, which requires a copy of the invoice or warranty to be sent. Here a document was sent, which, as it stands, may be alleged (I will say no more because the matter is still open) to contain that which is a warranty *plus* something which cannot come within the fair meaning of the statute, something that has been added later. The prosecutor, therefore, has received a copy of the warranty, and of something which according to the law may not be a part of the warranty, and ought not to be treated as such. No doubt a difficult case may arise where even with good faith a copy of the warranty is sent which differs from the warranty which is proved in court when lawyers come to handle the matter. I can conceive such a case arising on correspondence, and I agree that when that case arises it will have to be considered. I should not feel myself bound by the decision on the particular document in question in this case. Suppose for a moment that, interlaced with words which a lawyer would find to have been given as a warranty, there were words which materially altered, enlarged, or amplified the

document, and the document sent to the prosecutor was held not to be a copy because it contained differently the words of warranty—that might lead to a case being argued. So with other clauses or words which made the real warranty very different from that set out. The difficulty is in drawing the line, but I think in this particular case there was that which ought to have been considered by the magistrates. These things ought to be dealt with on the merits and with as little technicality as possible, and I think the magistrates were wrong, and this case must go back to them.

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Appeal allowed. Case remitted.

Solicitors for the appellant—Pickstone and Jones, Radcliffe.

Solicitor for the respondent—W. H. Wilson, Preston.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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May 16.

STAR TEA COMPANY, LTD. v. WHITWORTH.

Weights and Measures—Welghing paper with tea—False trade description—Tea sold in packets—Weight expressed on ticket inside—Checks entitling purchasers to some small article—Qualification as to gross weight on outside wrapper—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (1, d).

A ticket, inserted under the string of a packet of tea, on one side of which is printed "Quarter pound 2s. 8d. tea ticket," and on the other a notice that every purchaser from a quarter pound and upwards will be given some useful article, is, when the packet contains only 3½ ounces of tea, a false trade description within section 2 (1, d) of the Merchandise Marks Act, 1887, and is none the less so because the words "Quarter pound gross weight" are printed on the outside wrapper of the packet.

CASE stated by justices before whom the appellants had been convicted upon an information preferred by the respondent, an inspector of weights and measures for the borough of Walsall, under section 2 (1, d) of the Merchandise Marks Act, 1887, charging that they did unlawfully sell to the respondent a certain packet of tea to which was applied a false trade description, viz., that the packet of tea contained "a quarter pound weight of tea."

1. The appellants are tea merchants, and carry on business, amongst other places, at 22, Park Street, in the borough of Walsall, in the county of Stafford, their registered offices being at Nos. 292 to 314, Old Street, in the city of London. The respondent is an inspector of weights and measures for the said borough.

2. On January 5, 1904, the respondent went into the appellants' shop at Walsall. He asked to be supplied with a quarter of a pound of tea. He was told there were two prices, viz., 7½d. and 8d. He said he would take a quarter of a pound at 8d. The shop assistant thereupon took from a shelf a packet of tea already folded and tied up with string, inserted under the string a small ticket, and wrapping the whole in brown paper so delivered it to the respondent. The wrapper in which the tea was contained consisted of a piece of lead or silver paper, on which was printed, "The Star Tea Company's Special Blend," and in small type, "Quarter pound gross weight." An exactly similar wrapper is marked "A," and forms part of this case. On one side of the ticket inserted was printed the following: "Star Tea Company, Limited; quarter pound 2s. 8d. tea ticket,

22, Park Street, Walsall; 1, 1986," and on the other side a notice to the effect that every purchaser of tea from a quarter pound and upwards was given some useful article or check, and that by saving a number of these checks a valuable present would be given in exchange. An exactly similar ticket is marked "B," and forms part of this case. The respondent was not shown the silver or lead paper wrapping, *i.e.*, the wrapper in question, nor was it handed to him to read before it was wrapped in the brown paper and delivered to him, nor was his attention called to the words printed on it.

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3. The respondent weighed the packet of tea which he purchased at the appellants' shop, and found that it contained less than a quarter pound of tea, to wit, $3\frac{3}{4}$ ounces only of tea, and that with the paper wrapper on which the words, "The Star Tea Company's Special Blend, quarter pound gross weight," were printed the packet weighed 5 or 6 grains more than a quarter of a pound.

4. The respondent, before asking to be supplied with the quarter pound of tea, had seen in a different part of the shop a quantity of tea which was being weighed and placed in wrappers apparently similar to the wrapper "A," and it was admitted that the respondent knew that the words, "Star Tea Company, Limited, quarter pound gross weight," were printed on tea wrappers of the appellants'; but his attention had not been called by the appellants to these words, and, as a fact, the respondent did not see the words printed on the packet actually delivered to him until the purchase had been completed and he had taken it from the brown paper in which it had been supplied.

5. The respondent knew that gross weight included the weight of the silver or lead paper in which the tea was wrapped, and that it was the custom of the majority in the trade to weigh the paper with the tea.

6. It was admitted by the appellants at the hearing before the justices that they issued and distributed in the borough of Walsall handbills describing and enumerating the presents given by them "with quarter pound of tea." Exactly similar handbills are marked respectively "C" and "D," and form part of this case.

7. The appellants also admitted that they had placed in the window of their shop printed labels attached to the presents given away by them with a quarter pound of tea, such labels bearing the words, "Given with quarter pound of tea." An exactly similar label is marked "E," and forms part of this case.

8. It was contended on behalf of the respondent that the ticket which the appellants' manager placed under the string tied round the packet of tea as hereinbefore stated (and also the handbills and label) constituted a false trade description within the meaning of the Merchandise Marks Act, 1887.

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9. It was contended on behalf of the appellants that the ticket and the handbills and label were not a trade description within the meaning of the Act, nor were they applied to the packet of tea within the meaning of the Act, nor were they false, and that if they were trade descriptions they must be taken and read with the words, "Quarter pound tea gross weight," printed on the packet of tea, and this being so, there was no false trade description within the meaning of the Act.

10. It was held by the justices that the ticket did constitute a false trade description within the meaning of the Act, and they convicted the appellants.

11. The question for the opinion of the Court is whether upon the facts stated the justices were right in law in convicting the appellants of the offence charged.

12. If the Court should answer the above question in the negative the conviction is to be quashed, otherwise the conviction is to stand.

Avory, K.C., H. D. Bonsey, and H. M. Finch for the appellants. The prosecution is under section 2 (1, d) of the Merchandise Marks Act, 1887, whereby "every person who . . . applies any false trade description to goods . . . shall subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence under this Act." The respondent has, therefore, to make out that the appellants were selling goods with a false trade description. A verbal description is not an application of a false trade description within the Act: *Langley v. Bombay Tea Co.*, 1900, 2 Q. B. 460; 69 L. J. Q. B. 752. The whole question is whether giving the ticket, which is merely given to enable the purchaser to get a prize afterwards, amounts to the application of a false trade description to the tea. Though the ticket represents that the packet contains a quarter pound of tea, there is a clear representation on the actual packet that it is "quarter pound gross weight." The ticket is not a written statement intended to be applied to the goods; it is merely a coupon entitling the customers to an article.

Disturnal, for the respondent, was not called upon to argue.

LORD ALVERSTONE C.J. In this case the justices have found that the ticket in question constituted a false trade description, and, this being a pure question of fact, we cannot say that they have gone wrong in law. The appellants placed the ticket in the packet with the intention of its being read, and therefore it may be said to be a description of the particular packet sold. Counsel for the appellants have argued that the description on the ticket must be qualified by the words, "Quarter pound gross weight," printed on the wrapper; but

I am far from being satisfied that an ordinary purchaser of a packet of tea would understand from the presence of those words that the weight of the paper was included in the quarter of a pound of tea. However that may be, I am still of opinion that those words on the wrapper of the packet did not of necessity constitute a sufficient qualification of the description on the ticket. I think the justices were right, and in arriving at the decision they did, have not misdirected themselves in law. The appeal therefore fails, and must be dismissed.

WILLS J. I am of the same opinion. This ticket was intended as a voucher entitling the purchaser upon its presentation to receive some article upon the terms of having purchased a quarter of a pound of tea, and the words, "Quarter pound gross weight," on the wrapper do not qualify the false trade description shown by the ticket.

KENNEDY J. I agree. The ticket leads the customer to suppose he is buying a quarter pound of tea, and not a quarter pound of tea and paper.

Appeal dismissed.

Solicitors for the appellants—Neve, Beck, and Kirby.

Solicitors for the respondent—Ward & Co., for Cooper, Walsall.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

July 12.

EVANS v. GALLON AND ANOTHER.

Bakehouses—Underground bakehouse in use before 1901 continued after January 1, 1904—Necessity for certificate of district council—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 101 (1), (2).

Section 101 of the Factory and Workshop Act, 1901, absolutely prohibits the use of underground bakehouses after January 1, 1904, unless certified as structurally suitable for the purpose by the local authority.

CASE stated by the stipendiary magistrate for the city of Bradford, who had dismissed two informations preferred by the appellant, the medical officer of health of the city of Bradford, against the respondents for that they, on the 13th and 21st days of January, 1904, respectively, at Bradford, in the city aforesaid, did unlawfully use a certain underground bakehouse situate at 207, Priestman Street, in the city, without the same being certified by the council of the city, contrary to the provisions of section 101 of the Factory and Workshop Act, 1901.

It was proved or admitted that the premises in question were on the 13th and 21st days of January, 1904, used by the respondents as a bakehouse for baking for sale, and were an underground bakehouse as defined by subsection (3) of section 101 of the said Act, and were not certified by the council of the county borough of Bradford to be suitable for the purpose of a bakehouse, and were used as a bakehouse at the passing of the Factory and Workshop Act, 1901.

It was contended on behalf of the appellant that the place should not be used as a bakehouse unless certified by the council under section 101 (2) of the Factory and Workshop Act, 1901, to be suitable for that purpose, and that in the absence of such certificate it was used in contravention of section 101 of the Act, and must be deemed a workshop not kept in conformity with the Act, and that the respondents must be convicted accordingly under section 135 of the Act.

It was contended on behalf of the respondents that the place, being used as a bakehouse at the passing of the Act, could continue to be so used pursuant to subsection (1) of the section, and that subsection (2), being expressly subject to the foregoing subsection, no certificate was required. *Schwerzerhof v. Wilkins*, 1898, 1 Q. B. 640; 67 L. J. Q. B. 476, was cited.

The magistrate held that the place, being used as a bakehouse at

the passing of the Act, could continue to be so used without any certificate from the council, and dismissed the summons. 1904.1

The question upon which the opinion of the Court was desired was whether the magistrate had come to a correct determination in point of law in deciding that the said bakehouse could be used without being certified by the council to be suitable for that purpose. Evans v. Gallon and Another.

Section 101 of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), provides as follows:—

(1) An underground bakehouse shall not be used as a bakehouse unless it was so used at the passing of this Act.

(2) Subject to the foregoing provision, after the first day of January one thousand nine hundred and four an underground bakehouse shall not be used unless certified by the district council to be suitable for that purpose.

* * * * *

Danckwerts, K.C., and *Scarlett* for the appellant. The question is whether an underground bakehouse in existence and used as such at the date of the passing of the Factory and Workshop Act, 1901, can continue to be used as such after January 1, 1904, without the certificate of the local authority. Clearly there must be a certificate. No underground bakehouse can be used at all after January 1, 1904, unless it was so used before and at the passing of the Act of 1901; but even then it cannot be used without a certificate in compliance with the Act. No new underground bakehouse can be constructed under the Act at all, and every old one must be certified as suitable. Subsection (2) of section 101 is absolutely prohibitive of all underground bakehouses unless certified. *Schwerzerhof v. Wilkins*, 1898, 1 Q. B. 640; 67 L. J. Q. B. 476, has nothing to do with the case. [They were stopped by the Court.]

Newell for the respondents. This is an ancient underground bakehouse, and was in use as a bakehouse before and at the passing of the Act, and the learned magistrate thought that it could on that ground continue to be so used after January 1, 1904, without the council's certificate. If there be such an absolute prohibition of all underground bakehouses after the passing of the Act as has been suggested on behalf of the appellant, it is extremely difficult to deal with the point raised. The magistrate considered that the necessity for the certificate of the district council, required by subsection (2) of section 101, was subject to the foregoing provision in subsection (1) allowing an underground bakehouse to be continued as such if it had been so used before the passing of the Act, and that therefore there was no necessity for a certificate in the present case. The words of these subsections do not clearly lead to the notion that under-

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ground bakehouses are to be prohibited in the future, but rather that they should continue to exist subject in the case of new ones to the requirements of subsection (2).

LORD ALVERSTONE C.J. The point taken by the learned magistrate does not admit of argument. Section 101 was clearly intended by the Legislature to prohibit new underground bakehouses; but it allows the continuance of underground bakehouses existing at and before the passing of the Act of 1901 upon the terms of their being certified as suitable for that purpose under subsection (2); so that there is no class of bakehouse of this kind to which the certificate of the district council is not of necessity required.

KENNEDY J. I agree.

PHILLIMORE J. I agree.

Appeal allowed.

Solicitor for the appellant—The Town Clerk, Bradford.

Solicitor for the respondents—H. B. James, Leeds.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

BROOKS v. BAGSHAW.

July 8.

Adulteration—Prosecution—Time for proceeding—"Institution" of prosecution—Information laid within 28 days—Summons issued after that time—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19.

It is sufficient in cases where section 19 (1) of the Sale of Food and Drugs Act, 1899, requires a prosecution in respect of an article bought for test purposes to be instituted within 28 days of the purchase, if the information be laid within that period, although the summons be not issued until after the 28 days.

So long as the dismissal of a first summons issued upon an information is upon a technicality, and not upon its merits, a fresh summons may be issued upon the same information.

CASE stated by two justices of the peace for the city and county of the city of Norwich as follows:—

At a petty sessions held at the said city on March 3, 1904, an information was preferred before the magistrates by Joseph Brooks, the inspector under the Sale of Food and Drugs Act for the said city (hereinafter called the complainant), against one George Bagshaw, of Blofield, in Norfolk, farmer (hereinafter called the defendant), for that he, the defendant, did on January 9, 1904, unlawfully sell to the prejudice of the purchaser a certain article of food, to wit, a quantity of milk, which was procured by the complainant at the place of delivery, in course of delivery to the purchaser, and consigned in pursuance of a contract for sale to such purchaser, and which quantity of milk was not of the nature, substance, and quality of the article demanded by such purchaser, the same being then adulterated with 43 per cent. of added water, contrary to the form of the statute; and such information was dismissed by the magistrates, subject to the following case:—

1. At the hearing the defendant took a preliminary objection to the magistrates' jurisdiction to hear and determine the case on the ground that the prosecution was out of time, as not having been instituted before the expiration of twenty-eight days from the time of such purchase, as required by subsection (1) of section 19 of the Sale of Food and Drugs Act, 1899, which is as follows:—

"When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, notwithstanding anything contained in section twenty of the Sale of Food and Drugs Act, 1875,

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shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

The information before referred to was laid on January 23, 1904, before one of the justices for the said city, who on the same day issued his summons, addressed to the defendant, and made returnable on February 11, 1904. This summons should have been served not later than January 27 so as to comply with subsection (2) of the section above quoted, which requires that the summons in any prosecution under the Sale of Food and Drugs Acts shall not be made returnable in less time than fourteen days from the day on which it was served. The summons, however, being made returnable for February 11, 1904, by the default of the county police was not served until January 29, leaving only twelve clear days between the service and the return day of the summons. On February 6, the town clerk (who acted for the complainant) sent a letter, of which the following is a copy, to the defendant's solicitors:—

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You will remember that I arranged to ask for an adjournment of this case from Thursday next to Friday to suit the convenience of your Mr. Reeve. I now find that owing to the default of the county police the summons was not duly served. I am, therefore, unable to proceed further on this summons.

You will understand that I reserve to myself the right to take further action herein.

By reason of this defective service, on the return day of the summons, viz., February 11, 1904, the case was not proceeded with, but on the application of the complainant a fresh summons was issued by the same justice who issued the first summons, made returnable on March 3, 1904. This second summons, dated February 11, 1904, was intended to be issued, and was really issued upon the information of January 23, but through a clerical error the summons purported to be issued upon an information laid on the date of the second summons, viz., February 11, although there was no fresh information laid on that date.

2. The defendant, appearing in answer to the last-mentioned summons, thereupon contended that the prosecution had not been instituted within twenty-eight days as was required, inasmuch as the second summons had been issued, as appeared by it, on a second information laid after the twenty-eight days had expired, and was therefore bad; and further—should this contention fail—the defendant thereupon contended that the laying of the information alone was not the institution of a prosecution under the Sale of Food and Drugs Act, 1899,

s. 19, and that what was required by the said section was not only the laying of an information, but also the service of the summons issued upon such information within twenty-eight days from the date of the offence alleged in such information. 1904.
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3. It was on the other hand contended on behalf of the complainant that the clerical error in the second summons did not vitiate the same, inasmuch as there had not been any fresh information in writing or otherwise, and that although in the printed form of summons it purported to be laid under an information of the same date as the second summons, yet the matter was capable of explanation, and the summons could be amended in this particular. It was further contended by the complainant that the laying of the first information was a sufficient institution of the proceedings within the meaning of the Act, and that the summons issued upon that information need not necessarily be served within the twenty-eight days limit.

4. The magistrates were of opinion that the defendant had not been deceived or misled through the clerical error in the second summons which has been referred to, and they did not give effect to the contention made on his behalf with regard to it, being satisfied that there had not been any second information laid, and that the summons was intended to be and was in fact a re-issue of the summons on the information of January 23; but with regard to the contention on behalf of the defendant that the information must be followed by due service of the summons thereon within the limited period of twenty-eight days from the date of the alleged offence, they considered, having reference to the Act of Parliament under consideration, that the time limit for the institution of proceedings was intended by the Legislature to protect sellers of articles, especially those of perishable nature, from being prejudiced through delay on the part of the prosecution in bringing cases to a hearing, and that this protection could not be secured to the seller of such articles unless it were imperative to serve the summons as well as lay the information within the time limit of twenty-eight days. The magistrates therefore gave effect to this contention made on behalf of the defendant, and accordingly dismissed the information, but without costs.

5. Appended are copies of the information and the first and second summonses, marked A, B, and C respectively.

6. The question upon which the opinion of the Court is desired is whether the justices upon the above statement came to a correct decision in point of law.

Wilde for the appellant. The question here is what is the institution of the prosecution under section 19 (1) of the Sale of Food and

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Drugs Act, 1899? Is it sufficient that the information be laid within twenty-eight days from the date of the alleged offence, although the summons be not issued till after the twenty-eight days have expired? In *Beardsley v. Giddings*, 1904, 1 K. B. 847; 2 L. G. R. 719; 73 L. J. K. B. 378, it was held that it sufficed if the information were laid and summons issued within the twenty-eight days, although the summons were served after that period. Therefore the present case goes a step further, for here the alleged offence took place on January 9, the information was laid on January 23, but the summons was not issued upon that information till February 11, 1904. If a summons be dismissed on its merits, the information drops; but if it be dismissed on a technicality a fresh summons may be issued on the same information: *Ex parte Fielding* (1861) 25 J. P. 759; *Reg. v. Lancashire Justices* (1874) 38 J. P. 215; *Morris v. Duncan*, 1899, 1 Q. B. 4; 68 L. J. Q. B. 49. At first sight *Dixon v. Wells* (1890) 25 Q. B. D. 249; 59 L. J. M. C. 116, appears to be against this contention, but the decision there was that a summons had not been signed and issued in accordance with section 1 of the Summary Jurisdiction Act, 1848, and as a citation was worthless. *Thorpe v. Priestnall*, 1897, 1 Q. B. 159; 66 L. J. Q. B. 248, was cited below for the respondent, but that was a case of the consent of a chief officer of police to the laying of an information under the Sunday Observance Prosecution Act, 1871. *Pickavance v. Pickavance*, 1901, P. 60; 70 L. J. P. 14; *Simcox v. Handsworth Local Board* (1881) 8 Q. B. D. 39; 51 L. J. Q. B. 168, and *Batt v. Mattinson* (1900) 82 L. T. 800; 64 J. P. 615, do not help the respondent. They are only mentioned because he is not represented by counsel. It is, it is submitted, clear that a second summons may be issued upon an information so long as the dismissal of the first summons was not upon its merits.

The respondent did not appear.

LORD ALVERSTONE C.J. The question raised by this case is not exactly parallel with the one raised before us in *Beardsley v. Giddings*, 1904, 1 K. B. 847; 2 L. G. R. 719; 73 L. J. K. B. 378. It appears to be this: Can any valid objection be taken to a summons being issued more than twenty-eight days after the date of the alleged offence when the information upon which the summons is issued has been laid within twenty-eight days of the alleged offence? In *Beardsley v. Giddings* the offence was alleged to have taken place on June 23, and the information was laid on July 18. The summons there was also issued on July 18, but not served till July 22, 1903, and we held that it was not the service of the summons, but the commencement of the

proceedings, that was the governing condition, and therefore that it was sufficient in cases where section 19 (1) of the Sale of Food and Drugs Act, 1899, requires the prosecution to be instituted within twenty-eight days of the purchase of the article, if the information were laid and the summons issued within that period, though the summons were not served until after the expiration of the twenty-eight days. In that case my brother Wills said that he had always understood that the ordinary meaning of instituting a prosecution must be taken to be the laying of the information and the issue of the summons. That appears to me to be entirely the right view to take. So far back as the case of *Ex parte Fielding* (1861) 25 J. P. 759, it appears to have been pointed out by Cockburn C.J. that a valid information, having once been laid, if the summons for some cause or another was not served but dropped, another summons or a series of summonses could be issued upon it, unless and until there had been some determination of the case upon its merits. I am therefore of opinion that as the information in the present case was laid in proper time, that is to say, on January 23, 1904, in respect of an offence alleged to have taken place on January 9, the issue of the second summons on February 11 was not too late, and that the appeal must be allowed. The case will therefore go back to the justices, with our direction that they are to hear and determine it.

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KENNEDY J. I am of the same opinion, and have nothing to add.

PHILLIMORE J. I entirely agree.

Appeal allowed.

Solicitors for the appellant—Sharpe, Parker, & Co., for A. H. Miller, Town Clerk, Norwich.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

July 9.

POPLAR UNION v. MARTIN.

Poor Law—Pauper refusing to maintain himself—Refusal of work offered at labour colony—Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 2.

Upon the prosecution of an able-bodied pauper, under section 3 of the Vagrancy Act, 1824, as a person able wholly or in part to maintain himself and neglecting or refusing so to do, because he has refused work offered outside the workhouse for which he would receive board, lodging, and a small weekly wage, the Court must consider the conditions upon which such work has been offered, and whether the pauper's refusal to accept it was or was not reasonable.

CASE stated by a metropolitan police magistrate who had declined to convict the respondent as an idle and disorderly person under section 3 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), for that he, being a person able wholly or in part to maintain himself by work or other means, did wilfully refuse or neglect so to do, by which refusal or neglect he became chargeable to the common fund of the Poplar Union.

The facts, &c., were stated in paragraphs 5 *et seq.* of the case as follows:—

5. The respondent is an able-bodied man, 39 years of age, and on February 23, 1904, was admitted to the Poplar Workhouse, and on April 13 following he with ten other pauper inmates were taken by the labour master to the farm colony established by William Booth at Hadleigh, in Essex, for the reception and employment of destitute men. Under the terms of an agreement between the appellants and the said William Booth, the respondent could have started work at the colony on probation, receiving as remuneration his food and lodging free and sixpence a week in the nature of pocket-money, and if the respondent had after two or three weeks been employed upon brick work he could have earned 4½d. a yard for digging clay, at which rate of pay it is possible for some men to earn 30s. a week. He was told to go to work in the brickfield at the colony. It was not possible to do more than guess at the remuneration which he might have earned later on. These terms were explained to the respondent, and he was asked to sign an undertaking to conform to the rules of the colony, but he refused to work upon the said terms, or to sign such an undertaking, and left the colony. On April 18, 1904, the

respondent returned to the Poplar Workhouse, and again became chargeable on the rates.

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6. It was contended on behalf of the appellants that the respondent had rendered himself liable to conviction as an idle and disorderly person under section 3 of the Vagrancy Act, 1824.

7. I decided against this contention, on the ground that the respondent could not legally be required to work for anyone on the terms offered, which as to the money wages were, for a time, no wages at all, and as to the food, &c., a violation of the Truck Acts. I was of opinion that the words of the section above referred to ought to be construed with reasonable limitations and reasonable regard to the class of work to which the person charged had been accustomed, and also to the rate of wages ordinarily to be earned by persons engaged in similar employment, and therefore held that the respondent had not been proved to be a person able wholly or in part to maintain himself. The facts proved did, indeed, bring the pauper within the literal meaning of the words of the statute, but the consequences of construing the statute literally seemed to me to be such that a limited interpretation must be placed on the statute. I append some of the possible consequences which influenced my decision, inasmuch as the respondent will not be represented at the hearing of this case by the Divisional Court.

(a) Any employer of labour outside the workhouse could, under threat of proceedings under this statute, compel persons who had entered the workhouse to work for him at merely nominal wages, or even for half their food, inasmuch as the remuneration offered, however small, must be sufficient to maintain a person "in part."

(b) If men are sent outside the workhouse to work for any employer on any work, no matter how unsuitable to them, they would be liable to conviction under this statute as idle and disorderly on refusing or neglecting to do such work, whereas in the workhouse they can only be convicted for refusing to work if the work is such as is suited to their age, strength, and capacity. They have also in the workhouse the benefit of the regulations laid down by the Local Government Board, whereas outside the workhouse these cannot be applied.

(c) A man to whom employment might be offered abroad or in a colony might similarly be liable on refusal to conviction under this statute.

The question was whether the magistrate ought to have convicted the respondent, and dealt with him as an idle and disorderly person under section 3 of the Vagrancy Act, 1824.

Section 3 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), provides as follows :—

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Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month.

Colam for the appellants. The labour master offered the respondent work at the Salvation Army Colony, with whom the appellants had, with the sanction and approval of the Local Government Board, entered into an agreement for providing work for destitute persons. The respondent would equally work for nothing if he worked in the workhouse; but by this arrangement he had a chance in course of time of earning fair wages. In *Attorney-General v. Merthyr Tydfil Union* (1900) 82 L. T. 662, Lindley M.R. said at p. 665: "The Poor Laws impose on the comparatively well to do the duty of supporting those who by reason of their poverty cannot maintain themselves. This being so, the inability to maintain himself which justifies an able-bodied man in requiring relief from the Poor Law authorities must, I apprehend, be a real actual inability to support himself on any terms which he can in fact comply with, and which, as between him and the ratepayers, do not justify him in refusing to support himself. He cannot, in my opinion, lawfully justify such a refusal on the ground that he cannot obtain work on terms which, as between him and his employer, he does not consider reasonable." This employment does not come within the purview of the Truck Acts. The appellants find the respondent work to do at the colony, by which he could partially maintain himself. He had nothing to fear from entering into the agreement, for he was no more punishable for neglecting to work at the colony than he would have been if he had refused work within the workhouse. As to proof of the respondent being idle, the appellants are not bound to prove that he is able and refuses to work: *Carpenter v. Stanley* (1868) 33 J. P. 37. The respondent is a person who comes upon the ratepayers for support. and when offered work which will at any rate partially maintain him and relieve the ratepayers, he refuses it, and ought to be convicted under the Vagrancy Act, 1824, for his idleness. The magistrate has, however, refused to convict him upon grounds which, it is submitted, are inapplicable and wrong.

The respondent did not appear.

LORD ALVERSTONE C.J. If the only course open to us in this case had been to direct a conviction, I certainly should have had the greatest possible difficulty in dealing with it. Speaking only for myself, I cannot think it is sufficient to bring a person within the section as "a person being able wholly or in part to maintain himself . . . by work or by other means, and wilfully refusing or neglecting so to do," that it should be proved that somebody has offered him some kind of work on some terms which he is not willing to accept, without the magistrate going on to consider whether or not the refusal, under the circumstances, to take the terms offered, is sufficient evidence to show that his refusal was unreasonable. I do not want to criticise the learned magistrate's reasons, but I think certainly some of them with regard to the opportunity that would be given to persons to compel labourers to come and work for them at certain terms seem rather far fetched. On the other hand, the learned magistrate says that in his opinion the section "ought to be construed with reasonable limitations and reasonable regard to the class of work to which the person charged had been accustomed, and also to the rate of wages ordinarily to be earned"; and if he has considered these matters solely in connection with the refusal by the respondent to accept the terms offered not being unreasonable—in other words, it not being a wilful refusal, because the terms imposed on him were not fair terms—then, I think, these are considerations he may have in his mind in dealing with the particular question I have indicated. I think, therefore, the case must go back to the magistrate in order that he may decide whether or not there has been a wilful refusal or neglect on the part of the respondent to maintain himself wholly or in part. He must consider whether or not, under the circumstances, to a man such as the respondent, the offer made is an offer the refusal of which shows a wilful determination on his part not to maintain himself in part. If the condition of work is that the man accepting it must bind himself for a definite time, so that he would not be able to go away and take work elsewhere, or that he must submit himself to matters that a man may properly take objection to, matters of that kind should be considered with regard to the question whether there has been a wilful neglect by the respondent to maintain himself. The case must go back to the magistrate to rehear with this direction. If necessary the prosecution can bring further evidence before him; but I certainly do not think that the magistrate should have convicted upon evidence only that the respondent would not accept the Salvation Army's terms.

KENNEDY J. I am of the same opinion, and I quite share my Lord's views of the impossibility of directing a conviction upon the evidence before us. It seems to me, with the greatest respect to the

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learned magistrate, that the statute has not imposed any very great difficulty upon those who, like the learned magistrate, have great experience in these matters, in saying that the test is to be, can a man being able wholly or in part to maintain himself be said wilfully to have refused or neglected to do so? That is the condition of conviction. There are many circumstances—it would be absurd to try to enumerate even the majority of them—which to my mind would justify a magistrate, although the man is able bodied, in refusing to convict him of wilfully refusing or neglecting to maintain himself. One of them, I think, would be if a man being driven by the pinch of a particular necessity to ask for poor relief were met by an alternative of signing an agreement of service for any lengthened period, at a rate of wage which it might be possible to say would help to maintain him, but binding him to serve possibly at an uncongenial trade or occupation for an indefinite time, and causing him to lose chances of bettering himself. If a man declines under those circumstances to sign such an agreement, if I were the magistrate I should be slow to say he was wilfully refusing or neglecting to maintain himself. In the same way, if it were a condition of the employment that he should go to religious or some other services from which by conscience he was averse, I should think there would be very good ground indeed for declining to convict. Again, if a man whose ordinary occupation had been something of delicate manual industry, and who had by stress of circumstances been obliged to come on the rates, was offered some employment which would destroy or injure his opportunities of earning his livelihood in the skilled industry to which he was accustomed, which, in fact, would ruin his chances in the future, I think that is a matter that might properly be considered by the magistrate. With great respect, I should not, as stated by him, feel myself pressed by the suggestion that the work was merely novel work to which the man had not been accustomed, nor by the suggestion that the rate of wages was less than that ordinarily earned by persons in similar employment. As Lindley M.R. pointed out in *Attorney-General v. Merthyr Tydfil Union* (1900) 82 L. T. 662, it is not a matter entirely between a man and his own interest in getting the same wage as other persons. The man must be regarded as a person who is coming upon the rest of the community to support him, and therefore mere novelty, and mere getting a low wage in itself, I should be slow to consider circumstances which would prevent my saying that the refusal to accept the work was a wilful refusal within the statute. It seems to me the magistrate ought to consider all the circumstances; and if the statute be read—as it seems to me it ought to be read—as asking the magistrate to say on the facts, “Did this

man wilfully neglect or refuse to maintain himself?" I cannot conceive how any consequence such as is suggested could follow: that a man being sent to work outside the workhouse, no matter how unsuitable the work might be, would be liable to conviction under the statute if he refused to do such work. If the work for any reason, either inherent in the work itself or in its condition, was work which a man might reasonably refuse, it could not be said he was wilfully refusing so that the magistrate would be entitled to convict. As it is, I am not satisfied that the magistrate has considered the matter in the plain and simple aspect, but I think he has brought in some considerations which I should not treat as proper considerations, or as decisive against a conviction.

PHILLIMORE J. I am of the same opinion. What the magistrate had to determine was whether the respondent wilfully neglected or refused to maintain himself. The fact that he was offered work by which he could have earned food and shelter and some small amount of money besides is not enough proof that he has refused to maintain himself, because the work may have been offered on unreasonable terms. But if work is offered to a man on reasonable terms, his refusal to accept it may be very good evidence on which a magistrate can hold that it is a refusal to maintain himself wholly or in part. I do not want to go into unnecessary details, but it would seem to me that to a person in the condition of a pauper in the charge of the parish, work offered for any remuneration which would give him shelter and food, and the possibility of renewing his clothes when worn out, if not coupled with extraneous objectionable terms, would be work offered on reasonable terms, though any extraneous objections to the terms, such as undue length of engagement, rigorous conditions of conduct, or anything of that kind, might be very good ground on which the magistrate could find the terms offered were unreasonable. Finally, I should like to say—we have, of course, only heard the case argued upon one side—that I have been utterly unable to see for myself how the terms offered to the respondent in this case could be said to be a violation of the Truck Acts.

Case remitted to the magistrate.

Solicitors for the appellants—C. V. Young and Sons.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

SCOTT v. PILLINER.

1904.

July 12.

Bye-laws—Reasonableness—Good rule and government—Frequenting streets for selling newspapers devoted to giving information as to probable result of races, &c.—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16.

A bye-law for the good rule and government of a county made under section 23 of the Municipal Corporations Act, 1882, as extended by section 16 of the Local Government Act, 1888, providing that no person shall frequent or use any street or public place for selling or distributing any paper devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions, is unreasonable and bad.

So held by Lord Alverstone C.J., and Kennedy J. (Phillimore J. dissentiente).

CASE stated by justices who had convicted the appellant on an information preferred by the respondent charging the appellant for that, on April 19, 1904, at the parish of Handsworth, in the county of Stafford, he did then and there frequent and use a certain street or public place there situate, called Soho Road, and did then and there sell or distribute a certain paper or written or printed matter, to wit, a certain paper called *Midland Sporting Times*, devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions, contrary to bye-law No. 13 (c), being an amendment of and addition to bye-laws for the good rule and government of the administrative county of Stafford, other than municipal boroughs, and contrary to the statute in that case made and provided.

The facts, &c., were stated in paragraphs 4 *et seq.* as follows:—

4. At the hearing of such information, R. G. Pilliner, being sworn, stated:—"I laid the information as superintendent of the Handsworth Petty Sessional Division. I produce a certified and signed copy of the amendment of and additions to bye-laws for the good rule and government of the administrative county of Stafford, other than municipal boroughs (Handsworth is in Staffordshire County, and is not a municipal borough), sealed and signed by two members and clerk of the Staffordshire County Council, countersigned by clerk with memorandum endorsed—submitted to the Secretary of State, and

have not been disallowed. I am proceeding under bye-law 13 (c) for a breach of that bye-law as to the sale of racing tips."

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John Hall, on being sworn, stated:—"I am a sergeant of the police of the Staffordshire police force. The defendant is charged with selling or distributing a paper written or printed devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. I produce a paper called *Midland Sporting Times*, bearing date Tuesday, April 19, 1904. At 11.20 on the morning of April 19 I saw the defendant in the Soho Road, Handsworth, a street in Handsworth, the main road. He had a number of papers under his arm. I saw him sell one to a man who was passing him. I then went up to him, I bought the paper I produce from him, for which I paid 1d. I said to him, 'You will probably be summoned for selling these'; he said, 'All right; my boss will have to pay,' and he pointed to a man named Harris on the opposite side of the street as being his boss. Harris is a blind man. It contains eight columns, and with the exception of four small advertisements it is entirely devoted to sporting news, racing and steeplechasing. The first column is devoted to tips on races and steeplechases, except a portion quoting the betting for the City and Suburban, the Derby, and the Manchester betting. The second column is entirely devoted to tips. Column 3, except a small portion, is devoted to tips. Column 4 is entirely devoted to tips. Column 5 is devoted to racing news, but not tips. Column 6 is partly devoted to tips and the remaining portion to racing news. Column 7, no tips but racing news. Column 8, no tips, some racing news, and several advertisements by betting men, and some other advertisements nothing to do with racing, and two doctors' advertisements on the top of the paper on each sheet." In cross-examination the witness further stated:—"The defendant is a respectable, well-conducted man, a general vendor not employed exclusively for these papers. This is the first summons. I saw him first at 11.20, and then at 12.15 in a different locality. He was in Soho Road when he sold the papers produced. He was frequenting. I have seen him lots of times before and since in this locality. He only had similar papers to this on that day and similar papers on previous occasions. I have seen him more than half-a-dozen times in that street and at this particular spot ever since bye-laws came into operation, and previously on many occasions. It is a daily occurrence in the same street and within 100 yards of the particular spot and at this particular spot. Passing along the same place and the spot. He does not make any lengthened stand at one spot, but up and down the street, and I have seen him at the particular spot on lots of occasions before. He used the road for selling

1904. this particular paper frequently, and on many occasions before and
 Scott v. Pilliner. since the bye-law was passed.

5. The precise terms of the bye-law are as follows:—

13 (c) *Sale of Racing Tips.*

“No person shall frequent and use any street or other public place either on behalf of himself or of any other person for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. Every person contravening any of the foregoing provisions shall be liable to a penalty not exceeding £5.”

6. A copy of the said paper given in evidence is hereunto appended.

7. The appellant called no evidence, but contended:—

(1) That there was no evidence upon which we could properly find as a fact that the appellant had frequented the said street for the purpose of selling the said paper.

(2) That there was no evidence upon which we could properly find as a fact that the paper was wholly or mainly devoted to giving information as to the probable result of races, steeplechases or other competitions.

(3) That the said bye-law was *ultra vires*.

(4) That the said bye-law is unreasonable.

8. We found as facts that the appellant had frequented the said street for the purpose aforesaid, and that the said paper was mainly devoted to giving the probable result of races, and we held that the said bye-law was good and valid, and properly made by the county council of Stafford, and was neither *ultra vires* nor unreasonable. We accordingly convicted as aforesaid.

9. The opinion of this Honourable Court is desired as to whether we, the said justices, upon the above statement of facts came to a correct decision in point of law, and if not, what should be done in the premises. And we respectfully submit the following questions:—

(1) Was there any evidence on which we could properly find that the appellant frequented the said street for the purpose of selling the said paper?

(2) Was there any evidence on which we could properly find that the said paper was mainly devoted to giving the probable result of races?

(3) Was the said bye-law properly made by the county council of Stafford, and is the same valid as being reasonable?

Danckwerts, K.C., and *J. S. Pritchett* for the appellant. This is a question as to the validity of a bye-law made under section 16 of

the Local Government Act, 1888, which gives a county council the same powers of making bye-laws in relation to their county as the council of a borough have under section 23 of the Municipal Corporations Act, 1882. The contention on behalf of the appellant is that the bye-law is *ultra vires*. It has been made in excess of the powers given by section 23 of the Act of 1882, being too general and absolute: *Macdonald v. Lochrane* (1887) 51 J. P. 629. According to this bye-law it would be an offence to sell a paper stating who was likely to be the successful candidate at an examination. It cannot be that the seller, probably a boy, is to decide for himself whether the paper he sells is mainly directed to betting. The bye-law is an attempt on the part of the county council to impose a particular view of moral conduct on the inhabitants of Staffordshire, which is mainly a rural county. It is not an attempt to suppress a nuisance, but to impose a particular view of morality. There is nothing wrong in betting. It is not illegal. This is not a bye-law to prevent betting in the street or public place, as in *Thomas v. Sutters*, 1900, 1 Ch. 10; 69 L. J. Ch. 27. [LORD ALVERSTONE C.J. *Kruse v. Johnson*, 1898, 2 Q. B. 91; 67 L. J. Q. B. 782, lays down the law as it must be applied.]

Avory, K.C., and *W. Shakespeare* for the respondent. This bye-law is intended to prevent betting in the streets. This is its main object. Clearly the sale of racing tips in the streets is likely to induce people who buy them to go and bet with a bookmaker in the street. It is the frequenting and using the street for that purpose that is aimed at. The bye-law only applies to persons frequenting and using the street with these particular papers. It does not hit the ordinary newsvendor. If betting itself in the street may be prohibited by a bye-law, it is only reasonable to suppose that selling racing tips in the street may also be properly prohibited. The grounds upon which the decision in *Thomas v. Sutters*, 1900, 1 Ch. 10; 69 L. J. Ch. 27, was founded apply equally here. All the difficulty is removed by the word frequenting. A man may bet if he does not frequent; but he must not frequent to bet. If it be legitimate to make a bye-law forbidding the business of betting in a street, it is surely equally legitimate and reasonable to make a bye-law ancillary to it for the prevention of street betting.

Danckwerts, K.C., replied.

PHILLIMORE J. Although the power to make bye-laws for the good rule and government of their area was formerly possessed only by municipal corporations, Parliament has now in its wisdom extended this power to county councils by the Local Government Act, 1888, s. 16, in order that they may make bye-laws for the good rule and

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Scott v. Pillinar. government of their counties. If, therefore, in the opinion of the county council new and additional bye-laws are necessary for the good rule and government of the county, I feel strongly that we, sitting as a court of appeal, should not, without some very good cause, interfere with bye-laws framed by the council with that object. It seems to me that it may very well be that there are newspapers which may be circulated in a county whose only information is wholly or mainly confined to racing matters. That being so, it is not in my view unreasonable that a bye-law should be framed to meet this state of things and check the sale of information of the kind. In my opinion, therefore, this was a perfectly reasonable bye-law, and certainly not an unreasonable one. I also think it was clearly *intra vires*, and that we should not interfere with it or with the decision of the justices upon it.

KENNEDY J. I have the misfortune to differ from the judgment of my brother Phillimore, and regret that I feel obliged to come to a different conclusion. This bye-law has been made and framed with a view of subjecting to a penalty any person who frequents and uses any street or other public place, either on behalf of himself or of any other person, for selling or distributing any paper giving information as to the probable result of races, steeplechases or other competitions. Whether such a bye-law as this be *ultra* or *intra vires* turns entirely upon the legal question, as distinguished from any question as to the desirability of such a bye-law. Here in the case before us the conviction under the bye-law was for selling printed matter wholly or mainly devoted to giving information as to the probable result of races, steeplechases or other competitions. But then that is information which may be given without any breach whatever of the law. It is information of a perfectly legal kind, and to many persons it would be perfectly harmless. I am slow, indeed, to think that it is reasonable to prohibit the sale of a paper giving information in itself not illegal, and in most cases harmless, merely because some of the number of persons who buy the paper may be afforded an additional opportunity of betting. But the sole question here is whether the bye-law be reasonable, and not whether betting be desirable or otherwise. In my opinion, this county council cannot forbid the sale in the streets of a paper such as this, although I entirely agree with what has fallen from my brother Phillimore as to the principle that great liberty should be given to authorities empowered to make bye-laws for good rule and government. It is said that we ought to hold this bye-law to be a good bye-law because the sale of the paper may lead to betting on races; but the statements contained in the paper are not *ipso facto* immoral, and in my view it is unreasonable to say that its sale is unlawful and punishable. It is certainly going too far to say that it is

reasonable to prohibit the sale of this paper in the street because the bulk of its information relates to betting. I am, therefore, of opinion that this is an unreasonable bye-law, and cannot be supported. 1904.
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LORD ALVERSTONE C.J. It is with reluctance that I come to the same conclusion with my brother Kennedy that this bye-law cannot be supported. I entirely agree with the principle laid down that bye-laws made by public authorities for good rule and government should never be interfered with if it be possible to support them on legal grounds. But, on the other hand, I think that such bye-laws should be free from two objections, that is to say, from obscurity and from any tendency to turn an innocent act or proceeding into an unlawful one. They must be clear and definite as to the mischief they are intended to prevent, and they must stop short of turning an innocent act into an unlawful one. The real objection to the bye-law as it stands is, in my opinion, that it includes cases of selling papers which do not advance street betting. If this were the only bye-law by which street betting by tipsters could be stopped, and if it were solely confined to the suppression of street betting, I agree it would be an entirely proper bye-law. Had it in this sense been in aid of the prevention of street betting, I should have thought it reasonable. But the bye-law, as at present framed, is too wide, for it brings within its purview the sale, and innocent sale, of papers containing information which would not conduce to any offence. I think a bye-law might be framed, without being unduly restrictive, which might serve the purpose aimed at; but mainly on the ground of the uncertainty as to what a man may or may not sell, and on the ground that it extends to the sale of papers outside the mischief aimed at, I am of opinion that this bye-law cannot be supported.

Appeal allowed.

Solicitors for the appellant—Judge and Priestley, for Philip Baker & Co., Birmingham.

Solicitor for the respondent—H. M. Davis, for Hand & Co., Stafford.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

May 6, 9.

NEW RIVER COMPANY *v.* WESTMINSTER CITY COUNCIL.

Streets—Breaking up to lay pipes—Water mains—Reinstatement of street—Metropolis—Expenses—Charge for supervision—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 114.

Where a metropolitan local authority employ contractors to reinstate streets broken up by a company in pursuance of statutory powers they may, under section 114 of the Metropolis Management Act, 1855, recover from the company not only the sum actually paid by the authority to their contractors, but also a proper additional sum in respect of supervision over the work actually exercised by the authority's officers; for the expenses of such supervision are within the meaning of the section expenses of filling in the ground and making good the pavement.

CASE stated by J. R. W. Bros, Esq., one of the magistrates of the police-courts of the Metropolis, as follows:—

1. The appellants were summoned before me to answer a complaint by the respondents that the appellants did neglect or refuse to pay to the respondents the sum of £89 9s. 8d., made up of sums amounting respectively to (a) £81 6s. 7d. and (b) £8 3s. 1d., alleged to be due to the said respondents for expenses incurred in filling in, making good, and maintaining the pavement in the streets within the city of Westminster where the same had been broken up by the appellants, pursuant to powers contained in the Acts of Parliament authorising the said company to execute work in the said city, during the month of January, 1903, payment of which sum had been duly demanded of the appellants by the respondents.

2. After hearing the case I made an order against the appellants for the recovery (1) of the sum of £73 11s. 11d. in respect of claim (a) of the respondents, and (2) of a sum (to be thereafter assessed if necessary) in respect of claim (b) of the respondents. The appellants being dissatisfied with my judgment as being erroneous in point of law as to (b) have applied to me to state a special case and have duly entered into recognizances. I accordingly state this case for the opinion of the King's Bench Division of the High Court of Justice.

3. By 57 Geo. III. c. xxix. (the General Paving (Metropolis) Act, 1817 [properly the Metropolitan Paving Act, 1817, generally called Michael Angelo Taylor's Act]), s. 23, it is (*inter alia*) enacted as follows:—

That when and as often as any pavement of any streets or public places in any

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parochial or other district within the jurisdiction of this Act shall be broken or taken up by any water or gas light company, or by any commissioners of sewers, or by any person or persons acting by or under their respective orders or authorities, or by any other person or persons by the directions of this Act, or by and with or without the consent of the commissioners or trustees or other persons having the control of the pavements in any parochial or other district wherein any street or public place shall be situate the pavements whereof or any part whereof shall be broken or taken up, then all such part or parts of the pavements of any such street or public place which from time to time and at all times shall be so broken or taken up as aforesaid, and the pavement contiguous thereto, as far as may be rendered necessary in the judgment of a surveyor of pavements to such commissioners or trustees, or other persons having the control of the pavements in such parochial or other district, and after the ground opened shall be refilled and rammed down pursuant to the directions of this Act, shall be with all convenient speed completely and substantially repaved, with all necessary stones, ballast, gravel, and other materials, and shall be kept in complete repair, by the pavior or mason then contracting with or employed by such commissioners or trustees or other persons, or by such person or persons as they may from time to time appoint for that purpose, under the inspection and direction and to the satisfaction of the said surveyor of pavements to the said commissioners or trustees or other persons for the periods following ; (that is to say), all such part or parts of the pavements of any such street or public place, which from time to time and at all times shall be so broken or taken up as aforesaid, and the pavement contiguous thereto as aforesaid, which shall be so broken or taken up for the purpose of making and laying down any main or mains of pipes, or of substituting iron for wooden pipes, or of making any sewer, vault, or drain, for twelve calendar months next ensuing the breaking and taking up of the same pavements ; and all such part or parts of the pavements of any such street or public place, which from time to time and at all times shall be so broken or taken up as aforesaid, and the pavement contiguous thereto as aforesaid, which shall be so broken or taken up for the purpose of altering the position of or of repairing any pipes, stop-cocks, or plugs, or of repairing, cleansing, or altering any sewer, vault, or drain, for three calendar months next ensuing the breaking and taking up the same pavements ; and that the costs, charges, and expenses of taking out any ground, and filling in hard rubbish or other good materials, and of repairing and keeping in necessary repair for the periods aforesaid all or any such pavement in manner aforesaid, and all the expenses of cartage, and all other charges and expenses attending the same, as well as all costs and, charges, which may be incurred pursuant to the directions of this Act by any surveyor of pavements in and about executing and performing any works or matters neglected to be executed and performed by any company or commissioners of sewers, as hereinbefore directed, shall be ascertained and fixed from time to time by the surveyor of pavements to such commissioners or trustees or other persons within whose parochial or other district such works or other matters shall have been performed and executed, or such pavements shall have been broken up and repaved . . .

4. By section 28 of the statute 10 Vict. c. 17 (the Waterworks Clauses Act, 1847), which Act, with the exception of certain sections not affecting this case, is incorporated in the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), power is given to the undertakers (namely, the appellants) to break up streets, &c., under the superintendence of the persons having the control or management thereof

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(namely, the respondents), or of their officer. By section 31 of the said Act it is provided that streets are not to be broken up except under the superintendence of such persons as aforesaid, but if they fail to superintend the undertakers may perform the work without them. And by section 32 of the said Act it is provided that the streets, &c., broken up by the undertakers are to be reinstated by them without delay. By section 34 of the said Act it is provided that in case of delay by the undertakers, other parties (namely, the respondents) "may cause the work so delayed or omitted to be executed, and the expense of executing the same shall be repaid to such persons by the undertakers."

5. By 18 & 19 Vict. c. 120 (the Metropolis Management Act, 1855), s. 114, it is enacted as follows:—

Provided also, that whenever the permanent surface or soil of any street is broken up or opened, it shall be lawful for the vestry or district board of the parish or district in which the same is situate, in case they think it expedient so to do, to fill in the ground and to make good the pavement or surface or soil so broken up or opened, and to carry away the rubbish occasioned thereby, instead of permitting such work to be done by the company or person by whom such surface or soil is broken up or opened; and the expenses of filling in such ground and of making good the pavement or soil so broken up or opened shall be repaid, on demand, to the vestry or board by such company or person.

6. By section 225 of the last-mentioned Act it is enacted as follows:—

In every case where the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by and shall be recovered before two justices . . .

By virtue of the Metropolitan Police Courts Act, 1839, s. 14, and the Summary Jurisdiction Act, 1848, s. 33, the said proceedings may be taken in the Metropolis before a single metropolitan police magistrate.

7. By 25 & 26 Vict. c. 102 (the Metropolis Management Amendment Act, 1862), s. 82, it is enacted as follows:—

In every case in which any company or person shall be liable under the firstly recited Act [the Metropolis Management Act, 1855] to reinstate the pavement, surface, or soil of any street under the control of any vestry or district board which may have been broken up or opened, or to repay to such vestry or board the expenses of reinstating the pavement, surface, or soil of any street, every such company or person shall be liable to reinstate the pavement, surface, or soil, or to pay the expenses of reinstating the pavement, surface, or soil of such parts of the street as shall have been so broken up or opened, as well as of the part or parts contiguous thereto which may be affected by the works of such company or person, to the

reasonable satisfaction of the surveyor for the time being of the vestry or district having control over the pavements in such parish or district.

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8. At the hearing of the complaint the following facts were admitted or proved in evidence :—

(1) That in the month of November, 1901, the respondents issued to the appellants and the other companies and corporations having statutory powers to open up roads a "scale of charges for reinstating trenches" to be made by the respondents after the 31st of March, 1902, in respect of road repairs.

The document annexed hereto and marked J B 1 is a true copy of the said scale of charges.

[The following extract from this document shows its nature :—

" Character of Paving.				Charged at.	
" New kerb supplied and laid				8s. 6d. per lin. yard.	
*	*	*	*	*	*
" 1 in. asphalte footway on concrete ...				9s. od. per square yard.	
*	*	*	*	*	*
				"]	

(2) That in the month of October, 1902, the respondents issued in like manner another "scale of charges for reinstating trenches" to be made by the respondents after January 1, 1903.

The document annexed hereto and marked J B 2 is a true copy of the said last-mentioned scale.

[The document J B 2 was similar to J B 1, with some variations in the figures and in the kinds of paving described, except that at the end of the scale there was the following statement :—

"The above prices will be advanced 10 per cent. on and after the 1st January, 1903, and in addition the annual cost of maintaining the roadways and footways round surface-boxes where the pavement is 'dished' or worn away by the action of traffic consequent upon the fixing of the surface-box will be charged annually, as the city council cannot accept the responsibility for an increased cost of maintenance."]

(3) That the charges made by the respondents in the first-mentioned scale were in excess of the actual amounts paid by them to the said contractors [*Sic.* The reference is really to contractors mentioned later in the case], and were so made by the respondents to cover so-called incidental expenses (*a*) alleged to occur during the execution of the works, and (*b*) which they alleged they were, or might be, put to by reason of the subsidence or failure of the works during the period of the appellants' liability to maintain the same under section 32 of the Waterworks Clauses Act, 1847.

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(4) That the respondents made the subsequent additional increase of 10 per cent. to cover their estimate of the expenses to which they were put for superintending the works during the execution thereof. The second scale of charges did not state the ground on which the additional 10 per cent. was claimed, nor were the appellants informed of the prices in fact paid by the respondents to the said contractors until the statement and evidence in relation thereto were made and given in Court.

(5) That the respondents did in fact exercise some superintendence and supervision over the said works.

(6) That the works in question were executed for the respondents by certain road contractors under contracts based upon a fixed scale of charges. Such charges, so far as they affect this case, are set forth in the document annexed hereto, and marked J B 3.

[This document showed that the actual amount paid to the contractors in respect of the work in relation to which the present claim arose was £73 11s. 11d., the amount for which the learned magistrate gave judgment under head (a) of the respondents' claim.]

9. It was contended before me on behalf of the appellants—

(a) That it was just (within the meaning of section 226 of the Metropolis Management Act, 1855), that the respondents should be repaid only the amounts actually paid by them to the said contractors in respect of the said expenses of filling in the ground and making good the pavement or soil, and that no amount ought to be paid for incidental expenses by way of insurance against future possible repairs or otherwise, but that any future repairs must be dealt with as and when they became necessary; and

(b) That on the true construction of section 114 of the Metropolis Management Act, 1855, the respondents were not entitled to make any charge for supervision or superintendence, although such supervision or superintendence was in fact given, and that the same formed part of the general administrative duties of the respondents.

10. On behalf of the respondents it was contended that by virtue of section 23 of the General Paving Metropolis Act, 1817, the Waterworks Clauses Act, 1847, ss. 31, 32, and 34, the Metropolis Management Act, 1855, s. 114, and the Metropolis Management Amendment Act, 1862, s. 82, the corporation were entitled to be fully indemnified in respect of all the work which they had to do in respect of filling in trenches and restoring the streets to a state fit for traffic, and that the employment of officers to superintend and supervise such work was an ordinary and necessary expense incurred by the corporation in carrying out the work of reinstatement.

11. I was of opinion—

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(a) That it was just that the respondents should be repaid only the amounts actually paid by them to the contractors, and accordingly so ordered, and no appeal was brought from that part of my decision; and

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(b) That in law the respondents were entitled to recover a sum for expenses incurred in respect of the supervision or superintendence of the works, but I reserved the question of the amount to which the respondents were entitled in respect of such supervision and superintendence, and whether the same should be calculated on a percentage or other basis, pending the opinion of this honourable Court as to whether the respondents were legally entitled to make any claim in respect thereof, the question at issue being one that affected the whole of the Metropolis and the corporations and bodies having statutory powers to break up the streets therein.

A true copy of the shorthand writer's notes of my judgment is annexed hereto and marked J B 4, and forms part of this case.

[The document J B 4 was as follows :—

“The Magistrate: I do not propose to deal with the Waterworks Clauses Act further, except in so far as it extends the period to twelve months. In my view the principal Act is the Metropolis Local Management Act, s. 114. There is there power for the vestry to break up the roads and to reinstate the pavements. The practice here, between the parties, is for the water companies to break up the ground and fill in the soil, but for the city, the representatives of the vestry under the old Act, to reinstate the pavement. They can either reinstate the pavement personally—do it themselves—or do it by contract, or they can do it part by contract and part by themselves. Here what they charge for is the contract price plus a sum which they say represents the average reasonable sum for keeping it in repair. I think that the sum that they have made a contract to pay is a fair charge, whether they pay more or less than other boroughs. I do not stop to consider that now. I will take it that they are reasonable sums. But they are only entitled to charge for the expense they have actually incurred. They cannot charge on a question of average what might be a reasonable and probable sum. They must charge the sums they have actually spent. They might also by arrangement between the parties charge the contract sum plus 20 per cent. or 25 per cent., if they like to agree, but it is for them to prove there is such an agreement, which, up to the present, I have had no proof of. An agreement between corporations is a very formal matter, and must be proved in solemn form. I have had no evidence that there is such an agreement.

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Then the question of the 10 per cent. is now the only point I have to consider. The question is really as to whether that is part of the expenses in making good the pavement. If two persons were to arrange that one was to dig a trench and another was to repair the pavement—private individuals—it would be important that they should have somebody, such as a surveyor, to see that the work was properly done. It is to the benefit of both parties that the work should be properly done. The charge of 10 per cent. for supervision, I take it, includes also surveyor's expenses, which, as between individuals, would be charged like a surveyor's or architect's expenses. Whether 10 per cent. is a reasonable sum I have not yet decided, but I think they are entitled to charge a sum for supervision. If 10 per cent. is agreed on as a reasonable sum I think they may properly charge that. I propose to leave open really the question of quantum with regard to the balance. I think I have expressed my view of the law. The matter is important to both parties, and most likely the parties would like to have a case stated in order that they might have a decision of the Court on that point.

Mr. Courthope Munroe: May I say that I appreciate your decision, sir. You hold that the council can recover the prime cost, but no incidentals?

The Magistrate: No incidentals unless they are proved.

Mr. Courthope Munroe: It becomes prime cost then. The contract payments, but no incidentals, but you say they can recover something which has yet to be determined for superintendence?

The Magistrate: Yes.

Mr. Courthope Munroe: By way of percentage, or some other course?

The Magistrate: A percentage is the most convenient way of dealing with that, I should think."]

12. The question for the honourable Court is as to whether my determination as to the respondents' claim to recover a sum for expenses in respect of supervision or superintendence was correct in point of law.

Jelf (Courthope Munroe with him) for the appellants. It is submitted that the local authority have no power, under section 114 of the Metropolis Management Act, 1855, to make an extra charge for supervision where they reinstate a street that has been broken up by a water company. The section states in terms what they may charge, and does not refer to expenses of supervision. Express authority is required to support a charge of this kind: *St. Luke's Vestry v. North*

Metropolitan Tramways (1876), 1 Q. B. D. 760; *Walthamstow Local Board v. Staines*, 1891, 2 Ch. 606; 60 L. J. Ch. 738. If it is intended to empower a local authority to charge incidental expenses of this character against any person or body, the Legislature can find apt words for the purpose: see the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 9 (2). The history of the legislation supports the appellants' contention. Before the Act of 1855 the reinstatement of streets broken up by water companies was, it is submitted, regulated in London, as it still is elsewhere, by the Waterworks Clauses Act, 1847. Under section 32 of that Act, the work is to be done by the water company under the supervision of the local authority, but the local authority cannot charge for such supervision. Section 114 of the Act of 1855 should not be construed as transferring the burden of the expense of that supervision to the water company in the absence of clear provisions in that behalf. There is nothing to prevent the local authority from allowing the water company to do the work themselves, even in London, and in that case the local authority cannot charge for supervision. The respondents may endeavour to rely on the Metropolitan Paving Act, 1817; but the magistrate's decision is on the Act of 1855.

Morton Smith for the respondents. The history of the legislation is in the respondents' favour. The reinstatement of streets broken up by water companies in London was never governed by the Waterworks Clauses Act, 1847. Up to the passing of the Act of 1855 it was governed by the Metropolitan Paving Act, 1817, under which the local authority had to get the work done by contractors and were entitled to recover all the expense to which they were put. All that the respondents claim comes fairly within the words of section 114 of the Act of 1855. [He was stopped.]

LORD ALVERSTONE C.J. This case depends almost entirely upon a question of fact, but still it involves the construction of section 114 of the Metropolis Management Act, 1855. Under the Metropolitan Paving Act, 1817, commonly called Michael Angelo Taylor's Act, the local authority were entitled, when they caused a street broken up under statutory powers to be reinstated, to recover "all . . . charges and expenses attending the same." That would cover the expenses of their men's time and of proper superintendence. The Waterworks Clauses Act, 1847, does not for this purpose apply to the Metropolis. At the time the Waterworks Clauses Act, 1847, was passed, Michael Angelo Taylor's Act of 1817 was in force in the Metropolis, and the Act of 1847 did not exempt water companies from the earlier Act. Then came the Metropolis Management Act, 1855, and Mr. Jelf has

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argued very strenuously and fairly upon the language of section 114, that the words "the expenses of filling in such ground and of making good the pavement or soil so broken up or opened" mean the expenses of the work actually done, and do not mean the expenses of the superintendence of the work. It seems to me that it is really a question of fact, and if the magistrate is of opinion, as he is in this case, that the extra charge is really part of the expenses of doing the work, the local authority are entitled to recover that charge. The magistrate has put it in this way: "The question is really as to whether that"—(*i.e.*, the 10 per cent.—of course, he has not given them 10 per cent., for the amount is to be ascertained)—"is part of the expenses in making good the pavement. If two persons—private individuals—were to arrange that one was to dig a trench and another was to repair the pavement, it would be important that they should have some one, such as a surveyor, to see that the work was properly done. It is to the benefit of both parties that the work should be properly done. The charge of 10 per cent. for supervision, I take it, included also the surveyor's expenses, which, as between individuals would be charged like a surveyor's or architect's expenses. Whether 10 per cent. is a reasonable sum I have not yet decided, but I think the respondents are entitled to charge a sum for supervision." It seems to me that dealing with the matter in a practical way, and assuming the local authority were, as I think they were, entitled to this charge under Michael Angelo Taylor's Act, what the Act of 1855 has said is, that the expenses of filling in the ground and making it good shall be allowed. I agree with the view taken by the learned magistrate that that includes a fair and reasonable charge for seeing that the work is properly done, either by the contractor by whom it is done or by their own men, if they choose to employ their own men. Such a charge comes within the words "expenses of filling in such ground and making good" the pavement, &c. I think the learned magistrate was right, and this appeal must be dismissed.

WILLS J. I am of the same opinion. I suppose the reason why the council of the city of Westminster employ contractors to do this work is that they think it will be more cheaply and better done by persons whose regular business it is, than by their own workmen. Then, if that be so, I should have thought that it followed almost as a matter of course that according to the general principles of human nature and of experience in matters of this kind, no one in his senses, if he were having the work done for himself, would think of giving a contractor a free hand, and of allowing him to do the work without any counteracting influence or supervision to see that it was properly done. If a man builds a house and employs a contractor to do it he is sure to employ

a clerk of the works also to act as a kind of watch dog over the contractor ; and when he comes to ask himself how much his house has cost him, and what has been the expense of building the house, he certainly would throw in the wages of the person employed, and reasonably employed, to check the contractor and see that his work was properly done.

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On these grounds it seems to me it is a reasonable thing to say that the expense of such necessary and reasonable superintendence is part of the cost or expense of filling in the ground and making good the pavement, and so on.

KENNEDY J. I am of the same opinion. It seems to me that we must look at it as a reasonable question, as to whether this should be included under the head of expenses. Now expenses cannot really mean the expenses of merely filling in the ground, and of making good the pavement or soil as manual acts. It includes, surely, a degree of supervision, and skilled supervision, which, looking at the nature of the work, the work requires ; and if it has been honestly expended, the payment so made, and which is now sought to be charged by way of supervision seems to me to be a thing which is reasonable, and the magistrate has expressed it to be so, looking at the particular work.

Appeal dismissed. Leave to appeal.

Solicitors for the appellants—Thompson and Debenham.

Solicitors for the respondents—Allen and Son.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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Buildings—Metropolis—Dwelling-house “to be inhabited or adapted to be inhabited by persons of the working class” — London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), s. 13 (5).

The proviso to subsection (5) of section 13 of the London Building Act, 1894, under which in certain cases “a dwelling-house to be inhabited or adapted to be inhabited by persons of the working class” must be built at a greater distance from the centre of a street than would be necessary in the case of other buildings, refers to two distinct cases, first, that of a house adapted to be inhabited by persons of the working class; and secondly, that of a house “to be inhabited” by persons of that class.

The expression “adapted to be inhabited” refers to adaptation in point of construction. The expression “to be inhabited” means intended to be inhabited.

A house so constructed and situate as to render it practically certain, at the time when it is built, that it will be inhabited by persons of the working class, is a house “to be inhabited” by such persons within the meaning of the section.

CASE stated by a metropolitan police magistrate upon an appeal to him under section 150 of the London Building Act, 1894.

The case originally came before the Divisional Court on May 19, 1903, when it was remitted to the magistrate for further findings upon certain questions.

It will be convenient to set out the case as originally stated, and refer to the alterations made by the learned magistrate, when the case was remitted to him, which related to paragraphs 14 and 15 only, later.

The case, as originally stated, was as follows:—

1. At the hearing of the appeal before me the facts stated in the following paragraphs were either proved or admitted by both parties.

2. The appellant is the district surveyor, under the London Building Act, 1894, for Whitechapel and Spitalfields. The respondent is a builder and owner of house property. On February 10, 1902, the respondent served on the appellant, pursuant to section 145 of the Act, two building notices. By the first the respondent gave notice of his intention to erect in Spelman Street, in the parish of St. Mary. Whitechapel, three domestic buildings to be used as private houses, with shops on ground floors, and containing a basement and four storeys above. The second of such notices was a similar notice in respect

of two domestic buildings, to be used as private houses (but without shops), in Chicksand Street, in the same parish.

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3. On February 25, 1902, the appellant served upon the respondent five notices of objection, pursuant to section 150 of the Act, one in respect of each of such houses. The grounds of objection were in each case that the proposed building, being a dwelling-house to be inhabited or adapted to be inhabited by persons of the working class, was proposed to be erected or re-erected without the consent of the London County Council within a distance of 20 feet from the centre of the roadways to a height exceeding the distance of the front or nearest external walls of such building from the opposite side of the street, contrary to the provisions of section 13 (5) of the Act, as amended by section 4 of the London Building Act (Amendment) Act, 1898, and without providing an open space at the rear of the building, in accordance with the requirements of section 41 of the Act of 1894.

The respondent appealed against such notices of objection.

4. Copies of the notices are annexed.

5. The five houses, the subject of the building notices and objections, were to be erected upon a site bounded on the north by Chicksand Street, on the west by Spelman Street, on the south by Little John Street, and on the east by Little Halifax Street. The widths of these streets were as follows:—Chicksand Street about 35 feet; Spelman Street about 29 feet 6 inches; Little John Street nearly 10 feet; and Little Halifax Street 11 feet. The height of the houses was to be nearly 40 feet, and therefore in the case of Little John Street and Little Halifax Street considerably exceeded the distance of the front wall of the house from the opposite side of the street. I did not determine whether the height was or was not excessive in the case of Chicksand Street and Spelman Street. All the houses were less than the prescribed distance from the centres of the roadways.

6. On February 13, 1902, the respondent produced to the appellant plans of the basement, ground, and first floors of the houses. Subsequently, on February 24, 1902, the respondent produced to the appellant certain further plans showing in pencil the upper parts of the houses.

7. Some time in the year 1900 the respondent acquired the three blocks of old houses lying between Chicksand Street on the north, Spelman Street on the west, Finch Street on the south, and Casson Street on the east. These old houses were small ones, consisting of a basement and two floors above, and, like most other houses in the immediate neighbourhood, were inhabited chiefly by persons of the working class. The respondent then proceeded to clear the site preparatory to rebuilding.

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8. The site to which the present appeal relates was the smallest of the three sites above referred to. Before dealing with this site the respondent prepared plans of the fourteen old houses by which it was occupied, and duly procured those plans to be certified by the appellant as district surveyor under section 13 (5) of the Act.

9. The respondent did not disclose or intimate to the appellant any change in the plans above referred to as having been produced to the appellant on February 13 and February 24 (hereinafter referred to as the first set of plans), but upon the hearing before me the respondent produced revised plans, embodying certain alterations, and stated that it was his intention to erect the houses according to such revised plans. The alterations were, in substance, that all five houses were to be built with shops instead of only three of them, and that the basements were altered so as to provide the air space required by section 41 (2) of the Act: for example, in the case of house No. 5 the two habitable rooms shown in the basement were thrown into one, and one of the two fire-places done away with, and in this way the requisite air space was provided. I find, if necessary, that these alterations were made with the object of bringing these houses within the protection of the decision in the case of *London County Council v. Davis* (1898) 77 L. T. 693; 62 J. P. 68, hereinafter referred to, and for the purpose of providing the air space above referred to.

10. The appellant relied upon certain features of the houses as showing that they were adapted and intended to be occupied by persons of the working class. These features were in the case of house No. 1, which may be taken as an example, as follows:—(a) The large number of rooms, viz., thirteen; (b) the number of w.c.'s., viz., three, being one in the basement, one on the ground floor, and one on the first floor; (c) the presence of what are called "passage rooms," that is to say, rooms arranged in pairs, so that the inner room is only approached by passing through the outer room, and therefore adapted to be let together as a sitting-room and bedroom; (d) the number, viz., three, of sinks or basins and corresponding water taps, one in the basement, one on the ground floor, and one on the first floor; (e) the separate entrance giving access to the house without passing through the shop; (f) the absence of the conveniences usual in a house of this size intended for occupation by a single family, that is to say, the absence of any coal cellar, pantry, larder, wood store, scullery, bath-room, lavatory, or hot water service.

11. Ten of the houses above, in paragraph 7, referred to as having been erected by the respondent upon the largest of the three sites (viz., ten houses in Casson Street) were substantially similar to the houses the subject of this appeal (except that they contained no

shops), and were described in the building notices given by the respondent to the appellant in respect of them, as "domestic buildings to be used as private houses." Each of these houses had been fitted with three cooking ranges, one in each of the two basement rooms and one on the second floor, and three sinks.

12. The respondent produced an agreement, dated March 10, 1902, for letting house No. 1 to a Mr. Isaac Barr for twenty-one years at a yearly rent of £150 and a premium of £100. He also produced an agreement dated December 12, 1901, for letting house No. 3 to a Mr. Goldstein for twenty-one years (determinable as therein provided) at a yearly rent of £115. I was not satisfied that either Mr. Barr or Mr. Goldstein was in a position to pay the rent of his house without letting off some part of it.

13. The immediate neighbourhood is almost entirely inhabited by persons of the working class, and the surrounding circumstances are such that in all probability the houses, when finished, would be occupied chiefly by persons of the working class. At the time the respondent gave the building notices in respect of these houses he knew that they would in all probability be occupied chiefly by persons of the working class.

14. [This paragraph was altered on the re-statement, as hereafter appears.] The houses when completed would not be specially adapted for inhabitation by persons of the working class only. They would be suitable for occupation by any persons living in a small way, whether belonging to the working class or not.

15. [This paragraph was altered on the re-statement, as hereafter appears.] There is no definition in the London Building Act, 1894, of the term "persons of the working class," and it is used throughout this case in the sense in which it is ordinarily used and accepted.

16. No consent to the erection of the houses was obtained by the respondent from the London County Council.

17. The appellant contended that the proposed houses were dwelling-houses, to be inhabited or adapted to be inhabited by persons of the working class, within the meaning of the proviso to section 13 (5) of the Act, and that the building of them would, therefore, be work done in contravention of the Act, and that the present case was distinguishable upon the facts from *London County Council v. Davis* (1898) 77 L. T. 693; 62 J. P. 68.

18. The respondent contended that the present case was governed by *London County Council v. Davis*.

19. I was of opinion that the respondent had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by anyone who would take them.

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I was further of opinion that the present case was governed by *London County Council v. Davis*. I therefore decided to disallow the appellant's objections, and allow the appeal.

20. The question of law for the opinion of the Court is whether, upon the facts above stated, my decision was right in law.

21. If the Court shall be of opinion that my said decision was right in law, the respondent's appeal is to stand allowed; but if the Court shall be of opinion that my decision was wrong in law, the appellant's objection is to be affirmed.

At the hearing on May 19, 1903, the following judgments were delivered:—*

LORD ALVERSTONE C.J. This case presents to my mind very considerable difficulty. It may be said, and is very properly urged by Mr. Cripps, that it is a finding of fact, and that, subject to something to which I am about to refer, being a finding of fact by the learned magistrate, and there being evidence in support of those findings of fact, we ought not to interfere. If that were the true view of the case, whatever might be my own feelings about the decision which I should come to upon the questions of fact, I should not think that any further action ought to be taken in the case. But then it is said that if these findings of facts stand, then the case is governed by the case of the *London County Council v. Davis* (1898) 77 L. T. 693. I am rather inclined to think that that is so; I am rather inclined to think that if the findings of fact are held to be findings of fact not to be reviewed by this Court, and that not being under review by this Court, that the principles of law which are referred to in *London County Council v. Davis* would apply to this case. But, after listening to the arguments of Mr. Avory and Mr. Cripps, I have come to the conclusion that the case requires further consideration by the magistrate. I am not satisfied myself that the learned magistrate has applied the proper test to either of the two questions of fact; or, in other words, I think it is quite possible—and I say no more than that, speaking of one of such great experience, and who may possibly make his meaning more clear on further consideration—I think it is quite possible that he may have misdirected himself with regard to the way in which he has approached the question of fact, and has thereby misdirected himself in law. His first finding is: "The houses, when completed, would not be specially adapted for inhabitation by persons of the working class only. They would be suitable for occupation by any persons living in a small way, whether belonging to the working class or not." Now I confess I really do not quite understand what that means; if

* The judgments are taken from the shorthand notes of the proceedings.

it means a class of persons who would be liable—whose surroundings and families and whose living—would be liable in some respects to the overcrowding that was contemplated, no doubt, in connection with this legislation, I should have doubted whether it would have made any substantial difference, and, speaking for myself, I am rather inclined to think that on this question of adaptation the kind of question that ought to be considered by the learned magistrate would be whether it was adapted for habitation by persons who would live as the working classes do, that is to say, in small flats or separate tenements all, so to speak, in one house. But I do not want to appear to criticise the findings of fact too much; I want to point out why I cannot help thinking that if the learned magistrate has not approached the question of adaptation, as specified by the statute, exactly from what I have called the right point of view, he may have gone wrong in his application of it to the facts, the words, of course, for this purpose being “adapted to be inhabited by persons of the working class.” He has enumerated a number of main features in the house—the large number of rooms, for instance—indicating that in such a locality it would not be likely to be occupied by one family; the number of water-closets there, which was perhaps not in itself at all excessive, but one was on the ground floor, one in the basement, and one on the first floor. Then he refers to the presence of the passage rooms, and to the number of sinks or basins, and water taps, and the absence of such ordinary domestic conveniences as would be found in a house that would be let out for occupation if the person was not going to take in lodgers. I think that if the true view of this section is that you have got to see whether the house is adapted to be inhabited by persons of the working class (meaning thereby a class of persons who would live in two or three rooms in a house for the purpose of doing for themselves in these rooms without having any connection at all with the rest of the house), then I think it might be quite possible that the learned magistrate, in considering the question of “adapted to be inhabited by persons of the working class” only, has excluded from his mind some of the broad considerations that he ought to have considered with reference to the overcrowding or the crowded inhabiting of houses of this class. I think that the words that he has added on—“persons living in a small way, whether belonging to the working class or not”—leave one in doubt as to whether he has properly considered the question from the point of view of the structure of the house, from the point of view of the adaptation of the house for the purpose contemplated in the section.

Now I pass on to another finding of fact, which, I agree with Mr. Cripps, if it is to be taken as binding upon us, is, I think, conclusive

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under the case of *London County Council v. Davis*, with reference to the question of intention. I agree with what has been said both by Hawkins J. and by Channell J. in that case, that the words "to be inhabited" must mean "intended to be inhabited." Now the finding is, "The respondent had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by anyone who would take them." That seems to me to exclude what I may call the natural consequences of the way in which the houses would be occupied, as they were built and constructed. If he constructed them in such a way that it was practically certain that they would only be inhabited by persons of the working classes, then the fact that he intended them for occupation by anyone who would take them, meaning thereby that some persons would come along who might be willing to take a particular house out of a series, and not occupy them or not underlet them for the purposes of the working classes, would not be sufficient. But, coupling that, as I do, with the statement in the case that he does not think either of the persons would have taken those houses for the purposes of occupation if they were not going to underlet part, it seems to me that he may have excluded from his consideration the question of whether or not the houses, as constructed by the respondent, were intended to be occupied by persons of the working class, even although there may have been an intermediate tenant. Of course, I am aware how difficult it is, but I do not think that this Act of Parliament merits the amount of opprobrium that has been cast upon it, because I know how difficult it was; it was a very great work, and the result of the deliberations of a great many men. Therefore I am not surprised to find in such an Act of Parliament certain difficulties, whoever drafted it. I only say that, introduced as it was, there is no wonder that there should be certain difficulties arising under it; but I doubt whether in this case, applying the ordinary considerations to those words, the learned magistrate has not gone too far by limiting the scope of that adaptation and by limiting the scope of the intention, which is indicated, as I have said, by the introduction of the words "special" and "only" with regard to adaptation, and by the word "only" with regard to intention. I hope I have said something that will make my meaning clear, although I daresay many people will say that I have not. It is because I think that the learned magistrate has not sufficiently considered those two phrases from a sufficiently broad standpoint that I think there ought to be a further consideration of the matter by him. Perhaps I might indicate my view by putting it in another way. I think he has rather felt himself bound by the finding of fact in *London County Council v. Davis*, as well as by the finding

of law. I must say, speaking for myself, that if I had to treat this matter as a question of fact, on the facts of this case, both from the point of view of adaptation and intention, it seems to me to be far stronger in favour of the view that the houses were intended to be inhabited and adapted to be inhabited than they were in *London County Council v. Davis*. 1904.
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I think, therefore, the case must go back to the learned magistrate for further examination, and, if necessary, a further finding of what he means to find under those two questions to which I have called attention.

WILLS J. I am of the same opinion. It may very well be that the learned magistrate may arrive at the same conclusion that he has already arrived at, but I cannot help feeling what I have felt for a long time during this discussion, that apparently—I only say apparently, however, because no one but himself can tell how far it has gone—apparently, I say, he has put too much stress on that word “only” in both branches of the matters for his consideration, both with regard to adaptation and with regard to intention. With regard to adaptation, it seems to me that it is difficult to say that it is necessary that they should be adapted only to persons of the working classes if they are adapted substantially for persons who are liable to the same difficulties in respect to overcrowding, and who in that sense belong to the same class as the working classes. Then with regard to intention, I cannot help thinking that what he means is that the person who built them, or the person who was intending to build them, was indifferent as to who should be his tenants so long as he could let them; but that their ultimate destination, in whosoever's hands they were, was that they were to become working-class tenements, or to be occupied by persons of the working class, because he has found, in terms, that in all probability the houses when finished would be occupied chiefly by persons of the working class. I think that he knows that, and I think he has found that, if I remember rightly—yes, I see that he has found it in the same paragraph. If he meant that, it is difficult to say that he did not contemplate it. He intended that they should be occupied by persons of the working class; therefore he intended them for persons of the working class.

CHANNELL J. I agree; but I prefer, I think, to base my decision upon the ground that the 14th paragraph of the case, as to the adaptation for persons of the working class only, is not satisfactory, and it does not seem to me to bring the case within what I personally think I meant, and what I think my learned brother Hawkins also meant, in the case which has been referred to. In that case there was a finding, as appears on page 694, that the construction of the house

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"was that of a shop in front upon the ground floor with living rooms behind it. The rooms upon the upper floors were fitted with ordinary grates, and the water and sanitary arrangements were placed in the ordinary positions." Upon that I, at page 698, in stating my view of the facts, said that: "It seems to me that, having regard to the fact of the shops being there, the natural living for which that dwelling-house was adapted for is the use of a man who takes the shop and his family. It is, at any rate, not too large; there is nothing in it to indicate anything to the contrary. That being so, it does not come within 'adapted to be inhabited.'" The inference drawn there from the facts was that it was a place adapted for occupation by one family, the shopkeeper who kept the shop and his family. In the present case the learned magistrate apparently has found, and on the facts that he has set out reasonably found, that this house was specially adapted in its construction for separate occupations, occupations of persons living in a small way, by which I suppose he means living in some apartments or suite of apartments; but whether these persons, so living in a small way, belong to the working class is another thing. Then he proceeds to tell us what he thinks is meant by the words "the working class," namely, that it is in the sense in which the words are ordinarily used. If he means to find that these buildings were specially adapted in their construction for occupation as small dwellings, not that the shop and the rooms above it were to be occupied together, but specially adapted to the other, I should have thought that he had found facts which would bring it within this provision, because I do not see, as I said on the former occasion, as the learned magistrate says, how you can say that a room is specially adapted for a man belonging to the working class as distinguished from a clerk or any person of small means, but earning his own living in any way. It must mean, I think, so adapted for separate dwellings, as that it is likely that a large number of persons would be living in the house, and if so it comes within the mischief of the Act.

The case was accordingly remitted to the magistrate for further consideration, with power to re-state it if he thought it necessary.

It now came before the Court with the following amendments made by the learned magistrate:—

In the place of paragraph 14, which is held to be unsatisfactory, the following paragraph is to be substituted:—"14. The houses, when erected, would be capable of being inhabited by persons of the working class, that is to say, that the various rooms in the house could be occupied by different families or persons, but there was no such provision for occupation by different families or persons as exists in the

case of model dwellings, flats, or tenement houses. Each of the said houses would also be capable of being inhabited by one family only." 1904.
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In paragraph 15 of the case, instead of the words "in the sense in which it is ordinarily used and accepted," the following words shall be substituted: "As meaning any persons living in a small way, whether engaged in manual labour or not."

With regard to the words in subsection (5) of section 13 of the London Building Act, 1894, "to be inhabited by persons of the working class," I understand them to mean *intended to be or for the purpose of being inhabited by persons of the working class*. If I understand correctly the opinion as expressed in the judgments of the learned judges, the principles I ought to apply to the facts as stated in the case are as follows: Where a person proposes to erect a house in a locality almost entirely inhabited by persons of the working class which would when erected be capable of being so inhabited, and which would in all reasonable probability be ultimately so inhabited, such person having a knowledge of the locality and of the probability, it ought to be held that the house is one "to be inhabited or adapted to be inhabited by persons of the working class" within the meaning of subsection (5) of section 13 of the London Building Act, 1894. If I have correctly stated the principles which I am directed to apply to the facts as stated in the case, then I am of opinion that the houses in question come within the words of the statute, and that the objection of the appellant ought to be affirmed, and I respectfully ask the Court to remit the case to me for this purpose. If, however, I have not correctly stated them, then I respectfully ask the Court to remit the case to me with such further opinion or directions thereon as the Court may think proper.

Avory, K.C., and Daldy for the appellant. This case was on the previous hearing in May, 1903, sent back to the learned magistrate with the direction that he had misunderstood the effect of the decision in *London County Council v. Davis* (1898) 77 L. T. 693. The appeal to the magistrate was under section 150 of the London Building Act, 1894, the matter at issue being whether certain dwelling-houses were dwelling-houses "to be inhabited or adapted to be inhabited by persons of the working class" within the proviso to section 13 (5) of the Act. The learned magistrate thereupon allowed the owner's appeal, having found, as originally stated by him in paragraph 14, that "the dwelling-houses when completed would not be specially adapted for inhabitation by persons of the working class only. They would be suitable for occupation by any person living in a small way,

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whether belonging to the working class or not." The Court was then of opinion that the magistrate had not applied the proper test to the two questions of fact, and that he might have misdirected himself by limiting the scope of the adaptation by the words "specially" and "only." The case was sent back to the magistrate with that intimation, and paragraph 14, as it now stands, shows that he finds the houses would be capable of being inhabited by different families or persons of the working class, and were also capable of being inhabited by one family only. The necessary conclusion from that finding is that the objection of the district surveyor must prevail. "To be inhabited" in the proviso means "intended to be inhabited."

Cripps, K.C., and *Clavell Salter, K.C.*, for the respondent. If this construction be upheld it will prevent the building of houses for working classes in a working-class district. The learned magistrate has made no alteration in his finding in paragraph 19 of the case; he is still of opinion that the respondent had no intention that the house should be occupied by persons of the working class only, but that he intended them for the occupation of anyone who would take them. On the last occasion the Court thought the present case was governed by *London County Council v. Davis*. The London Building Act, 1894, did not aim at turning all newly built houses in a working-class district into working-class dwellings. If these houses had been erected in the ordinary way for working-class dwellings, they fall within the section; but if they have not been so erected, they do not. The *onus* is upon the appellant to show that they were so erected, and that they were intended to be occupied by the working classes.

LORD ALVERSTONE C.J. I am glad to know that this case can go to the Court of Appeal, so that any opinion I may express can be the subject of review. No one can consider it to be a clear case or free from difficulty, but I may say that this further statement of the case by the magistrate, and the further argument that we have heard to-day, has confirmed me in the view which I took on the last occasion, namely, that the learned magistrate had applied too narrow a ruling. As to whether the actual expression of his present opinion is correct or not, I will say a word or two in a moment.

When the case was last before us, Mr. Cripps most naturally contended that paragraph 14 stated the other side out of Court. It ran as follows: "The houses, when completed, would not be specially adapted for inhabitation by persons of the working class only. They would be suitable for occupation by any persons living in a small way, whether belonging to the working class or not." He contended that that was, on the question of adaptation, a conclusive finding against the appellant. He further contended that the appellant was also

stated out of Court by the finding in paragraph 19: "I was of opinion that the respondent had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by anyone who would take them. I was further of opinion that the present case was governed by *London County Council v. Davis*. I therefore decided to disallow the appellant's objection, and to allow the appeal." Without repeating at length everything I said on the previous occasion, I desire to repeat that I think the objection to Mr. Cripp's argument is that it of necessity overlooks the fact that the section contemplates two states of things, the first being that the dwelling-house is "to be inhabited," and the other that it is "adapted to be inhabited" by persons of the working class, and I repeat that I understand the words "to be inhabited" to mean "intended to be inhabited," as was pointed out by Mr. Justice Hawkins, as he then was, and by my brother Channell in *London County Council v. Davis* (1898) 77 L. T. 693. Now the case as re-stated, I think, re-affirms in rather different language the finding that the houses were not specially adapted, if I may use that expression in order to make my meaning clear. The new paragraph 14 is in these terms: "The houses when erected would be capable of being inhabited by persons of the working class, that is to say, the various rooms in the house could be occupied by different families or persons, but there was no such provision for occupation by different families or persons as exists in the case of model dwellings, flats, or tenement houses. Each of the said houses would also be capable of being inhabited by one family only." I think, therefore, that that in its altered form equally negatives what I may call the special adaptation of these houses. Then Mr. Cripps says that the learned magistrate has left paragraph 19 unaltered, and therefore he is still entitled to say that the respondent had no intention that the houses should be occupied by persons of the working class only. I think that is also true. But then the language of the learned magistrate in that which he has added seems to me to show that although he has not altered the language of paragraph 19, he has pointed out that he had laid too much stress on the word "only" in that paragraph, and that that was not the proper test. Now I said in the course of my judgment when the case was originally heard that, having read that paragraph 19, it seemed to me to exclude what I may call the natural consequences of the way in which the houses would be occupied as they were built and constructed. I appear to have said that, "if the respondent constructed them in such a way that it was practically certain that when constructed they would only be inhabited by persons of the working class"—I daresay I did use the

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word "only"; but what I meant was, constructed in such a way that they would be inhabited by persons of the working class, and whether the word "only" is inserted in the passage or not really does not make much difference—"then the fact that he intended them for occupation by anyone who would take them, meaning thereby any person who might come along and might be willing to take a particular house out of a series and not occupy it or underlet it for the purposes of the working classes, would not be sufficient," I should have added, "to prevent the houses from being houses that were intended to be inhabited by persons of the working class." Though I failed to make it clear, I was not dealing with the question of adaptation, but with that of intention. That being so, what does the magistrate say on the question of intention? He says this: "Where a person proposes to erect a house in a locality almost entirely inhabited by persons of the working class which would when erected be capable of being so inhabited, and which would in all reasonable probability be ultimately so inhabited." I think the word "ultimately" makes the proposition too wide; it would include the destination of the houses many years after. But I do not think the learned magistrate meant by putting in the word "ultimately" to deal with the condition of the houses after any lapse of time, because of what he says afterwards. He goes on to say, "Such person having a knowledge of the locality and of the probability, it ought to be held that the house is one 'to be inhabited or adapted to be inhabited by persons of the working class' within the meaning of subsection (5) of section 13 of the London Building Act, 1894. If I have correctly stated the principles which I am directed to apply to the facts as stated in the case, then I am of opinion that the houses in question come within the words of the statute, and that the objection of the appellant ought to be affirmed." I understand that to mean that he comes to the conclusion that the houses situate as they are with the accommodation, of which he has specified the peculiarities, were houses which it was practically certain, when they were constructed, would be used by persons of the working class. I think that that finding brings the case within the provision as to the erection of houses to be inhabited by persons of that class, and therefore I think that the argument put forward on behalf of respondent fails, and that upon the re-stated case the appeal ought to be allowed.

WILLS J. I am of the same opinion. I confess I feel considerable difficulty in saying that the appellant is now entitled to have the appeal allowed in face of the fact that I do not think the magistrate has quite properly or sufficiently directed himself. If that be so, and if it be correct that the direction to himself is not quite what it ought to be, then it seems to me that the natural consequence

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would be that it must go back to him again. I quite agree with the view that my Lord has taken. I think that "to be inhabited" and "adapted to be inhabited" as dwelling-houses for "the working class" constitute two distinct conditions. I think the first means "intended to be inhabited," and I think the second means in some respects having features of construction which point to use by persons of that class as the natural use. Then I agree with my Lord again in thinking that the second branch of the proposition is negatived by the finding of the magistrate that this is not a building which, within the meaning of that section, is adapted to be used as a dwelling-house for the working classes. Where I differ from the magistrate is in this: I think in the first place that the words, "which when erected would be capable of being used by them," which he uses, come to very little and mean very little. I should not quite agree with Mr. Cripps that every house is, within any sensible construction, capable of being used as he suggests, although, of course, in one sense it is—I mean in the sense that the occupants would have a roof over their heads under which they might be sheltered. Certainly the arrangements, we will say, of a large house in the West End of London are hardly such as would make a house of that class, without alteration, in ordinary parlance capable of being so inhabited. But I think it would be more correct if in place of such an expression as being "capable of being so inhabited" we were to read "would naturally be so inhabited." Then I think that the word "ultimately" ought to be expunged from this direction. It goes a great deal too far. It might cover a case in which at the present moment it would not be at all likely, yet perhaps in the course of a few years anybody might say with reasonable certainty that would be its destination. I think if those corrections are made, and if the rule be accepted as laid down by my Lord, and if the magistrate still thinks that he ought to come to the conclusion that the houses are within the words of the statute, so be it. I do not think it is clear from what is stated in the case; but if his direction is so corrected, and if he applies to the facts the specific direction given by my Lord's judgment, it is by no means uncertain that he will come to the same conclusion.

LORD ALVERSTONE C.J. I think I ought to say that I agree entirely with the view which my brother Wills has taken, and I think the case must go back to the magistrate to be dealt with on that direction.

KENNEDY J. I agree, and I only desire to add a few words because I had not the advantage of hearing the case argued before. I agree that the case must go back to the learned magistrate with our assent to the proposition in the amended case, altered, as it should be, according to the directions given by my Lord. Practically it would come to this

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—that the proposition ought to be: "Where a person proposes to erect a house in a locality almost entirely inhabited by persons of the working class which would when erected be so inhabited, or which in all reasonable probability would be so inhabited," and so on, leaving out the word "ultimately," and possibly with advantage leaving out the words, "capable of being." On the first question it seems to me that we are deciding nothing contrary to *London County Council v. Davis* (1898) 77 L. T. 693. I think, reading the section we have to construe, as far as the context permits one, in a natural and not in an artificial sense, we must take the Legislature to mean two different kinds of things by the two branches of the section in question which are separated by the word "or," "provided always that no dwelling-house to be inhabited or adapted to be inhabited by persons of the working class shall," and so on. Now, are the premises in question adapted to be inhabited? I am not prepared to say on the magistrate's finding that they are not so adapted, because it is all very well to insert the word "specially"—it is all very well, as was put in the original case, to say that they would not be specially adapted for inhabitation by persons of the working class only; but neither the word "specially" nor the word "only" appears in the section, and I cannot see why they should be inserted. The magistrate has to deal, as he himself points out in the amended case, with all the circumstances—the circumstance of knowledge of the locality, the circumstance of knowledge of the class of inhabitants of the locality, and the nature of the building in its various details. Is it adapted? It is found that while, no doubt, there is "no such provision for occupation by different families or persons as exists in the case of model dwellings, flats, or tenement houses," the buildings are "suitable for occupation for any persons living in a small way, whether belonging to the working classes or not"; in other words, that they are, to my mind, adapted for persons of the working class. Passing from the question of adaptation, we come to "to be inhabited," and I shall add nothing to what has been said on that point, because it seems to me that the magistrate, with the modified direction which the Court has intimated that he should give himself, should have quite enough to justify the finding to which he has come that these dwelling-houses were dwellings "to be inhabited," that is, intended to be inhabited by persons of the working class, because he finds that the houses, when finished, in all probability would be occupied chiefly by persons of the working class, and he finds that the builder knew that there was such a likelihood; and that if the direction which he sets out, and to which I have referred, is the right direction to apply, then the houses

come within the words of the statute, and that the appellant's objections ought to be sustained. I can find nothing in the facts as stated which would make that finding improper, and I think the finding is sufficient to bring the case within the words of the section. 1904.
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Case remitted.

Solicitor for the appellant—W. A. Blaxland.

Solicitors for the respondent—Woodcock and Rylands.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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June 30.

COURT OF APPEAL.

Re FARNHAM'S SETTLEMENT. THE LAW UNION AND CROWN, INSURANCE CO. v. HARTOPP.

Tenant for life and remainderman—Costs of sanitary works—Notice served on "owner or occupier"—Works carried out by tenant for life under agreement with trustees—Subrogation—Permanent Improvements—Charge on Corpus—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 4, 5 (9), 11, 121, 141.

Notice was served under the Public Health (London) Act, 1891, upon the trustees of certain settled property as the owners of the premises to do certain sanitary work upon the premises. The plaintiffs, who were the assignees of the life interest of the equitable tenant for life, agreed with the trustees that they would themselves do the work without prejudice to the question who was liable to pay for it, and they carried out the work.

Held, that, having regard to the arrangement that had been come to, the plaintiffs were in the circumstances of the case entitled to be subrogated to the rights of the trustees, and to have a declaration of charge on the corpus of the estate for so much of the money expended by them as had been spent upon permanent improvements, and for the costs of the application and of the appeal.

Decision of Kekewich J. reported 2 L. G. R. 668, reversed on other grounds.

Semble, in determining how the expenses of repairs of this kind ought to be borne as between the tenant for life and the remainderman, the Court is not bound by any hard-and-fast rule, but has a discretion, and can enquire into the nature of the repairs and the circumstances of the case.

APPEAL from a decision of Kekewich J., reported 2 L. G. R. 668.

The plaintiffs were mortgagees of the life estate of William Farnham, the tenant for life under the trusts of a settlement dated November 6, 1882, and they had foreclosed his interest. They now took out a summons asking that the sum of £255 19s. 10d., expended by them in carrying out certain sanitary works on certain premises in the City of London, a portion of the property subject to the trusts of the settlement, pursuant to notice under the Public Health (London) Act, 1891, might be paid by the trustees of the settlement out of the capital moneys in their hands subject to the trusts of the settlement. The summons was intituled, "In the matter of the Settled Lands Acts, 1882 to 1890," as an additional title.

The defendants to the summons were the trustees of the settlement and persons beneficially entitled in remainder who were infants. The

property in question was under the settlement subject to a trust for sale with the consent of the tenant for life.

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The notice under the Public Health (London) Act, 1891, was served upon the trustees, who were the persons in possession of the property, in November, 1902. The work required to be done was the setting right of defective drains. The trustees had at the time no capital moneys in their hands. Some correspondence took place between the plaintiffs and the trustees, the result of which was that the plaintiffs took upon themselves the duty of completing the sanitary works without prejudice to the question of who was liable to pay for them, and they spent £255 19s. 10d. in carrying out the works. The work involved the relaying of a portion of the drains of the premises. The plaintiffs alleged that the works were in the nature of permanent improvements, and in no way in the nature of ordinary repairs.

Kekewich J. made no order on the summons, except that the trustees should out of the rents of the hereditaments coming to their hands during the life of the tenant for life retain their costs and pay the costs of the guardian *ad litem* of the infant defendants; the order being without prejudice to any future application by the plaintiffs, when the trustees had any capital moneys in their hands, to be allowed the expenses in question out of the capital moneys as expenses of improvements within the meaning of the Settled Land Acts.

The plaintiffs appealed, and asked for a declaration that the liability to pay the £255 19s. 10d. ought to be borne by *corpus* and not income of the settled property, and that that sum and the costs of all parties might be raised by a charge on the settled property.

Badcock, K.C., and *E. S. Ford* for the appellants. It cannot make any difference whether the application is made by the tenant for life or the trustees. An order should be made which does justice between the two parties. In the ordinary way such works as these would be paid for out of capital: *In re Lever*; *Cordwell v. Lever*, 1897, 1 Ch. 32; 66 L. J. Ch. 66. Kekewich J. considered that the plaintiffs did not come within that case, as it went upon the principle of indemnity to the trustees; but the plaintiffs are entitled to be subrogated to the rights of the trustees.

[*COZENS-HARDY L.J.* Is not that case inconsistent with *In re Copland's Settlement*; *Johns v. Carden*, 1900, 1 Ch. 326; 69 L. J. Ch. 240?]

The point was not really argued there—the tenant for life was only entitled to a small improved ground rent. Moreover, that case is not quite consistent with *In re Thomas*; *Weatherall v. Thomas*, 1900, 1 Ch. 319; 69 L. J. Ch. 198.

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Under the Public Health (London) Act, 1891, a local authority can serve a notice to abate a nuisance on the owner or occupier of premises, and the expenses can be recovered from the owner or occupier, and the owner within the Act is the person receiving the rack rent of the premises, whether on his own account or as agent or trustee: see sections 4, 11, 121, 141. The liability is really on the owner for the time being, as the occupier can, subject to any agreement with the owner, deduct what he pays from his rent.

The works done in *In re Lever* were exactly the same as those in the present case, and there is really no difference between that case and this. The distinction drawn by Kekewich J. was one of form, not of substance.

[COZENS-HARDY L.J. That case does not seem consistent with *In re Tucker's Settled Estates*, 1895, 2 Ch. 468; 64 L. J. Ch. 513.]

That was a case under the Settled Land Acts. The plaintiffs do not put their case solely under the Settled Land Acts, but also under the general jurisdiction of the Court. Their claim is rather in the nature of a salvage claim. If they had not done the work, the local authority might under subsection (9) of section 5 of the Act of 1891 have entered and done it themselves, which would in the end have probably been more expensive. That is a reason for charging the expenses to capital: *In re De Teissier*; *De Teissier v. De Teissier*, 1893, 1 Ch. 153, 161; 62 L. J. Ch. 552, 554, and *In re Willis*; *Willis v. Willis*, 1902, 1 Ch. 15; 71 L. J. Ch. 73. The Court cannot interfere with an equitable tenant for life on the ground of permissive waste: *Powys v. Blagrave* (1854-5) Kay 495; 4 De G. M. & G. 448; 24 L. J. Ch. 142. There are other cases consistent with *In re Lever*:—*In re Barney*; *Harrison v. Barney*, 1894, 3 Ch. 562; 63 L. J. Ch. 676; *In re Hotchkys*; *Freke v. Calmady* (1886) 32 Ch. D. 408; 55 L. J. Ch. 546; and *In re Freman*; *Dimond v. Newburn*, 1898, 1 Ch. 28; 67 L. J. Ch. 14.

It is not true to say that to charge these expenses on *corpus* would relieve the tenant for life of all burden. He would suffer in his income.

Under the Public Health (London) Act, 1891, the whole of the expenditure is chargeable against the owner, and there is no distinction between what are improvements and what are not.

[COZENS-HARDY L.J. The summons is intituled, "In the matter of the Settled Land Acts," and under these Acts the Court can dissect the expenditure, and see what was for permanent improvement and what was not.]

P. O. Lawrence, K.C., and *C. Church* for the remaindermen. The summons is in form a Settled Land Act summons, though the notice of appeal is different. The tenant for life is not bound to spend

money on the estate, and if he does it is as a merely voluntary act. In *In re Hotchkys* and *In re Freman* the question was as to repairs by the trustees. If the trustees had spent the money and come to the Court for reimbursement, the Court could have declared them entitled to a charge, but it is quite different when the tenant for life asks to be reimbursed what he has spent voluntarily. That can only be done where there is some recognised rule or principle permitting it, as, for instance, under section 15 of the Settled Land Act, 1890. The position of an equitable tenant for life as regards these matters is shown by *In re Wythes*; *West v. Wythes*, 1893, 2 Ch. 369; 62 L. J. Ch. 663; *In re Bagot's Settlement*; *Bagot v. Kittoe*, 1894, 1 Ch. 177; 63 L. J. Ch. 515; *In re Newen*; *Newen v. Barnes*, 1894, 2 Ch. 297; 63 L. J. Ch. 763; and *In re Richardson*; *Richardson v. Richardson*, 1900, 2 Ch. 778; 69 L. J. Ch. 804.

[ROMER L.J. I do not think that *In re Lever* goes so far as to say that expenditure such as this must be charged against capital. I think the judge there, rightly or wrongly, came to the conclusion that the repairs were such that the cost was properly charged against capital.]

Stamp for the trustees.

Badcock, K.C., in reply. The summons can, if the Court thinks fit, be amended so as to ask for administration of the trusts of the settlement, and for a declaration that the appellants are entitled to a charge on the *corpus* for their expenditure, and they would offer no objection to an inquiry as to how much of the expenditure was for permanent improvements. The summons would in that case be treated as a summons under the general jurisdiction of the Court.

VAUGHAN WILLIAMS L.J. As this case has turned out, I need not go into any general question as to the position of an equitable tenant for life who is not in possession, nor any of those questions which were discussed in *In re Hotchkys*; *Freke v. Calmady* (1886) 32 Ch. D. 408; 55 L. J. Ch. 546, or in *In re Freman*; *Dimond v. Newburn*, 1898, 1 Ch. 28; 67 L. J. Ch. 14, and I must not be understood as saying anything to the contrary of what was decided in those cases. But the first thing that we have to ask ourselves in this case is—having regard to the peculiar circumstances of this case—whether the assignees of the tenant for life are entitled to stand in the shoes of the trustees; and we are of opinion, subject to something that I am going to say, that they are so entitled, and the real right that they ought to be allowed to enforce is the right of the trustees. We do not leave out of consideration the fact that they represent the tenant for life; and, without deciding what may be the equity against a tenant for life upon an adjustment of the expenditure as between him and those entitled to

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the *corpus*, we express our opinion that, at all events, these tenants for life are entitled to a charge in the right of the trustees by subrogation for the expenses of permanent improvements; and as the tenants for life by their counsel have expressed their willingness to accept an immediate charge for that amount, we will direct an inquiry as to how much of this expenditure has been in the nature of expenditure for permanent improvements, of which the *corpus* will have the benefit, and to that extent we think that the tenants for life are entitled to have an immediate charge. This that we are doing now is not an exercise of any jurisdiction which is given to the Court under the Settled Land Acts, and the order will accordingly be so drawn up.

The appellants, in my judgment, have succeeded in this case, as that which we are now giving them is very different from the postponement with liberty to apply which the judgment of Mr. Justice Kekewich gave them; and under those circumstances we will allow the costs, including the costs of this appeal, to be added to the plaintiffs' charge. The costs of all parties will be paid in the first instance by the plaintiffs, and then can be added to their charge.

ROMER L.J. I have come to the same conclusion. This is not a case where a tenant for life has made a voluntary payment on account of repairs, or a payment by reason of some legal obligation that has been cast upon him. It is a case where repairs had to be executed by the owners of the property, who were the trustees, and the tenants for life found the money which otherwise would have had to be found by the trustees under an arrangement between them. In my opinion, in the circumstances of this case the arrangement came to this—that the tenants for life in advancing the money were to be treated very much as if the money had been expended by the trustees; that is to say, the circumstances were such as, in my opinion, justified the tenants for life in saying that they stood in the trustees' place so far as the trustees themselves, if they had expended the money, would have had a right to call upon the remaindermen to allow the money expended by them to be charged on the *corpus* of the estate. That being so, it is clear to my mind that on this application the Court had jurisdiction at any rate to decide that, so far as these moneys were expended in permanent improvements, the trustees certainly would be entitled to charge them upon the *corpus* of the estate; and, inasmuch as the appellants' case is that these moneys were all expended for permanent improvements, and they do not object to the limitation that has been fixed by my Lord, I think that we can give them relief to the extent that he has indicated, and the appeal ought to succeed.

Under the circumstances of the case, I, like my Lord, do not desire or think it proper to discuss the various cases that have been decided;

but I only desire to say this—that I trust it is still left open to this Court to consider in a proper case whether or not, when trustees come before the Court in such a case as we have here, the Court has not entrusted to it a discretion in exercising its jurisdiction as to how moneys that have been expended by a trustee should be allotted as between a tenant for life and a remainderman. It is a matter, to a great extent, of discretion—judicial discretion, of course—but I venture to hope that it is still open to this Court, in determining between the tenant for life and the remainderman how repairs such as we have here ought to be borne, to decide that it is not bound by any hard and fast rule, but has a jurisdiction to inquire into the nature of the repairs, how they were required, and generally into the circumstances of the case. I do not want to go beyond what I have said, but I trust that it is still open to consider that question in any future case that arises.

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COZENS-HARDY L.J. I am of the same opinion. If the trustees had come to the Court knowing the expenditure had been incurred, but before it had been paid, and brought the tenants for life and the infant remaindermen before the Court, and had asked the Court to give them relief in the shape of a declaration of charge, I cannot myself doubt but that it would have been competent to the Court to give the trustees a charge. I think that the Court would not have been bound to say that the charge should only be given in one shape and form, namely, a charge upon the capital for the amount expended by the trustees. I think it would have been competent to the Court to say that the amount should be raised by a terminable charge, the effect of which would have been that the tenants for life would have had to bear not merely the interest, but a portion of the capital. I think it would have been further open to the Court to investigate the nature of the expenditure, and to say what was really fair, just, and equitable as between the various beneficiaries in the mode of distributing the burden upon them.

Here we have a peculiar set of facts—a legal liability upon the trustees to incur the expenditure and an arrangement made by the tenants for life with the trustees, to which, I agree, the remaindermen were not privy or party, but an arrangement under which the tenants for life said, without prejudice to any question, that they would find the money required. That being so, it seems to me that it is a case in which the tenants for life are entitled to say that they are subrogated to the rights of the trustees to the extent to which the Court may consider that, as against the capital of the estate, the charge ought to exist; and when the summons is amended in the manner which has been proposed, I think there will be no difficulty in declaring that the appellants are entitled to a charge of that nature. I understand that they

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do not object to the declaration in the form which has been suggested, not giving them a charge for the total amount of £255 19s. 10d., which I think would not be right, but for so much only of the £255 19s. 10d. as can be shown to have been spent in permanent improvements. There must be, of course, an inquiry to work out that result, on which evidence will have to be adduced to satisfy the master, and the charge will also extend to the costs here and below, the plaintiffs submitting to pay the costs of the other side, and of course adding their own costs to their charge. The charge will be for the aggregate amount of the total costs, and for the apportioned part of the £255 19s. 10d., and it will carry interest.

ROMER L.J. It will be quite sufficient to have a declaration of charge on the *corpus* for the amount, with interest at 4 per cent. until it is paid off upon the death of the tenant for life. It is a charge by the Court. A deed will not be required.

Appeal allowed.

Solicitors for the plaintiffs—Robins, Hay, Waters, and Hay.

Solicitors for the trustees and remaindermen—Church, Adams, and Prior.

Supreme Court of Judicature.

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July 13, 14.

Foreshore—Private owner—Right of public to bathe.

The plaintiff C. was the lord of the manor of Minster. The defendant claimed a right in the public at common law to go upon the foreshore at Joss Bay, part of the manor, for the purpose of bathing in the sea from it.

Held, that there was no such common law right.

The judgment of the majority of the Court in Blundell v. Catterall (1821) 5 B. & Ald. 268, followed.

Decision of Buckley J., reported 2 L. G. R. 258; 73 L. J. Ch. 160, affirmed.

APPEAL from a decision of Buckley J.

The facts are fully stated in the report of the case in the Court below. Shortly they were as follows: The plaintiff, the Marquis Conyngham, and the plaintiffs, Sir Theodore Henry Brinckman and the Hon. Arthur William de Moleyns, as trustees for him, were the owners of the manor of Minster, in the Isle of Thanet, and of the foreshore lying between the ordinary high-water mark and the ordinary low-water mark of the sea at a bay called Joss Bay, part of that manor. The plaintiff, Frederick William Turner, had licence under a deed executed by the steward of the manor to enter on a portion of the foreshore, including Joss Bay, for the purpose of placing bathing machines, tents, and pay boxes on the shore, and in July, 1903, he was exercising his rights under that deed.

The defendant was the headmaster of an elementary school at Poplar, in the county of Middlesex. In July, 1903, he brought some two hundred boys belonging to his school down to a camp situated on the cliffs immediately adjoining Joss Bay on land belonging to Alfred Harmsworth, which was customary freehold of the manor, and held by Harmsworth as tenant of the manor at a quit rent, the camp being placed there by his permission. The defendant asserted the right of the boys to bathe in the sea in Joss Bay.

The plaintiffs brought this action for a declaration as to their right to the foreshore, and for an injunction to restrain the defendant, his servants, agents, and workmen, from bathing from the foreshore in question, and from wrongfully entering upon the said foreshore or any part thereof for that purpose.

So far as material to the present report, the defendant based his

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claim on a common law right in all the subjects of the Crown to use the foreshore for the purpose of bathing.

Buckley J. made the declaration asked for, and held that there was no such common law right as the defendant asserted; and he granted an injunction. He followed *Blundell v. Catterall* (1821) 5 B. & Ald. 268.

The defendant appealed.

Buckmaster, K.C., and *Sheldon* for the appellant. The opportunity of access to the foreshore which the public have enjoyed for a long time shows that there is a common law right to use it for certain purposes, and one of those purposes is bathing.

[VAUGHAN WILLIAMS L.J. What is a common law right?]

A right which depends on the fact that all persons have used it everywhere in the United Kingdom; bathing in the sea wherever access to it can be lawfully obtained is an instance of such a right. The rights of fishing and recreation are further instances of the right. The common law is nothing but the immemorial custom of all the inhabitants of the realm: *Ball v. Herbert* (1789) 3 T. R. 253, 261.

The shores of the sea are by the right of nations common like the sea as being the approaches to the sea, for no one is prohibited from approaching to the sea provided he abstains from the villas and buildings: "Bracton, de Legibus Angliæ," bk. 1, c. xii.; 1878 ed., pp. 56 and 57. It has been said that Bracton took his law to a great extent from the civil law, but he only took what he thought was applicable to the common law of England. He does not say that there is no property in the shores. The king originally had the property in them, that is, between the ordinary high water and low water mark: "Hale, de Jure Maris," c. iv. (Hargrave, p. 12); but the public had the use that is necessary: "Callis on the Statute of Sewers" (2nd ed.), pp. 54, 55. The right of the Crown is not, in general, for any beneficial interest to the Crown itself, but for securing to the public certain privileges in the spot between high and low water mark: *Dickens v. Shaw* (1823), "Hall on the Sea Shore" (2nd ed.) app. xlv., lxiv. The right of bathing is one of such privileges. The king could not grant an exclusive right of fishery over the foreshore: "Moore's History and Law of the Foreshore" (3rd ed.), p. 723.

[COZENS-HARDY L.J. referred to *Att.-Gen. v. Chambers* (1854), 4 De G. M. & G. 206; 23 L. J. Ch. 662.]

Every subject has the right to take fish upon the shore between high and low water mark: *Bagott v. Orr* (1801) 2 B. & P. 472; and the right of bathing on the foreshore at Brighton seems to have been

extensively practised before 1809: see *Rex v. Crunden* (1809) 2 Campb. 89. 1904.

The learned judge relied upon *Blundell v. Catterall* (1821) 5 B. & Ald. 268, but the plaintiff there had the exclusive right of fishery at the place in question with stake nets, and the right claimed by the defendant was to drive bathing machines over it. The judgment of the Court might have gone on those special facts only. The judges did express themselves in more general terms, but those general statements were not necessary for the decision of the case, and the decision was, in effect, a decision on the circumstances of the case.

Every one has the right of fishing in the sea—it is common to all, so there must be a right of access to it for all. Every sea-coast village or town has a highway ending on the foreshore, and that shows that they must have rights over it. Whatever rights the public had in the foreshore when it was in the ownership of the Crown must remain when it is in private ownership: “Hale, de Jure Maris,” c. vi. *Blundell v. Catterall* was followed by Cozens Hardy J. in *Llandudno Urban Council v. Woods*, 1899, 2 Ch. 705; 68 L. J. Ch. 623, but apparently only because he felt bound by it. This Court is not bound by that case.

[ROMER L.J. It has been recognised in Ireland in *Howe v. Stawell* (1833) Alcock & Napier 348, 356: “Carson’s Real Property Statutes” (ed. 1902), p. 91.]

[*Astbury, K.C.* It was also recognised by Alderson B. in *Tyson v. Smith* (1838) 9 A. & E. 406, 412.]

It was cited in *Mace v. Philcox* (1864) 15 C. B. n.s. 600; 33 L. J. C. P. 124, and that case could have been decided simply on *Blundell v. Catterall* if the Court had approved of it, but it was not so decided.

In *Att.-Gen. v. Tomline* (1879) 12 Ch. D. 214, 233; 48 L. J. Ch. 593, 597, Fry J. says that early writers considered that the bank of the sea was not absolutely private property free from all public use, and he had before him the passage referred to in *Callis*. There cannot be exclusive possession of it: *Lord Advocate v. Young* (1887) 12 App. Cas. 544, 553. If that is so, it is for the Court to say in each case whether the particular right claimed by the public is one to which they are entitled. There is no authority for saying that the rights of the public in the foreshore are limited to fishing and navigation. If that was decided in *Blundell v. Catterall* it was wrongly decided. The sea is a highway which anyone can use who can get to it. It cannot be that the right to cross the foreshore is limited to two only of the purposes for which people want to use the sea.

[ROMER L.J. Do you say that the whole foreshore is a public highway?]

It is not necessary to go so far as that. It is sufficient to say that

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bathing is one of the purposes for which it may be used. The rights of the public in land covered by tidal water are dealt with in "Phear on Rights of Water" (ed. 1859), pp. 44-50.

Astbury, K.C., and *Mossop* for the plaintiffs were not called upon.

VAUGHAN WILLIAMS L.J. This case raises what at one time in the history of the law of this country might have been a very difficult question, and certainly was a very important question; but, according to my understanding, the law as laid down by the majority of the Court in *Blundell v. Catterall* (1821) 5 B. & Ald. 268, has been recognised ever since by the whole of the profession as an accurate and binding statement of the law; and I do not think, if that is so, that we ought now, after the lapse of eighty years, to upset the law as thus settled. I know that it may be properly said, as indeed it was said, on behalf of the appellant, that the exact question which the Court of King's Bench had to decide in *Blundell v. Catterall* is not the question that we have to decide to-day. Each of the judges there began his judgment by stating what the question to be decided was. Holroyd J. says (p. 283): "The question put in this case for our opinion, is the general question, whether there is a common law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose, on foot and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common law right in all the King's subjects to do so in the *locus in quo*, though the soil of the seashore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial." And when Abbott C.J. comes, at the conclusion of the case, to state shortly what the judgment of the Court is, he says: "But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavour to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed." I have read those passages to show that I quite recognise and bear in mind that that which had to be decided in *Blundell v. Catterall* was, strictly speaking, not the same question as that which we have to decide here; but when the majority of the Court came to discuss the narrower question which they had to decide in *Blundell v. Catterall*, they each of them did discuss and did determine the wider right which is claimed by the defendant in this action. That is to say, they did discuss the

question whether there is by common law a right to go upon that part of the foreshore which has become private property for the purpose of bathing, and they really discussed not only the question whether there is a common law right to do that in a case where a part of the foreshore has become private property, but they also discussed the question whether there exists, or existed, any such right at a time when the foreshore still continued to be Crown property; and, in my judgment, we should be doing very wrong if we were now to re-open the questions which, in my opinion, were determined once and for always in the judgments of the majority of the Court in that case. 1904.
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Having said that, I really feel that it would be a sort of presumption on my part, when I am following the judgments of the majority of the Court in that case, to attempt to give again the grounds which justify those judgments—in particular the judgment of Holroyd J., which has come to be regarded as one of the finest examples that we have of how the judgment of an English judge ought to be expressed, and its reasons given. I am quite unwilling, therefore, to attempt to do anything of the sort; but I propose to say a word or two about some grounds which were urged by counsel on behalf of the appellant when attacking this judgment. I mean things that they said when asked how they would state their own case apart from the decision of Holroyd J. As I understand, the way in which they put it was this: They said, so far as the sea is concerned, no one can possibly deny the right to swim in the sea, and the only thing that could be in question was the right of access to the sea from the land in order to enable one to get into it and swim. They said that there was a right of access to the sea across the foreshore in the sense in which the foreshore is the property of the Crown—the foreshore covered by the medium tides. They at first said that there was a right of access to every part of the foreshore, and that that right was really essential to the exercise of rights which it was admitted that the public had over the sea, like the right of navigation and the right of fishing. It was put to them that it might be that those rights, when they were exercised, had to be exercised by obtaining access to the sea by going along public highways which, when they reached the foreshore, would be treated as prolonged, when the sea was out, over the foreshore in a direct line to the sea. Apparently they rejected that as being the limit of the right of the public, on the ground that when they had to exercise one of those rights—that is, the right of fishing—they would want to progress along the beach right and left in order to exercise that right. In fact, they were driven to say, in order to maintain their position, that there was a public highway along the whole of the beach, the frontage of the sea, in so far as it fell within the foreshore. All I can say is that I could not see that they produced

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any authority whatsoever to support that proposition. Under those circumstances, as the appellant does not seem to me either to show that the right that he contends for is essential to the exercise of any admitted public right on the sea, nor does he show any authority which affirms such a right, I do not think that we ought to affirm this right now, the affirmation of which would, in my judgment, be entirely inconsistent with the judgments of the majority of the learned judges in *Blundell v. Catterall*.

Counsel cited to us text-books—text-books, no doubt, written by authors of great learning and authority—and they relied very much upon certain passages in *Dickens v. Shaw* (1823), “Hall on the Sea Shore” (2nd ed.), app. xlv., lxiv., which are said to affirm the proposition that the right of the Crown in the foreshore is not in general for any beneficial interest to the Crown itself, but for securing to the public certain privileges in the spot between high and low water. If all that is meant by that proposition is the proposition which was affirmed by Bayley J. in his judgment in *Blundell v. Catterall*, I have not a word to say against it, but I do not see how it helps the appellant’s contention. It was Bayley J. who delivered the judgment in *Dickens v. Shaw*, and it is not likely that he meant to say anything different; but if all that Mr. Hall in his essay on the “Rights of the Crown in the Sea Shore” (2nd ed.), pp. 218, 219, meant to say is that which was said by Bayley J. in *Blundell v. Catterall*, 5 B. & Ald. at p. 304—“Many of the King’s rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights”—it in no way supports the appellant in saying that it is impossible that the Crown should have any beneficial interest in the foreshore. When one comes to consider the matter, one knows perfectly well that the Crown has large beneficial rights in the foreshore—rights which are now, I think, enjoyed by the public Exchequer; but they are none the less the rights of the Crown, and, as was pointed out during the argument by Cozens-Hardy L J., in the case of a railway coming along the foreshore, the railway company have to buy of the Crown, and to pay the Crown for the foreshore; and there are all sorts of rights on the foreshore, beneficial rights—pecuniary beneficial rights—which the Crown has habitually exercised. Under those circumstances it is sufficient to say that it is true that the Crown holds the foreshore upon such terms that it has to recognise the *jus publicum*, whatever it is, over the foreshore, and to do nothing which is inconsistent with that *jus*. The *jus*, as far as the rights of navigation and of fishing are concerned, to use the foreshore for those purposes,

has a great deal of authority to support it ; but except for those rights, and except in so far as any act which was done would defeat those rights, the Crown has beneficial ownership of the foreshore, and the private persons here, the present owners of the foreshore, would have those rights vested in them.

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Under those circumstances it seems to me that we ought to support the judgment of Buckley J., because we are bound to follow *Blundell v. Catterall*, which is to my mind conclusive of this case. I think this judgment ought to be affirmed.

ROMER L.J. I hope I may be excused for saying that I have listened most sympathetically to the arguments addressed by the appellant's counsel in this case ; but my duty as a judge is to say that I cannot accede to those arguments: No doubt, in connection with the foreshore of this country, there are certain rights of the public in relation to navigation and fishing, and what the extent of those rights may be I need not consider now, for the right claimed here is in no wise connected with rights of navigation or rights of fishery. Also, no doubt, the public have certain rights of necessity ; but I am obliged to say that in the eyes of the law bathing cannot be regarded as a matter of necessity in dealing with the proposition I have just mentioned. I suppose a claim to bathe in the sea would be regarded in the eyes of the law, if it was a claim as of right, as a claim for a species of recreation. That being so, on what grounds does the appellant base his claim? He puts it in one of two ways : First, he puts it as part of the general right, and says that there is a general right on the part of the public of passing and re-passing for all lawful purposes along every part of the foreshore—in other words, that the foreshore is to be regarded as a species of public highway. In the alternative, he says, if that is not so, at any rate the public have a limited right or a special right to use the foreshore for the purpose of bathing.

If those questions had not been considered more than eighty years ago, I think they would have had to receive, and would have received, the most careful consideration, and might have been treated as giving rise to some difficulty ; but both those questions had to be considered, and were most carefully and fully dealt with in *Blundell v. Catterall*. No one can read the judgments in that case without seeing how very fully all the points bearing upon the questions involved were dealt with and considered, and how careful the judgments were ; and in particular I think it may be said that the judgment of Holroyd J. has been considered as one of the most remarkable judgments that was delivered by that learned judge in the course of his career on the Bench. The points in question there received the most minute and careful consideration. The judgments of the majority of the judges in that case

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have remained unchallenged by judicial authority from that time to the present. They have received recognition, but have never been dissented from. Throughout the long period that has elapsed no single judgment can be pointed to in which they have been impugned or reflected upon; and under these circumstances I agree with my Lord in thinking that it is too late to ask us to treat this as an open question. I think we are bound under the circumstances by the decision in that case, unless indeed we were persuaded that some of those judgments were obviously wrong; and certainly, speaking for myself, that is far from the case. Indeed, the judgment of Holroyd J. appears to me to be a very convincing judgment. At any rate, at this period of time I am not prepared to differ from the judgment of the majority in that case, and I think this Court ought to follow that judgment. I agree, therefore, in thinking that this appeal fails.

COZENS-HARDY L.J. I agree, but, having regard to the very admirable arguments which have been addressed to us on behalf of the appellant, I desire to add a very few words. If we were in 1804 instead of 1904 the question raised in the appeal would undoubtedly have required much consideration and elaborate research, but the great case of *Blundell v. Catterall*, decided in the Court of King's Bench in 1821, has relieved us from this task. No earlier authority has been cited to us which was not discussed in that case. The whole law relating to the foreshore was there investigated, and with a learning which it is impossible not to envy. I take that decision to amount to a positive assertion that no such right as is now claimed exists at common law. This case, or rather the principles there laid down, have never since been questioned in any authority which has been called to our attention. Under those circumstances, without saying that it may not be open to the House of Lords to reconsider it, I think the point is one which we ought not in this Court even to attempt to discuss.

One word more only about a case which was very much relied on—*Bagott v. Orr* (1801) 2 B. & P. 472. Whether *Bagott v. Orr* is good law or not it is not necessary for us to decide. Certainly I do not desire to attack it, but it only proceeds on the footing that the common right of fishing enjoyed by the public includes the right to get shell-fish when the foreshore is dry; but it in nowise supports the right of the public to go on the foreshore for the purpose of bathing, or for the purpose of recreation.

For these reasons I think that the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant—Lewis and Lewis.

Solicitors for the respondents—Saltwell, Tryon, and Saltwell.

High Court of Justice.

KING'S BENCH DIVISION.

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LONDON COUNTY COUNCIL v. DAVIS.

July 8, 12.

Streets—Meaning of “street”—Forming and laying out of street for foot traffic—Metropolis—Market or bazaar—London Building Act, 1894 (57 & 58 Viet. c. cexlvi.), ss. 5, 7, 8.

A court in the Metropolis laid out on ground cleared of ancient buildings, with 55 places of business on one side, with 24 independent shops on the other, and having six or seven means of access for persons on foot from the surrounding streets through the buildings, is a street intended for foot traffic within section 7 of the London Building Act, 1894, and requires the sanction of the London County Council to its formation, though the control of the entrances is retained by the owner, who closes the main gates at night and on certain days, and though the court with the places of business and shops is intended to form and does form as a whole a market or bazaar.

CASE stated by a metropolitan police magistrate who had dismissed an information laid by Thomas Chilvers, on behalf of the appellants, which charged that the respondent on or about June 22, 1903, at the rear of houses in Cannon Street Road, and to the east of Morgan Street, in the borough of Stepney, in the county of London, and within the metropolitan police district, did unlawfully commence to form and lay out a street without having first obtained the sanction of the London County Council, under section 7 of the London Building Act, 1894, whereby he became liable to the penalty prescribed by section 200 (1, a) of the said Act.

The facts, &c., were stated in paragraphs 3 *et seq.*, as follows:—

3. In or about the month of May, 1902, the respondent, who is a builder, was proposing to pull down a row of small houses on the eastern side of Morgan Street and to build six blocks of dwellings on the site of such houses.

4. On reference to the tracing (enlarged from the Ordnance sheet for 1894) marked No. 1, whereof a copy is annexed to and is to be taken as part of this case, it will be seen that at the back of the yards of the said small houses in Morgan Street there was at one time another row of small houses called London Terrace, which, however, had been almost entirely pulled down about the year 1896. Beyond London Terrace was a footway leading from Commercial Road to James Street, and beyond this footway were the back walls of the houses and premises in Cannon Street Road. The said footway was carried upon brick arches, the space under such arches serving as

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cellars for the London Terrace houses. The front walls of the London Terrace houses came up to the footway which was the only means of access to them. Access was also given by the footway to the rear of some of the houses in Cannon Street Road.

5. On November 3, 1902, and before commencing to erect his blocks of dwellings, the respondent duly gave to the district surveyor the building notice whereof a copy marked A is annexed to and is to be taken as part of this case.

6. The respondent proceeded to erect the said blocks of dwellings with basements in accordance with the tracing marked No. 2, which is annexed to and is to be taken as part of this case. The basements at the back of the blocks were ultimately completed as shops, twenty-four in number, with entrances from the open space next hereinafter described.

7. In order to provide the necessary air space at the basement level of the blocks of dwellings, which was about 8 feet 6 inches below the level of Morgan Street, it was necessary to excavate the ground formerly the site of the old houses in London Terrace, and the respondent originally intended to extend the said space up to the wall in rear of the Cannon Street Road houses, clearing away the arches over which the footway ran, and so doing away altogether with the footway. He found, however, that the wall at the rear of the Cannon Street Road houses would not stand without the support which it received from the arches. He was also served with a writ at the suit of one Silverman, the occupier of premises in Cannon Street Road, who claimed to be entitled to a right of way from the rear of his premises along the footway. In these circumstances the respondent decided to replace the old arches or cellars under the footway, which were in a dilapidated condition, by the erections described in the following paragraph, which served to carry the said footway, and this work was executed by him in and after the month of June, 1903. The level of the footway when replaced was about 9 or 10 inches above the level of Morgan Street, and there was no evidence that this was not the level at which it originally stood.

8. The said erections are fifty-five in number. Each of them is separated from the adjoining one by a vertical brick wall nine inches thick. A bed of concrete resting on iron girders supported on the tops of the walls forms a covering or roof to the said erections, and at the same time forms the surface of the footway. Each of them is about six feet wide and four feet six inches deep and nine feet high, and has a door or doors opening on to the said space. Most of them have in front small gables projecting slightly above the level of the footway. The said erections serve not only to carry the footway but also as

buttresses or supports to the wall at the rear of the Cannon Street Road premises.

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9. The said space was paved by the respondent with granolithic cement paving, having a fall of above four inches from the Cannon Street Road side of the space towards the Morgan Street side. The surface water runs off into gullies running along the backs of the blocks of dwellings and thence into a gully running through the centre of the said blocks into the main sewer in Morgan Street. It is lighted and cleansed at the respondent's expense.

10. On September 10, 1903, when the said information was laid, the twenty-four basements on the Morgan Street side of the said space and the fifty-five erections on the Cannon Street Road side of the space had all or nearly all of them been let by the respondent to weekly tenants, chiefly of the Jewish faith, and were being used for the sale or storage of goods. The said space was in fact a kind of market or bazaar and was frequented by a large number of persons. The photograph marked D, and initialled by me, and dated October 19, 11.30 a.m., is to be taken as part of this case for the purpose of giving a representation of the construction of the said space, but as regards the persons it must be taken as representing those who were present at that particular time only.

11. The means of approach to the space at the time of laying the information were as follows:—

(a) A main entrance from Morgan Street through the middle of the blocks leading down steps into the said space and having iron gates at the Morgan Street end.

(b) Each of the blocks is entered by a passage from which there are stairs leading to the upper part and also stairs leading down into the said space from which alone there is access to the basements. The stairs leading downward give access to the space for the occupiers of each block, but there was nothing to prevent persons passing from Morgan Street down these stairs into the said space. Between the laying of the information and the hearing, wooden gates were placed by the respondent to all these entrances at the Morgan Street end.

(c) A flight of steps at the southern end of the space having a gate at the top through which access was obtained to the old footway and thence into James Street, or eastward through the old passage-way of Bowyer's Buildings into Cannon Street Road. After the laying of the information the respondent cut off all means of access to the said space at this point by building a wall somewhere about the spot marked "gates" on plan No. 2.

(d) A flight of steps with a gate at the top leading up from the space on to the old footway between the erections numbered 31 and 32

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on plan No. 2. Facing the top of the said steps, there was a door in the wall forming the rear of premises in Cannon Street Road which the respondent had acquired by deed a licence to use, thus gaining access into a yard in which there was a place sanctioned by the Jewish authorities for the killing of poultry. From this yard there was a passage leading into Cannon Street Road.

(e) After passing through the gate at the top of the steps described in the last paragraph, there is a gate on either side across the old footway. Passing through that on the southern side access is obtained to the old footway, and thence through another gate at a point between the erections numbered 51 and 52 on plan No. 2, and so into James Street or through Bowyer's Buildings into Cannon Street Road. Passing through the gate on the north side of the said steps access is obtained to the old footway but the entrance into Commercial Road had been for some years prior to the date of the information blocked up by some person or persons other than the respondent, and was then still blocked up. The respondent kept the door in the wall and all the gates mentioned in this paragraph under his control, but whether he had any right to place any gates across the old footway it is not material to this case to enquire.

12. The iron gates at the main entrance in Morgan Street above referred to were closed at night about 10.30 or 11 p.m., and on Jewish sabbaths and festivals. No business whatever is permitted on Jewish sabbaths and festivals. All other means of access to the said space were entirely under the control of the respondent. There was, however, at the date of the information nothing to prevent persons passing from Morgan Street through any one of the passages in each of the blocks when the said iron gates were so closed.

13. The said blocks of dwellings accommodate some eight hundred persons who naturally form the majority of those who frequent the said space and deal at the basement shops and the erections there, but other persons are not prevented by the respondent from using the space for the same purpose, and it is to his interest that as many persons as possible should so use it.

14. The respondent laid out the said space in the circumstances and to the extent above described, and no further, and he had not made any such application to the council nor received any such sanction for forming or laying out a street as is required by section 7 of the London Building Act, 1894.

The appellants contended that the respondent had commenced to form and lay out a street for foot traffic within the meaning of section 7 of the London Building Act, 1894, and section 200 (1, a) of the same Act, as amended by the London Building Act, 1894 (Amendment)

Act, 1898, and they cited the case of *Armstrong v. London County Council*, 1900, 1 Q. B. 416 ; 69 L. J. Q. B. 267. 1904.

The respondent contended that the space in question was a Jewish market or bazaar, and was not a street within the meaning of the said Acts. London County Council v. Davis.

The magistrate was of opinion upon the facts as above stated that the respondent had formed a market in the said space, but that it was not a "street" within the meaning of the Act, and he dismissed the information.

The question of law for the opinion of the Court is whether his decision was right in point of law.

The London Building Act, 1894 (57 & 58 Vict., c. ccxiii.), contains the following provisions :—

Section 7. Before any person commences to form or lay out any street whether intended to be used for carriage traffic or for foot traffic only such person shall make an application in writing to the Council for their sanction . . . and no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the Council.

Section 8. For the purposes of this part of this Act a person shall be deemed to commence to form or lay out a street if he erect a fence or other boundary or lay down lines of kerbing or level the surface of the ground so as to define the course or direction of a street or if he form the foundations of a house in such manner and in such position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed. Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street.

Avory, K.C., Daldy, and Robertson for the appellants. The question is, has the respondent laid out a new street for foot-passengers within the meaning of the London Building Act, 1894. The magistrate considered that a market or bazaar had been laid out, and that the case was therefore not within the statute, and he dismissed the information. The respondent in the first place cleared an open space, and subsequently erected a row of shops, therefore there is a place frequented by persons going to the shops, with several accesses to it, and frequented by numbers of persons besides those who occupy the shops. It is a thoroughfare for foot-passengers in the sense of having a route through it. The public have in fact access to it, and it is no answer to say that it is a private street in the sense of not being dedicated as a highway : *Armstrong v. London County Council*, 1900, 1 Q. B. 416 ; 69 L. J. Q. B. 267. It is wrong to say that because the place may be a market or bazaar it ought therefore to be excluded from the provisions of the statute, which by section 5 (1) defines the expression "street" as meaning and including any highway, and any

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road, bridge, lane, mews, footway, square, court, alley or passage, whether a thoroughfare or not.

Macmorran, K.C., and *Brandon* for the respondent. The magistrate has said that this is not a street, but that it is a market or bazaar. It is submitted that there may be a place which is a market or bazaar and in no sense a street frequented by people. Section 8 contains a proviso that no one shall be deemed to form or lay out a street if he do any of the acts in the section mentioned for some purpose other than that of laying out a street. Every act of the respondent here is referable to another state of things altogether. The object with which the place was formed was not to create a thoroughfare or give access to anyone from anywhere, but to form a market or bazaar which persons from the outside may attend if they desire. *Armstrong v. London County Council* was largely decided upon a question of fact. Here the respondent has done all he was compellable to do. Laying out a street must be for the passage of traffic. If, instead of there being a number of small shops here, there had been one very large one, there could be no question of laying out a street. It is purely a question of fact, and this is a market. In *London County Council v. Davis* (1895) 64 L. J. M. C. 212, a passage 200 feet long and 20 wide leading through a gateway to two blocks of buildings erected for artisans' dwellings, and not intended for the use of the public, was held not to be a street within section 8. This market is not intended for a public thoroughfare. The question must be one of degree in each case, and the facts here are sufficient to warrant the magistrate in holding that this place was a place different from a street.

Avory, K.C., called upon as to the time when it was suggested the new street was laid out. No point was taken as to this in the case, but the end of June, the 22nd or 23rd, was properly fixed as the date, as will be seen from paragraph 7 of the case. The Court is asked to say that the magistrate ought to have convicted.

Cur. adv. vult.

July 12. LORD ALVERSTONE C.J. Upon the point raised in the case by the learned magistrate I really have had no doubt from the time that I understood the facts. The magistrate has decided in favour of the respondent's contention that the space in question is a Jewish market or bazaar, and not a street within the meaning of the Act, and he was of opinion, upon the facts as stated, that although the respondent had formed a market in the said space it was not a street within the meaning of the Act, and he therefore dismissed the information. After listening to the learned magistrate's judgment, it is quite plain to me that he has embodied in

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one sentence the ground of his decision, and that is that as the place was described to him as existing on or about the 22nd June it was not a street but a market. Whether or not any point could be raised upon an earlier state of things which would have made it a street, and that therefore some question might well have arisen, is a matter which we need not consider now, because it was not raised before the magistrate. I think, for the purposes of this case the answer which Mr. Avory has given us is a good one and the correct one, and that what was being done on June 22nd was at any rate the commencing to form or lay out a street within the meaning of section 7. Now I stated a few moments ago that when we really know what was actually done, as Mr. Avory now suggests, namely, when the final act with regard to the arches under the building forming the roadway was done, the case does appear to be clear. I can see now that there might have been some contention raised, although I think it is very likely it would not prove a well-founded one on the facts that the twenty-four basements might be used as workshops, or shops, in connection with some trade which might be carried on by the occupants of the houses. But looking at the place and seeing the character of the buildings, I do not think there is very much likelihood of these stores being used in connection with the rooms in the places above. As I understand the plan the passage is utilised in the manner shown, and opens out in six places on this court, and there is a big broad staircase; there are also ways out, whereby at certain points people can get out into Cannon Street Road. At any rate, if it were possible to put a different construction upon the matter, as it was originally designed and contemplated, Mr. Davis was minded to erect the fifty-five shops on the other side to which no access can be had at all except by going down the passage, and therefore it seems to me there is no doubt about it. Now section 7 states that before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, application shall be made, and "street" is deemed by the definition clause (section 5 (1)) to include any highway, footway, square, court, alley or passage, whether a thoroughfare or not. Mr. Macmorran has contended, or at any rate indirectly contended, that in order to lay out a street, within the meaning of section 7, the person must be doing something of a character indicated in section 8. I do not take that view (and I have expressed this opinion before); section 8 is in my opinion a section which has been enacted in order to enable persons to come from the commencement of certain work, and if as a matter of fact those acts are done, and they are acts done in the course of forming or laying out a street, proceedings can be taken although the street is not finally formed; obviously for the reason that it was in the

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interests of the person himself that he should be told that he was beginning to do work which he would not be allowed to do. That is the construction which we put upon that section when the point arose in another reported case.

As the matter stood in June last, what was the condition of things? Here is a court, or passage, of some twenty feet wide, with fifty-five places of business on one side which have no connection whatever with the houses physically or structurally, but they are let, some to tenants and some to outsiders, and on the other side are twenty-four independent shops. That was the state of things at any rate when the London County Council thought that what was shown indicated that the respondent was laying out this place to be so used. I do not want to go through all the facts again, but there were no less than six or seven modes of access through those buildings designed and designed only for the purpose of getting to them, and there is also some means of access from the Cannon Street Road side.

Looking at the plan, and looking at the statements in the case, I have no hesitation in coming to the conclusion that the learned magistrate has applied a wrong test. It is not a question of whether the respondent has established a market here or whether he has established a bazaar. The question is whether or not he has laid it out so that people shall be free to come and go and pass in and out and through this place by means of the passage, and also by means of going to these stairs. I think the learned magistrate ought to have come to the conclusion that on these facts there was a commencing to lay out a street. I desire to say that I cannot on these facts come to any other conclusion without practically disagreeing with the reasons of the decision in *Armstrong v. London County Council*, 1900, 1 Q. B. 416; 69 L. J. Q. B. 267, which expressly deals with the matter, and which seems to me to be the governing case. It does not cease to be a street simply because some part of the user may be stopped at certain times.

Under these circumstances it seems to me that had the learned magistrate really applied his mind to the question of what this really was, a passage-way or thoroughfare, or courtyard leading to shops, he must have come to the conclusion that within the definition of the section, it was a commencing to form and lay out a street. But he has for the moment allowed his mind to consider, not what the respondent was laying out and doing, but what was the purpose in his mind of creating what he is pleased to call a bazaar or a market, which if it be in a street does not prevent it from being a street. I therefore think that this case must go back to the learned magistrate for a conviction.

KENNEDY J. I am of the same opinion, and have nothing to add.

PHILLIMORE J. I also agree.

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Appeal allowed

Solicitor for the appellants—W. A. Blaxland.

Solicitor for the respondent—Romaine.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

Mar. 29.

WIELAND v. BUTLER-HOGAN.

Food—Unsound meat—Meat intended for the food of man—Public Health Act, 1875 (38 & 39 Viet. c. 55), ss. 116, 117.

A butcher at the close of business on a Saturday placed his unsold meat, which was then all sound, in a safe. In the ordinary course of business the safe would have been opened after the shop had been cleansed on the succeeding Monday morning, and not earlier, and the meat would then have been examined and any found unsound destroyed or removed. Some of the meat in the safe which had become decomposed since the Saturday night was found in that state by an inspector of the local authority, who examined the safe on the Monday morning before the ordinary time for opening it arrived.

Held, on a case stated by justices setting out these facts, that there was no evidence that the decomposed meat was intended for the food of man.

Mallinson v. Carr, 1891, 1 Q. B. 48; 60 L. J. M. C. 34, distinguished.

CASE stated by justices of Middlesex before whom the appellant had been convicted on an information preferred by the respondent, a medical officer of health of the Tottenham Urban District Council, under sections 116 and 117 of the Public Health Act, 1875, alleging that on October 12, 1903, certain meat in the possession of the appellant, at 194, Philip Lane, in the said district, was deposited for the purpose of sale on the premises and intended for the food of man.

The material parts of the case were as follows :—

The facts proved or admitted before us at the hearing were as follows :—On Monday, October 1, 1903, shortly after 12 p.m., William Charles Portman, an inspector of nuisances for the district, entered the shop where the appellant carried on his business of a butcher. One customer was present in the shop, which was being cleansed under the direction of the appellant's manager, Sandford. The shop contained a safe which the inspector found closed. It was opened by him, and found to contain a large quantity of meat, for the most part perfectly sound, but part of a neck of mutton, weighing about 3 lb., some sausages, and nine pieces of cooked meat on separate dishes, showed signs of decomposition. All these were seized by the inspector, and after being submitted for inspection to the respondent were taken before and condemned by a justice of the peace, on the same day, as unsound and unfit for the food of man. The meat condemned was unsound

and unfit for the food of man at the time of seizure by reason only of decomposition or putrefaction.

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Evidence on behalf of the appellant was adduced as follows:—

Business was carried on at the appellant's shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, and was then sound and fit for the food of man. The ordinary course of business at the appellant's shop is to devote the morning on Mondays, when very little trade takes place, to cleansing and preparatory work, and not to set out for sale or examine the contents of the safe until this process is complete; and on the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of about thirty-six hours. And further, that in the ordinary course of the appellant's business all the meat contained in the safe would have been examined before selling or exposing for sale, and any part found to have been unsound would have been removed.

The justices convicted the appellant, and the question for the opinion of the Court was whether their decision was right in point of law.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), contains the following provisions:—

Section 116. Any medical officer of health . . . may at all reasonable times inspect and examine any . . . meat . . . exposed for sale, or deposited in any place for the purpose of sale . . . and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such . . . meat . . . appears to such medical officer . . . to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same . . . in order to have the same dealt with by a justice.

Section 117. If it appears to the justice that any . . . meat . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty . . .

Clarke Hall for the appellant. The form in which this case is stated is peculiar, but it must be taken that the justices believed the appellant's evidence that the meat was not intended for the food of man. They must be taken to have found that the appellant, the moment he became aware that the meat was unsound, would have destroyed it or had it removed. The facts here therefore differ from those in *Mallinson v. Carr*, 1891, 1 Q. B. 48; 60 L. J. M. C. 34, on which the respondent will rely. There the meat was inherently unsound, and there is a distinction between the possession of meat inherently unsound, and of meat which, originally sound, has gone bad in the night.

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R. Cunningham Glen for the respondent. All that is proved in this case is that the appellant's manager gave certain evidence, and by convicting the appellant the justices showed that they did not believe this evidence. By section 116 of the Act the *onus* was on the appellant to prove that the meat was not intended for the food of man. To upset this conviction the Court must hold that the justices were bound by the statement of the appellant that the meat was not intended for the food of man—a statement which it is manifest they did not believe.

LORD ALVERSTONE C.J. No doubt if the contention on behalf of the respondent is open to him that the *onus* is on the appellant to show that the meat was not intended for human food this conviction ought to stand; but I can hardly think that the justices having stated the case in the way they have done ever intended it to be understood that they disbelieved the appellant's evidence. In my opinion they intended to state, as a fact proved before them, that the meat had not been dealt with by the appellant on the Monday morning in question; and that while they received and accepted his evidence on this point as truly stating the facts, they at the same time considered that he had committed an offence against the section of the Public Health Act, 1875, so that the real question in their minds was whether they had rightly come to this conclusion upon the evidence as it appeared before them. I agree with counsel for the appellant that *Mallinson v. Carr*, 1891, Q. B. 48; 60 L. J. M. C. 34, which certainly appears at first sight to be directly against the appellant, proceeded on the assumption that the defendant there had in his possession and retained meat inherently unsound after he was perfectly well aware of the fact. I am therefore of opinion that upon the facts found here the justices came to a wrong determination in law, and that the appeal ought therefore to be allowed.

DARLING J. I am of the same opinion, for there was no proof that the meat was ever intended for the food of man; nor was there evidence showing that it was exposed or intended to be exposed for sale as food for man on that Monday at all. The evidence of the appellant's foreman was that the meat put away in the safe on the Saturday night was not examined till after the shop had been cleaned up and put to rights on the Monday morning; and there is no evidence to show that this meat when taken out of the safe by the inspector and discovered to be tainted was ever intended for the food of man.

CHANNELL J. I agree.

Appeal allowed.

Solicitors for the appellant—W. T. Ricketts and Sons.

Solicitor for the respondent—E. Shelton.

High Court of Justice.

KING'S BENCH DIVISION.

EAST PRESTON UNION v. LEWISHAM UNION.

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Mar. 2, 3.

Poor Law—Settlement and Removal—Boundaries—Parish divided by Local Government Act, 1894—Subsequent alteration of boundaries by Provisional Order—Saving in Provisional Order for effect of previous residence—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 1 (3)—Worthing Extension Order, 1902 (scheduled to 2 Edw. VII. c. cclx.), Art. xxxl.

The parish of B. was divided by the direct operation of the Local Government Act, 1894, into two new parishes, which were named respectively B. and W., with the consequence that a settlement in the original parish of B. acquired by residence in the part of that parish that became the parish of W. was destroyed.

A Provisional Order of the Local Government Board of 1902 for the alteration of the boundaries of a borough made incidental alterations in the boundaries of, among other parishes, the new parishes of B. and W., and contained a saving section with reference to settlements, &c., in the parishes affected. The first two clauses of the section preserved existing settlements and status of irremovability, and the remaining clause provided that "for all purposes of settlement and removal residence prior to the commencement of this Order in any part of the existing parishes of B., H, W. T., and W. shall be deemed to have been residence in the parish in which the part is included by this Order."

Held, that this saving did not revive, as a settlement in W., the settlement in the original parish of B. that had been destroyed by the division of that parish in 1894.

CASE stated by consent and by order of a judge pursuant to section 11 of the Quarter Sessions Act, 1849, as follows:—

1. On June 24, 1903, by an order of removal under the hands and seals of Brownlow Poulter and William Brown, Esqrs., two of His Majesty's justices of the peace sitting in and for the county of London, the settlement of one Charles Ernest Lindus, aged 54 years or thereabouts, a pauper then chargeable to the Lewisham Union, in the county of London, was adjudged to be in the parish of Worthing, in the East Preston Union, in the county of Sussex, and he was ordered to be removed from the said Lewisham Union to the said East Preston Union, and the guardians of the last-mentioned union were thereby required to receive and provide for the said pauper according to law.

2. The appellants caused due notice of appeal to the then next general quarter sessions of the peace, to be holden at the sessions house, Newington, in and for the said county of London, against

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the said order, to be duly served, and such appeal has been duly entered.

3. Afterwards, by consent of the parties hereto, and by order of the Hon. Mr. Justice Bucknill, dated October, 1903, this special case was stated between the appellants and respondents, the parties hereto agreeing that judgment in conformity with the decision of this Court and for such costs both in the High Court of Justice and in the court of quarter sessions as this Court shall adjudge may be entered by motion by either party at the sessions held next or next but one after such decision shall have been given.

4. The said C. E. Lindus made a settlement by residence for three years and upwards, *videlicet*, from about the year 1886 to about the year 1891, and not afterwards, in such manner in each of the said years as to be irremovable at Lennox Road and Longhurst Road, both situated in the then existing parish of Broadwater, in the said East Preston Union.

5. Previous to the passing of the Local Government Act, 1894, and from before the year 1886, the said parish of Broadwater was partly within the urban district of Worthing (which in the year 1890 became, with the adjoining urban district and parish of Heene, the borough of Worthing), and partly within the rural sanitary district of the East Preston Union. On the passing of the said Act by virtue of the operation of the provisions in section 1 (3), and other sections thereof, the respective parts of the parish of Broadwater became separate parishes. By an order of the Local Government Act, 1894, Committee of the West Sussex County Council, dated July 27, 1894 (annexed hereto), it was provided as follows:—"That part of the parish of Broadwater which is within the borough of Worthing, and which will become a separate parish by the operation of the Local Government Act, 1894, shall bear the name of Worthing, and that part of the parish of Broadwater which is without the said borough, and which will become a separate parish by the operation of the said Act, shall bear the name of Broadwater."

6. The said residences of Charles Ernest Lindus at Lennox Road and Lyndhurst Road were both of them in that part of the original parish of Broadwater which under the said Act and order became a separate parish bearing the name of Worthing.

7. By a Provisional Order dated May 5, 1902, made by the Local Government Board in pursuance of sections 54 and 59 of the Local Government Act, 1888, cited as the "Worthing (Extension) Order, 1902," and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1902 (annexed hereto), a part of the then parish of Broadwater within the rural district of East Preston was added, with

a part of the parish of West Tarring, to the then existing parishes of Heene and Worthing so as to form a new parish to be called the parish of Worthing, the whole forming the area of the borough of Worthing as extended by the said Provisional Order. The remaining portion of the then parish of Broadwater was as to part, together with a part of the parish of West Tarring, amalgamated with the adjoining parish of Durrington, and as to the remaining part of the then parish of Broadwater amalgamated with the adjoining parish of Sompting. The part of the parish of Broadwater amalgamated with the parish of Sompting was separated from the rural district of East Preston and the East Preston Union and added to the rural district of Heyning West and the Heyning Union.

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8. Prior to and at the passing of the Local Government Act, 1894, the old parish of Broadwater had but one set of overseers, and one poor rate was made and levied for the entire parish. From and after the passing of that Act, and prior to the coming into operation of the said Provisional Order in 1902, separate overseers were appointed for each of the two new parishes of Worthing and Broadwater, and a separate poor rate was made and levied for each of these said parishes, and from that time, *videlicet*, the passing of the Local Government Act, 1894, overseers ceased to be appointed, and a poor rate ceased to be made for the whole parish of Broadwater. In the year 1902 the parishes of Broadwater and Worthing, as created in 1894, ceased to exist, and a new and extended parish of Worthing, comprising in its area the parish of Worthing as created in 1894, the parish of Heene, and parts of the parishes of Broadwater and West Tarring, came into existence. Since 1902 separate overseers have been appointed for the new parish of Worthing, and a separate poor rate made and levied for the said parish, and since 1902 overseers have ceased to be appointed, and poor rates have ceased to be made for the parishes of Broadwater and Worthing created in 1894.

9. Article XXXI. of the Provisional Order is as follows:—

“(1) Every person who has acquired or who on or before the commencement of this Order shall acquire a settlement in any existing parish affected by this Order shall be deemed to have acquired a settlement in the parish comprising the area in which the acts or circumstances conferring such settlement shall have been done or occurred or if such acts or circumstances shall have been done or occurred in more than one parish such settlement shall be in the parish comprising the place of residence of such person at the time of acquiring such settlement.

“(2) Any person who shall have acquired a status of irremovability from any existing parish affected by this Order shall be deemed to have

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acquired a status of irremovability from the parish comprising the area in which he shall reside at the commencement of this Order or (if he shall be then in the receipt of relief) from the parish comprising the area in which he was residing at the time of becoming chargeable.

“(3) For all purposes of settlement and removal residence prior to the commencement of this Order in any part of the existing parishes of Broadwater Heene West Tarring or Worthing shall be deemed to have been residence in the parish in which the part is included by this Order.”

10. The appellants contend :—

(a) That the original parish of Broadwater as above described having been divided into two separate parishes in the year 1894 by virtue of the provisions of the Local Government Act, 1894, the said parish thereupon ceased to exist, and all settlements gained in the said parish prior to such division, including the settlement of the said Charles Ernest Lindus (if any), ceased to exist also.

(b) That the said Charles Ernest Lindus at the time the order of the said justices was made was not legally settled in the parish of Worthing or in any parish in the East Preston Union.

(c) That the settlement of the said Charles Ernest Lindus (if any) in the parish of Broadwater prior to 1894 was not revived or made good, and no legal settlement was conferred upon the said C. E. Lindus in the parish of Worthing by the provisions of Article XXXI. of the said Provisional Order.

11. The respondents contend :—

(a) That the parish of Broadwater was not divided for Poor Law purposes by the Local Government Act, 1894.

(b) That the parish of Broadwater was not divided for Poor Law purposes by the Order of the Local Government Act, 1894, Committee of the West Sussex County Council, dated July 27, 1894.

(c) That inasmuch as both the parishes of Broadwater and Worthing were in 1894, and have been ever since, in the East Preston Union no division of either of the said parishes affected the settlements therein.

(d) That if the settlement of the said C. E. Lindus ceased for a time to exist, by the operation either of the Local Government Act, 1894, or of the order of the Local Government Act, 1894, Committee of the West Sussex County Council of July 27, 1894, it was revived or made good by the provisions of the Article XXXI. of the Provisional Order of May 5, 1902, confirmed by the Local Government Board Provisional Orders Confirmation (No. 7) Act, 1902.

(e) That consequently the said C. E. Lindus was at the time of making the said order of removal and still is settled in the present parish of Worthing by virtue of his residence for three years and

upwards, viz., from about 1886 to about 1891, in such part thereof as was then the parish of Broadwater in such manner in each of the said years as to be irremovable.

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12. The question for the decision of this Court is whether the said C. E. Lindus was legally settled in the said parish of Worthing, in the East Preston Union, at the time of the making by the said justices of the said order of removal.

13. If the Court shall be of opinion in the affirmative thereof, then the appellants agree that a judgment in conformity with such decision and with such costs, both in the High Court of Justice and in the court of quarter sessions, as the Court may adjudge, may be entered on motion by the respondents after such decision shall have been given. If the Court shall be of a contrary opinion, then the respondents agree that a judgment in conformity with the decision of such Court and for such costs, both in the High Court of Justice and in the court of quarter sessions, as the High Court may adjudge, may be entered on motion by the appellants at the sessions next or next but one after such decision shall have been given.

Macmorran, K.C., and *W. Mackenzie* for the appellants. The settlement in Broadwater was destroyed by the division of the parish effected by the Local Government Act, 1894. Upon this point the case is covered by *Dorking Union v. St. Saviour's Union*, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408. Clause (3) of Article XXXI. of the Provisional Order of 1902 did not revive the pauper's settlement in Worthing; it was intended as a saving clause to preserve the effect of residence in the parishes existing at the time of the Provisional Order. The pauper's residence took place in a parish which had ceased to exist before that time. [They also cited *West Ham Union v. London County Council*, 1904, A. C. 40; 2 L. G. R. 301; 73 L. J. K. B. 85; *Stourbridge Union v. Droitwich Union* (1871) L. R. 6 Q. B. 769; 40 L. J. M. C. 186; and *Reg. v. Tipton Inhabitants* (1842) 3 Q. B. 215; 11 L. J. M. C. 89.]

Clavell Salter, K.C., and *R. Cunningham Glen* for the respondents. So far as this Court is concerned it must be admitted, in view of *Dorking Union v. St. Saviour's Union*, that upon the division of the parish by the Act of 1894 the pauper's then existing settlement was destroyed. It is submitted, however, that he is now settled in the existing parish of Worthing by virtue of Article XXXI. (3) of the Provisional Order of 1902. That article begins in clauses (1) and (2) by preserving existing settlements and existing status of irremovability; but clause (3) intentionally goes further. It provides that for all purposes of settlement and removal residence in any part of the four

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parishes enumerated shall be deemed to have been residence in the parish in which the part is included. The pauper's case comes literally within these words.

Macmorran, K.C., in reply.

LORD ALVERSTONE C.J. I am thankful to be relieved from entering into the consideration of the first point, and from having to arrive at any determination as to the effect of all the previous decisions in relation to it; for I think we are justified in saying that the decision of the Court of Appeal in *Dorking Union v. St. Saviour's Union*, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408, binds us and warrants us in holding that the settlement which the pauper had in Broadwater in 1894 was destroyed, because the old parish of Broadwater was destroyed by the operation of the Act of 1894. The contention by counsel for the respondents is that Article XXXI. (3) of the Provisional Order of 1902 not only preserves existing settlements, and what I may call growing settlements, but revives old settlements in Broadwater. The argument is certainly one of great ingenuity, and I think if clause (3) stood by itself it would be a good one, for the words are, "for all purposes of settlement and removal residence prior to the commencement of this Order in any part of the existing parishes of Broadwater Heene West Tarring or Worthing shall be deemed to have been residence in the parish in which the part is included by this Order." But I cannot think that that was the object and scope of the legislation. Here the Legislature were dealing with seven parishes, taking parts from some and adding them to others and altering boundaries. Article XXXI., moreover, contains clauses (1) and (2), which apply to cases in which doubts may arise as to the parish to which a pauper belongs, and these clauses deal with residence which had begun before or was continuing at the time of the Order. Then clause (3) was necessary to prevent its being said that the pauper had not lived long enough in the existing parish. Counsel for the respondents contends that it goes further, and was intended to re-establish the effect of residence in the parish of Broadwater, which was divided in 1894, and so give a settlement in the parish of Worthing as it now exists. But in my view it would be casting a burden on the new parish to say that the old settlement revived, and I do not think the natural meaning of the words of clause (3) leads us to such a conclusion. Had it been intended that they should do so the words would have been clearer. I am, therefore, of opinion that clause (3) does not operate to revive the pauper's settlement in Broadwater which was destroyed in 1894.

WILLS J. I am of the same opinion. If clause (3) of Article XXXI. had stood by itself Mr. Salter's argument would have been a particularly

good one. But it must be remembered that clauses (1), (2), and (3) must be read together. The two first provide that if a settlement has been acquired the privileges and liabilities connected with it shall continue to exist in the proper parish; and then the third clause was required to meet cases where the right was in course of being established or acquired, so that no interruption should take place in its acquirement by reason of the alteration of boundaries. But it is going too far to say that clause (3) revives or creates afresh settlements which had been lost.

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KENNEDY J. I am of the same opinion. To my mind it is clear that the residence referred to in clause (3) is residence which is to count as residence in the parish included in the Provisional Order at the date it was made; that is to say in 1902. Had the Legislature intended to grant a new settlement in the place of one lost or destroyed there is no reason why the Order should be confined to settlements by residence only.

Appeal allowed.

Solicitors for the appellants—Carter and Barker, for Harry B. Piper, Worthing.

Solicitors for the respondents—Callard and Vulliamy.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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KING'S BENCH DIVISION.

Apr. 20.

HEMSWORTH RURAL DISTRICT COUNCIL v. MICKLETHWAITE.

Highways—Extraordinary traffic—Excessive weight—Pressure per square inch—Contributory negligence—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12.

It is not a complete defence to an action by a highway authority, under section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12 of the Locomotives Act, 1898, to recover expenses of highway repairs occasioned by extraordinary traffic or excessive weight, to show that the highway authority have been guilty of negligence in not keeping the road in proper repair to bear ordinary traffic, for the doctrine of contributory negligence has no application to such an action. The circumstance that the highway authority have failed to keep the road in a proper state is, however, material in estimating the amount of the expenses that are properly attributable to the extraordinary traffic or excessive weight.

The question whether particular traffic is extraordinary is to be determined by comparison not merely with the other traffic on the road during the particular year, but with the traffic which by the time in question has become the ordinary traffic of the road. The standard of what is ordinary traffic for this purpose may vary from time to time.

The bearing of evidence as to pressure per square inch on the question of excessive weight considered.

APPEAL by the plaintiffs from the judgment of a county court judge for the defendant.

The action was brought by the plaintiff council under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover £218 in respect of extraordinary expenses incurred by them in repairing a highway by reason, as they alleged, of damage caused by extraordinary traffic and excessive weight conducted thereon by or in consequence of the defendant's orders.

The traffic complained of was the passage of traction-engines, drawing trucks laden with bricks, over the highway.

At the trial in the county court the learned judge called upon counsel for the plaintiffs to deal with a point which had occurred to him, viz., whether in an action under section 23 of the Act of 1878, as amended by section 12 of the Act of 1898, the doctrine of contributory

negligence had any application. The learned judge then proceeded to deliver the following judgment, in which the facts and circumstances of the case are fully set out :—

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“ This action is brought for extraordinary expenses incurred by the plaintiffs between April 1, 1902, and March 31, 1903, in repairing a certain highway known as Engine Lane or Ferrymoor Lane, of a length of one mile and two chains, and leading from the Barnsley and Pontefract main road to a place called Grimethorpe, such expenses having been incurred to repair damage alleged to have been caused by excessive weight and extraordinary traffic, the alleged excessive weight and extraordinary traffic being the passage of traction-engines drawing trucks laden with bricks under the orders of the defendant. The claim amounts to £218 14s. 11d. The facts of the case are somewhat peculiar, and appear to raise points on which there is as yet no judicial authority. The history of the road is as follows :— Ten years ago there were only, at most, ten houses at Grimethorpe. About that time a shaft for a proposed colliery was commenced to be sunk, and about five years ago, in 1897 and 1898, the colliery began to work. At that time there were already seventy-eight houses, and since then the place has rapidly developed, and there are now 238 houses in the place besides a church, a vicarage, a school, a co-operative store, and a public-house. Of the houses which have been built, rather more than half have been built by the colliery company, and the materials used, or at all events the greater part of them, have been brought by rail to a siding belonging to the colliery, or obtained in the neighbourhood of the colliery, and have not passed over the road. The main part also of the produce of the colliery has been sent away by rail, but the materials used in building the rest of the houses have been brought over the road, mainly in ordinary carts, and of these materials the defendant has conveyed by means of his traction-engines 188,000 bricks, or enough to build about six of the cottages. This was done by a traction-engine making on an average one journey a week from April to January inclusive. Traction-engines are much used in the neighbourhood, not only for drawing loads of bricks and building materials, but also for the ordinary purposes of distributing goods, and there is abundant evidence that other traction-engines are in the habit of using this road, including one belonging to the Barnsley Brewery Company taking beer to the public-house, one taking goods to the co-operative store, and, occasionally at all events, others with building materials. The road is slightly downhill all the way from the high road, and ever since the colliery has been opened such coal as has gone by road, mainly to Cudworth, has been drawn up the road in carts with two horses to each cart. The road itself has never been, at all events

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until last year, when these expenses sued for were incurred, properly adapted to the natural increase of traffic incident to the working of the colliery, and the rapidly increasing population of the place, the road having remained merely a road adapted for agricultural purposes, patched up from time to time with dross and other soft stone and rubbish. It is to be remarked, however, that these expenses have increased annually.

"It would appear from the case of *Etherley Grange Coal Company v. Auckland District Highway Board*, 1894, 1 Q. B. 37, that had the plaintiffs put the road in a proper condition when, in consequence of the opening of the colliery, it was damaged and became unsuitable for the traffic over it; that is to say, when the traffic became extraordinary, they could have recovered their expenses in so doing. As to the question of excessive weight, calculations were given in evidence which showed that the pressure or weight per square inch of the defendant's traction-engine and brick trucks was considerably less than that per square inch of an ordinary laden coal cart; and there was no evidence of any culverts existing under the road, and certainly not of any being injured, as it was admitted might happen where the pressure of the whole breadth of the wheel of a traction-engine or truck came on one stone or pipe. There was a considerable conflict of testimony as to the actual state of the road. It was clearly, at all events until the recent expenditure upon it, not adapted to the ordinary traffic of the district, apart from any question of traction-engines. There was evidence which satisfied me that the coal carts and horses going up the hill laden from the colliery cut the road into deep ruts in its then condition, and, indeed, were a more efficient cause of damage to the road than the traction-engines, as the witness, William Johnson Treadwith, a surveyor of very large experience, who was called by the defendant, said that on a road of this description a traction-engine crushes in the road to some extent like a steam-roller, whereas a narrow cart-wheel cuts through it. Having regard to the present conditions of Grimethorpe, I cannot find that the occasional passage of the defendant's traction-engines and trucks was extraordinary, and though, no doubt, traction-engines and laden trucks are in one sense an excessive weight to pass over an ordinary agricultural unmade road, so also are the coal carts and a great deal of the other traffic using the road in question. It appears to me that the plaintiffs are in fault in not having adapted the road to the already largely-increased requirements of the neighbourhood, and that it is too late now to attempt to put the whole burden of their recent making-up of the road upon the defendant, who is only one of many parties using it. It may be observed that the growing importance of Grimethorpe by increasing the rateable value of the district in itself

provides a fund by which the road leading to it can be adapted to the ordinary traffic over it. To put the case in other words, even assuming some damage to have been done to the road by the traction-engine and trucks, this being an action for a personal tort : *Story v. Sheard*, 1892, 2 Q. B. 515; 61 L. J. M. C. 178, the plaintiffs cannot recover for such damage by reason of their contributory negligence in not keeping the road in a proper condition for the ordinary traffic using it. Had the road been properly made up, it is impossible to say what, if any, damage would have been done by the defendant's traction-engine and trucks; but with a road adapted to the requirements of the district, and similar to other made roads in the neighbourhood, there is nothing to show me that the traffic was extraordinary or the weight excessive. My judgment must, therefore, be for the defendant."

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Section 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), provides that :—

Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognisance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid . . .

Section 12 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29), provides that :—

Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows :—

(a) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court.

* * * * *

(c) There shall be substituted for the words "by whose order" the words "by or in consequence of whose order."

Dankwerts, K. C., and *Scholefield* for the plaintiffs. The doctrine of contributory negligence has no application to an action for the recovery of extraordinary expenses for the repairs of damage to a highway under these sections, and the learned county court judge was mistaken in holding as he did that the plaintiffs were debarred from recovering by reason of their contributory negligence in not keeping the road in a proper condition for the ordinary traffic using it. He apparently

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misconceived the ground of the decision in *Story v. Sheard*, 1892, 2 Q. B. 515; 61 L. J. M. C. 178, for nothing was laid down in that case as to the application of any principle of contributory negligence; and in *Attorney-General v. Scott*, 1904, 1 K. B. 404; 2 L. G. R. 461; 73 L. J. K. B. 196, on an application for an interim injunction to restrain the use of a traction-engine so as to be a nuisance to a highway, it was laid down that it was no defence to say that the damage to the road would not have occurred but for the negligence of the authority responsible for its repair. As to the principle to be applied in estimating the ordinary traffic of a road, a mere passing phase of traffic must be left out of consideration, but the traffic of several past years must be considered. For instance, the excess of traffic caused by new buildings in a neighbourhood, which would for a short period amount to extraordinary traffic, must be left out of consideration: *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161; *Whitebread v. Sevenoaks Highway Board*, 1892, 1 Q. B. 8; 61 L. J. M. C. 59; *Etherley Grange Coal Co. v. Auckland District Highway Board*, 1894, 1 Q. B. 37. Upon the question of excessive weight and pressure per square inch the learned judge applied an erroneous principle. This particular point was dealt with by Lindley J. in *Aveland v. Lucas* (1880) 5 C. P. D. 211, 351; 49 L. J. C. P. 643, when he said that the actual pressure per square inch of the appellants' wagons being less than that of ordinary wagons was a fallacious test, for the total pressure on the road remained the same.

Montagu Lush, K.C., and *R. A. Shepherd* for the defendant. The learned county court judge merely adopted the view that the doctrine of contributory negligence was applicable in this case as an alternative view. There was abundant evidence that the traffic conducted by the defendant was not extraordinary traffic within section 23 of the Act of 1878, and within the decision of *Wallington v. Hoskins* (1880) 6 Q. B. D. 206; 50 L. J. M. C. 19. The state of the road is most material, and it is essential that in assessing damage done by extraordinary traffic or excessive weight this circumstance should be taken into consideration. If, as appears to have been the case here, the road was in such a condition of disrepair that it could not carry ordinary traffic, then no damage could result to it from the passage of the defendant's traction-engine: *Aveland v. Lucas* (1880) 5 C. P. D. 351; 49 L. J. C. P. 643.

Danckwerts, K.C., in reply. The learned judge has not sufficiently considered the question of excessive weight, and has adopted the fallacy that it was the duty of the plaintiffs to turn this agricultural road into a road for heavy traffic. The true test is what is the ordinary traffic on the road before the extraordinary traffic comes upon it: *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161.

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LORD ALVERSTONE C.J. It is with some regret that I have come to the conclusion that there must be a new trial of this case, although it is quite possible that its result may be same as the former trial. If I were satisfied that the learned county court judge had answered the questions in favour of the defendant upon the true principle, and that the other part of his judgment, to which reference has been made, had not to a certain extent diverted his mind from the true issue, I should have been very unwilling to send the case back to him.

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It certainly seems to me there was evidence upon which he could have found that the road was injured by the excessive weight of the defendant's engine, and possibly that the traction-engine itself was extraordinary traffic. As to this I am myself in some doubt, but I am by no means satisfied that the learned judge did sufficiently apply his mind to the question of excessive weight. However, that is not the only ground upon which I feel we ought to hold that this case needs further investigation. I think the learned judge was impressed by a view, to my mind a wrong one, and one which Mr. Lush has not supported, that if there were any default on the part of the plaintiffs, as road authority, in not repairing the road they could not recover by reason of the doctrine of contributory negligence. I think the learned judge's mind was rather impressed with that view, because he asked whether counsel would like to argue the point. He also reverts to it at the end of his judgment. It is difficult to state clearly what the true view of all the decisions on this section should be, but, as I understand it, the issues before the learned judge ought to have been, and he ought to have found, what the ordinary traffic for this road was during the period, or at the commencement of the period, at which these expenses were alleged to have been occasioned by the road being cut up; and if he found the ordinary traffic were either agricultural, or the carting of bricks, or merely the ordinary traffic of a town, or possibly that of traction-engines, then, this fact having been ascertained, the road authority, before putting the expenses upon the person to be charged for extra repairs, ought either to have put or to be assumed to have put the road into a proper condition to bear the ordinary traffic of the neighbourhood, be it merely agricultural or otherwise. That I understand to be the result of more than one decision, and the learned judge appears to have been aware of it, because there is a passage in his judgment in which he says, "if the plaintiffs had put the road in a proper condition when in consequence of the opening of the colliery it was damaged and became unsuitable for the traffic over it, that is to say, when the traffic became extraordinary, they could have recovered their expenses of so doing." Therefore, if the truth of the matter were that the traffic on this road had ceased to be merely agricultural, and

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the ordinary traffic upon it was altered so that it was used by way of ordinary traffic for heavy brick carts, coal carts, and other heavy vehicles, then, before the plaintiffs would be entitled to claim and assess what might be due to them in respect of damage done by extraordinary traffic or excessive weight of vehicles, the road must have been put into a condition of fitness to bear the altered state of traffic. I have little doubt but that in the end the plaintiffs will not succeed in recovering their entire claim, because when the case is really examined it will be found that they have sought to put on this particular defendant the total cost of £218, as the difference between £63, the average cost of a mile and a fraction of road for the previous four years, and £283, the total cost of this year.

I am, therefore, of opinion that the learned judge must consider, or make it clear that he has considered what the ordinary traffic on this road was, and if at the commencement of this period of the year 1903, in which this expense was incurred, the allegation is that the defendant has either by extraordinary traffic or excessive weight injured the road he will, of course, have to say whether, having regard to the condition of the road for such traffic as ordinary traffic it has been cut up and injured by the defendant's extraordinary traffic or excessive weight. If the road is really to be taken as nothing but an agricultural road at that time, it is obvious that the traffic to which it would be subjected would be ordinary agricultural traffic. On the other hand, if the character of the whole road had changed, coal carts had gone along it doing considerable damage, and traction-engines had come into use, such facts would show that the plaintiffs were no longer entitled to treat this road as a purely agricultural road.

Moreover, I am not satisfied that the learned judge has sufficiently considered the question of excessive weight. The square inch theory or argument is undoubtedly evidence that must be considered. As Lindley J. pointed out in *Aveland v. Lucas* (1880) 5 C. P. D. 211, when sitting in the Divisional Court, the argument that there is less pressure per square inch from the vehicles causing the damage than from the ordinary traffic on the road cannot be separated from the question of excessive weight; in other words, the square inch argument may be a very valuable one to show that the traffic is not extraordinary, but it does not by any means follow if the weight be excessive that the total result on the road may not be one that injures the road by there being excessive weight.

I feel a doubt as to whether or not the learned judge has approached this question from the point of view I have endeavoured to express and which I think is the correct view. Therefore I think, though with regret, that this case must go back for a new trial. All questions are

entirely open, and I express no opinion upon them. The learned county court judge may on the new trial come to the opinion that the finding of fact is such as would prevent the plaintiffs being entitled to recover.

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WILLS J. I am of the same opinion. Traffic must of necessity, as time goes on, vary in its character according to the development of the various industries in the particular neighbourhood; and traffic which in one year, or at one given time, may be extraordinary traffic, will in the course of time, and it may be in the course of a comparatively short time, become ordinary traffic. Therefore I think that in considering whether traffic is extraordinary or not it is not sufficient to take simply the year to which the question relates and compare other traffic on the road *during* that year with the traffic complained of. That would be a fallacious test. The test is whether the particular traffic in question has by the usage of time and of society, and by the varying circumstances applicable to the case, *by that time* become such as can fairly be called ordinary traffic. A few years ago a motor-car would have been very extraordinary traffic, but I doubt much whether it would be called extraordinary traffic as things exist now. That is only an illustration of the principle I am attempting to lay down. I think it is very possible that the learned judge has dealt with the question of extraordinary traffic upon that footing, and if he has there is nothing to prevent him coming to the same conclusion again. If, on the other hand, he meant to say it was only not extraordinary because during that particular year there were many other traction-engines using the road, I doubt very much whether that would be a proper test.

With regard to excessive weight, I have always felt it a very difficult matter to understand what exactly is meant by excessive weight. Many of the decisions on the subject help us little towards a general understanding of what is meant by the expression whatever they may decide with regard to any particular case. It is clear that the square inch test has a good deal to do with it. It cannot be disregarded. If it could the very steam-rollers used to make the roads would become instances of excessive weight. The square inch test cannot be disregarded, for it seems to have a very important bearing on the question whether the weight is excessive; but we must also take into consideration, as Lindley J. pointed out in the Divisional Court in *Aveland v. Lucas* (1880) 5 C. P. D. 211, the effect of the concentration of that weight, whatever it is, upon a comparatively small space. In fact, everything which can bear upon the question of whether it can properly be called excessive weight must be considered, and the doubt I have is whether the learned judge in this case has taken sufficiently into consideration what has been said with regard to excessive weight, and the

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various decisions to which our attention has been called. I do not say he has not, and I am far from saying he may not arrive in the end at exactly the same conclusion he has already done.

With regard to the question of the road authority not keeping the road in order for ordinary traffic, it is clear that had a considerable effect upon his judgment. In the way he put it, it cannot be supported as an absolute answer to the plaintiffs' claim, as proving that no action can lie under these circumstances ; but it is a very essential element in the consideration of the case, because both extraordinary traffic and excessive weight must have some reference to the state of the road to which they are applied ; and also this much is perfectly clear, that the plaintiffs are only entitled to recover the damage done by extraordinary traffic and excessive weight from the particular person who is sued. They have done here what road authorities are constantly doing where they can hit one man ; they endeavour to put upon him the whole expense caused both by himself and other people ; and if it comes to be a question of assessing the expenditure which ought to be charged against the defendant, this fact of the road not having been kept in adequate repair for the needs of the neighbourhood, such as they had grown to be in ordinary use, is a very important matter, for it would be most unjust that because they have a cause of action against him they should saddle him with the effect of their own default as the effect of the extraordinary traffic or excessive weight he has brought on the road ; and therefore, probably, if the learned judge maintains the view he has expressed—and there seems to be ample evidence to support what he has found—that the road was in very bad condition for its proper reasonable or ordinary use, it ought to go very far either in negating the fact that the defendant's traffic has done any mischief at all, or in diminishing the amount the defendant ought to pay for the damage he has done.

KENNEDY J. I only propose to add a very few words. I share my Lord's hesitation about sending this case for a new trial at all. I agree that it should go back ; but it seems to me it is one of those cases in which my reason for my concurrence is that if a judge takes an alternative view it may, to some extent, affect the justice of the weight he gives to legal considerations on the alternative head. It is difficult to separate the two. There is one view the learned judge has taken which I think may, to some extent, have misled him in weighing the facts of the case, namely, an idea about contributory negligence as affording in itself a complete answer to the action, although, to some extent, actual mischief may have been caused by the weight put upon this road by the defendant.

If we had been satisfied that in saying "had the road been properly

made up it is impossible to say what, if any, damage would have been done by the defendant's traction-engine and trucks," the learned judge was using the word "properly" in its strictly correct sense, *i.e.*, as meaning so made up as, according to the experience of past years, its traffic should have led the plaintiffs to make it up, then I do not think there would have been anything to quarrel with in the finding, or anything that could be objected to, because it lies on the plaintiffs to prove not merely that the defendant has put heavy weights, or frequently put heavy weights on the road, but to show that the road has been damaged by those weights and by that traffic.

It may turn out that the learned county court judge, when the case goes back to him, will tell the parties that when he said in his judgment, "it was clearly, at all events, until the recent expenditure upon it, not adapted for the ordinary traffic of the district apart from the question of traction-engines," he meant—what in my opinion would have been perfectly right—adapted to the traffic, not merely as it once was, of a purely agricultural kind, but to traffic which to some extent involved the use of this particular road by coal carts; and if he meant to find, on the evidence before him, that what had happened in the past, whether there were traction-engines or not, had made ordinary the user of the road by weights, which, if provided for, would have given a road sufficient to prevent any injury being done by those weights, in my judgment he would have been justified in finding for the defendant.

Therefore, without for one moment wishing to express any *scintilla* of difference from what has been so authoritatively laid down as to how to calculate excessive weight or what to treat as extraordinary traffic, it seems to me the question he has considered is one which, if he had left out the alternative view he expressed, is substantially right. But I think it safer to adopt the decision that this case should go back for a new trial, because unquestionably there has been a certain doubt cast upon the meaning of some of the phrases used by the learned judge when dealing with the proper considerations, from the fact that he seems to have reverted again to a view we none of us think right with regard to contributory negligence.

Appeal allowed.

Solicitors for the plaintiffs—Scholefield and Scholefield, Hemsworth.

Solicitors for the defendant—Hicks, Davis, and Hunt, for Bury and Walker, Barnsley.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

Aug. 6.

KENT COUNTY COUNCIL *v.* FOLKESTONE CORPORATION.

Limitation of time—Action against local authority—Highways—Action to recover expenses occasioned by extraordinary traffic—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a)—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1, b).

The provisions of section 1 of the Public Authorities Protection Act, 1893, limiting to six months the period within which an action for any act done in pursuance of any Act of Parliament, or of any public duty or authority, must be brought, apply to an action against a local authority under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover expenses of road repair occasioned by extraordinary traffic conducted by or in consequence of the orders of such authority, and for the purposes of their powers and duties as local authority.

FURTHER consideration of an action tried before Darling J., sitting without a jury at Maidstone Assizes.

The action was brought under section 23 of the Highways and Locomotives (Amendment) Act, 1877, as amended by section 12 of the Locomotives Act, 1898, for the recovery of extraordinary expenses amounting to £520 6s. 8d. alleged by the plaintiffs to have been incurred by them in repairing certain main roads by reason of damage caused by excessive weight passing along the same and extraordinary traffic conducted thereon by or in consequence of the order of the defendants.

The traffic in respect of which the action was brought consisted in the haulage by means of traction-engines of stone and other materials for the use of the defendants. The plaintiffs alleged that the stone, &c., was to be used in widening a particular street in the borough of Folkestone, the work in connection with which was not complete at the time when the action was brought.

The damage to the roads was done in the early part of 1903, none occurring later than March 23, 1903.

The certificate of the plaintiffs' surveyor, given pursuant to section 23 of the Highways and Locomotives (Amendment) Act, 1878, on which the action was based, was given on January 4, 1904.

The sum of £520 6s. 8d. specified in the certificate as the amount of the extraordinary expense to which the plaintiffs had been put by reason of the traffic was subsequently demanded of the plaintiffs, and the writ in the action was issued on February 11, 1904.

The defendants, besides denying that the traffic was "extraordinary" or of "excessive weight," and setting up certain other defences to which it is unnecessary to refer for the purposes of this report, pleaded that the action was barred by section 1 of the Public Authorities Protection Act, 1893. 1904.
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At the trial, subject to further argument on points of law, Darling J. found that the traffic was extraordinary traffic, and assessed the sums due to the plaintiffs in respect thereof at £250 for damage done before February 11, 1903, *i.e.*, more than twelve months before the commencement of the action, and £50 for damage done between that date and March 23, 1903, making together £300.

Dickens, K.C., and *T. Mathew*, for the plaintiffs, moved for judgment for £300.

Hume Williams, K.C., and *Hansell* for the defendants. The claim is barred by section 1 of the Public Authorities Protection Act, 1893. The hauling of the stone was an act done in execution of an Act of Parliament, or of a public duty or authority, within the meaning of that Act, and the action was not brought within the six months limited by that Act for the institution of an action for any such act: *Carey v. Bermondsey Borough Council* (1903) 2 L. G. R. 219; *Parker v. London County Council* (1904) 73 L. J. K. B. 561; 2 L. G. R. 662. The limitation of time in section 12 of the Act of 1898, which applies to all actions for the expenses of extraordinary traffic, is not inconsistent with a shorter limitation applicable to actions against public authorities: *Markey v. Tolworth Hospital Board*, 1900, 2 Q. B. 454; 69 L. J. Q. B. 738. The Act of 1898 cannot, therefore, be taken to have impliedly repealed the Act of 1893 as regards such actions.

[They also argued that the traffic, though in certain respects exceptional, was not "extraordinary" within the meaning of the Act of 1878; and that, except as regards the £50, the claim was out of time under section 12 (1, b) of the Act of 1898. As the judgment turned entirely on the Public Authorities Protection Act, 1893, it has not been thought necessary to report the arguments on these points.]

Dickens, K.C., in reply. The Act of 1898 was intended to constitute a special code regulating all actions in respect of extraordinary traffic, and therefore should be taken to override the Act of 1893 as regards such actions: *Taylor v. Meltham Local Board* (1877) 47 L. J. C. P. 12. Further, such an action is not of the class to which the Act of 1893 is directed.

DARLING J. I am of opinion that the plaintiffs are not entitled to judgment in this action for the £300 at which I assessed the damages

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at the trial, subject to further consideration of points of law. I am against the defendants upon the point as to whether the traffic was or was not extraordinary, for I am still of the opinion I formed at the trial that the traffic did amount to extraordinary traffic. The only question left, therefore, is whether the defendants come within the protection afforded by the Public Authorities Protection Act, 1893. Upon that point, and upon that point alone, I am of opinion, although the question is not altogether free from difficulty, that the defendants are entitled to judgment. By section 1 (a) of that Act, where any action, prosecution or other proceeding is commenced against any person for an act done in execution of a public duty or authority, "the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." Then section 12 (1, b) of the Locomotives Act, 1898, is as follows: "Proceedings for the recovery of any expenses"—i.e., expenses of extraordinary traffic—"incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Mr. Dickens has contended on behalf of the plaintiffs—and it is the only argument that he could use—that the Locomotives Act, 1898, had made provision for a particular class of action with regard to which the Act had laid down a code applicable to all persons, including public authorities. If that be so, and if such a code be really laid down, then the Act has *pro tanto* repealed the Public Authorities Protection Act, 1893, so far as concerns the six months' limitation of time within which actions must be brought against public authorities. But there is nothing in the Locomotives Act, 1898, that says so in plain words, nor does it contain any words whatever repealing any provision of the Act of 1893. In my opinion, the two enactments remain, and there is still a distinction to be drawn between the private individual, who, not being favoured to the same extent as public authorities, can have an action brought against him within twelve months, and the public authorities themselves, against whom no action will lie unless commenced within the six months. The protection remains, and the defendants are entitled to claim it. I think this case is really covered by *Markey v. Tolworth Hospital Board*, 1900, 2 Q. B. 454; 69 L. J. Q. B. 738, and that the reasons I made use of in giving the judgment I did in that case apply equally here, notwithstanding that the point there arose in an action under the Fatal

Accidents Act, 1846, instead of the Locomotives Act, 1898. I certainly feel bound to say that had I to consider the question now before me again without authority, I should still think the reasoning of the judgment of the Divisional Court in that case correct.

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I am therefore of opinion that section 1 of the Public Authorities Protection Act, 1893, was not partially repealed by section 12 (1, b) of the Locomotives Act, 1898, and that the present action, not having been commenced within the six months, cannot be maintained. The plaintiffs' claim is barred, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for the plaintiffs—Church, Adams, and Prior, for Turner, Maidstone.

Solicitors for the defendants—Holt, Beever, and Crowdy, for A. F. Kidson, Folkestone

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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May 12.
June 7.

HAEDICKE v. FRIERN BARNET URBAN DISTRICT COUNCIL.

Sewers—Drains—"Single private drain"—Pipe in private ground draining houses belonging to different owners—Proceedings taken against one owner under nuisance clauses of Public Health Act—Work done by owner under protest—Compulsion—Recovery of expenses from local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 41, 94—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.

A local authority, in whose district section 19 of the Public Health Acts Amendment Act, 1890, was in force, served notice in the statutory form of a notice under section 94 of the Public Health Act, 1875, upon the plaintiff, as the owner of three houses, requiring her to abate a nuisance arising from a conduit (described in the notice as a drain) laid wholly in private land and draining those houses, together with another house of the plaintiff's and some twelve others belonging to other owners, into a sewer laid under a road. The plaintiff, who was aware that the conduit drained the houses in question, executed the work under protest and sued the local authority for the expense to which she was put.

Held by Channell J.—1. *That, though in the absence of authority he would have decided otherwise, he was bound by* Bradford v. Eastbourne Corporation, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571 *to hold that the conduit was a "single private drain" within section 19 of the Act of 1890, and that he must regard* Thompson v. Eccles Corporation, 1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497 *as having been decided per incuriam.*

2. *That the fact that the pipe was a single private drain did not prevent its being a sewer which the local authority were bound to maintain subject to their right in the circumstances contemplated by section 19 of the Act of 1890 to take proceedings under that section to cause it to be repaired at the expense of the owners of all the houses served by it.*

3. *That the local authority not having taken proceedings under section 19 of the Act of 1890, no liability on the part of the owners had arisen, and that the plaintiff was therefore entitled to recover, on the ground that she had done the work under pressure in the nature of compulsion from the authority who were themselves bound to do it.*

North v. Walthamstow Urban District Council (1898) 67 L. J. Q. B. 972 explained and followed.

ACTION tried before Channell J. without a jury.

The action was brought by the plaintiff, Mrs. J. Haedicke, to recover expenses amounting to £73 incurred by her in relaying a drain pipe at the rear of Nos. 3, 5, 7, and 9, Friern Barnet Road, four houses

in the defendants' district, of which the plaintiff was owner, together with £15 damages for loss of rent of one of the houses.

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The drain pipe in question, with which the houses were connected by house drains of the usual kind, took the drainage of these houses, together with that of some twelve others, and, though originally discharging otherwise as explained in the judgment of Channell J., had, some years before the events giving rise to the present action took place, been diverted by the defendant council or their predecessors so as to discharge into a sewer belonging to them.

In January, 1903, the pipe became obstructed, and the occupier of one of the plaintiff's houses complained to the council. And after some previous correspondence the council on February 24, 1903, caused the following notice to be served on the plaintiff's husband, who managed her property :—

“ FINAL NOTICE. URGENT.

“ The Friern Barnet Urban District Council, to Mrs. J.

Haedicke, or owner, of Norfolk Villa, Brondesbury, N.W.

“ Take notice that under the provisions of the Public Health Act, 1875, the Urban District Council of Friern Barnet, being satisfied of the existence of a nuisance at Nos. 5, 7, and 9, Friern Barnet Road, in the county of Middlesex, and within the district of the said urban district council, arising from defective drains, w.c. accommodation, &c., do hereby require you, within three days from the service of this notice, to abate the same, and for that purpose to relay the drains in rear of houses with sound glazed stoneware pipes, jointed in cement upon concrete foundation, and all necessary inspection chambers and ventilating pipes, remove defective soil pipes, discontinue the use of ground floor w.c., and reconstruct same on outer walls with windows opening directly into the external air.

“ If you make default in complying with the requisitions of this notice, or if the said nuisance, though abated, is likely to recur, a summons will be issued requiring your attendance to answer a complaint which will be made to a court of summary jurisdiction for enforcing the abatement of the nuisance and prohibiting a recurrence thereof, and for recovering the costs and penalties that may be incurred thereby.”

The notice was accompanied by a letter from the inspector of nuisances to the council to the plaintiff's husband, as follows :—

“ I am instructed by the Friern Barnet Urban District Council to serve the enclosed notice, and must request you to at once give the

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necessary instructions for the work to be completed by the time specified, so that I can report to the council at their next meeting."

Upon receipt of the notice and letter the plaintiff's husband wrote to the clerk to the defendant council, as follows :—

"Kindly confer with sanitary department. They serve me notice to repair drains Nos. 3, 5, 7, and 9, Friern Barnet Road, which is a combined drain or sewer repairable by the local authority, and as this is a legal point you are hereby written to for Mrs. Jenny Haedicke, Norfolk Villa, Brondesbury, N.W."

On February 27 the clerk to the council wrote to the plaintiff's husband as follows :—

"I am in receipt of your postcard, and in reply I have to inform you that the drains in question are repairable by the owner and not by the local authority. The notice should be complied with without any further delay."

The next day, February 28, the plaintiff's husband wrote to the clerk to the council, as follows :—

"Re notice 5, 7, 9, Friern Barnet Road.

"In self-defence I shall do these repairs to the drainage and enforce payment in a court of law. The owner is Mrs. Jenny Haedicke, my wife, and you have no better chance than other local authorities who tried that game once before . . ."

It was common ground that the notice of February 24, 1903, referred to the drain pipe in question as well as to the house drains of the several houses.

In March, 1903, the necessary work to the drain pipe was carried out by the plaintiff in accordance with directions of the defendants' officers.

The statement of claim was as follows :—

"1. The plaintiff is the owner of houses situate and known as Nos. 3, 5, 7, and 9, Friern Barnet Road, New Southgate, in the county of Middlesex, and in the district of which the defendants are the sanitary authority.

"2. On February 24, 1903, the defendants, by Albert E. Still, their sanitary inspector, served upon the plaintiff a notice in writing calling upon the plaintiff to repair a sewer by means of which the said houses, together with others in the said road, are drained. By means of the said notice the plaintiff was by law compelled to do, and did, the said works at a cost of £73.

"3. The said works were and became necessary by reason of the default of the defendants, who were in fact liable to repair the said sewer at their own cost.

"4. The plaintiff seeks to recover the said sum of £73, either as

money paid for and on behalf of the defendants at their request, or as reasonable expenses of executing the said works necessary to abate the nuisance referred to in the said notice, which arose through the default of the defendants as aforesaid.

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"5. The plaintiff further claims that by reason of the defendants' aforesaid default she was unable to let No. 5, Friern Barnet Road, for the period of 26 weeks, and lost £15 rent.

"The plaintiff claims £88."

In their defence the defendants admitted that the plaintiff was owner of the houses, and that they caused the notice of February 24, 1903, to be given, though not admitting that its purport was correctly stated in the statement of claim. They did not admit that the plaintiff was compelled to do or did the alleged work at the cost of £73 or at any other cost or at all. They denied that the works had become necessary by their default, or that they were liable to repair the pipe. They denied that the works were in connection with any sewer repairable by them. And they denied that the plaintiff was unable to let the house in respect of which damages were claimed by reason of the defendants' default, or at all.

Macmorran, K.C., and *Colam* for the plaintiff. The plaintiff's case is that the pipe in question is a sewer vested in the defendants and repairable by them; that she, by the notice of February 24, 1903, was compelled to repair it; and that she is consequently entitled to recover as a person compelled to do what it was the defendants' duty to do. That such a notice as that of February 24, 1903, puts compulsion on the person on whom it is served is established by *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972; see also *Cree v. St. Pancras Vestry*, 1899, 1 Q. B. 693; 68 L. J. Q. B. 389; *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31.

That the pipe was a "sewer" within the meaning of the Public Health Act, 1875, is indisputable. The defendants will, however, contend that it was a "single private drain" within section 19 of the Public Health Acts Amendment Act, 1890, which is in force in the defendants' district, and that, by reason of that section, the defendants are not liable to repair the pipe, but that it is repairable by the owners of the property, including the plaintiff.

To this contention there are three answers.

In the first place, according to the most recent case on the subject, *Thompson v. Eccles Corporation*, 1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497, a pipe such as that in question is not a single private drain at all, that expression being confined to pipes which are not sewers within the meaning of the Public Health Act, or which, being

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made for profit, or for some such reason, even though sewers, do not vest in the local authority.

Secondly, if *Thompson v. Eccles Corporation* is not to be accepted as governing this case—and it is no doubt difficult to reconcile with *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, which was previously regarded as the leading case on the subject—still, the pipe is not a single private drain within section 19 of the Act of 1890, for this reason. That section is concerned exclusively with single private drains whereby houses are connected with public sewers. In this case, however, the pipe originally did not discharge into a sewer, but into a ditch or cesspool. And it cannot be that the action of the local authority in diverting it into a sewer could transform it into a single private drain. It has been held that once a pipe is a sewer it remains a sewer, notwithstanding that all the houses but one which it serves are cut off from it: *St. Leonard, Shoreditch, Vestry v. Phelan*, 1896, 1 Q. B. 533; 65 L. J. M. C. 111.

Thirdly, even if the pipe is a "single private drain" within section 19 of the Act of 1890, the plaintiff is entitled to recover. A drain which serves a number of houses, and is therefore a sewer within the Public Health Act, 1875, vested in the local authority, is none the less a sewer, and none the less vested in the local authority, because it is at the same time a "single private drain" within section 19 of the Act of 1875. And the fact that it is a single private drain does not take away or destroy the responsibility of the local authority. The only effect of the section is that if the proper complaint in writing is made to the local authority, then that authority by adopting a particular form of procedure may cast the expense of repairs upon the owners of the houses which the drain serves: *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; *Reg. v. Hastings Corporation*, 1897, 1 Q. B. 46; 66 L. J. Q. B. 80. It is an essential part of the procedure that notice should be served on the owners of all the houses which the drain serves requiring them collectively to do the work: *Lancaster v. Barnes Urban District Council*, 1898, 1 Q. B. 855; 67 L. J. Q. B. 744. The responsibility of the house owners does not arise, and that of the local authority remains unaffected, until there has been (1) a complaint in writing to the local authority of nuisance, and (2) the service by the local authority of a proper collective notice on the owners of the houses. Here neither of these conditions has been fulfilled. And, further, if they had the plaintiff's liability would not have been for the whole expense but only for a share of these expenses apportioned in the manner prescribed by section 19 of the Act of 1890.

The loss of rent of No. 5 was due to the default of the council in keeping the sewer in repair, and is recoverable.

Clavell Salter, K.C., and *Duckworth* for the defendants. To succeed on the main claim the plaintiff must establish that she was compelled to execute the works, and, secondly, that the defendants were compellable to execute them. Even assuming that the pipe was a sewer, and not a single private drain, neither proposition is tenable. The plaintiff was not compelled to do the work. She might have ignored the notice and successfully defended any proceedings taken on it: *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217; *Oliver v. Camberwell Borough Council* (1904) 2 L. G. R. 617. Secondly, the council were not compellable to do the work in any sense which will found an action: *Pasmore v. Oswaldtwistle Urban District Council*, 1898, A. C. 387; 67 L. J. Q. B. 635; *Robinson v. Workington Corporation*, 1897, 1 Q. B. 619; 66 L. J. Q. B. 388.

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Secondly, the pipe was a "single private drain" within section 19 of the Act of 1890. No doubt *Thompson v. Eccles Corporation*, 1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497, is against the defendants on this point. But that case was based on *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164, which the Court refused to follow in *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, and again in *Seal v. Merthyr Tydfil Urban District Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37, where Cave J., who was one of the judges by whom *Hill v. Hair* was decided, practically abandoned his earlier view and accepted *Bradford v. Eastbourne Corporation*. Apart from authority it is submitted that the section must be meant to apply to a case like the present. If it is not, it is practically inoperative. If the pipe is a single private drain within section 19 of the Act of 1890, then the plaintiff cannot establish the propositions on which her case is based; for she has merely done what she was bound to do. The fact that the machinery necessary to enforce section 19 of the Act of 1890 was not actually put in operation cannot be material.

The fact that the pipe was not originally connected with a sewer but with a ditch or cesspool is immaterial. It was connected with a sewer at material times. *St. Leonard, Shoreditch, Vestry v. Phelan*, 1896, 1 Q. B. 533; 65 L. J. M. C. 111, went on the ground that the pipe once vested in the local authority could not be divested by the cutting off of some of the houses served by it. Here there is no question of a divesting of the pipe.

Cur. adv. vult.

June 7, 1904. CHANNELL J. read his judgment as follows:—In this case the plaintiff is the owner of four houses in Friern Barnet Road, within the district of the defendant district council, which houses were drained by the usual house drains into a nine-inch pipe which was laid

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through the back gardens of these and other houses, about sixteen in number. That nine-inch pipe, when first laid, a considerable number of years ago, communicated with a similar pipe behind other houses, between thirty and forty in number, and both parts of the pipe were entirely on private ground, and the outfall was into a ditch or a cess-pool—it does not clearly appear which. In 1888 the defendants or their predecessors constructed a sewer in the roadway, and they then made a communication from the nine-inch pipe into the sewer, so diverting the drainage of the sixteen houses through the nine-inch pipe into the sewer. The nine-inch pipe in the neighbourhood of one of the plaintiff's houses about January, 1903, became obstructed, and a nuisance was caused of which the occupier complained to the defendant council, and after some correspondence, and the service of two notices, which I need not further refer to, the district council served a notice, dated February 24, 1903, stating that the council was satisfied of the existence of a nuisance at 5, 7, and 9, Friern Barnet Road (being three of the four houses owned by the plaintiff), and requiring her within three days to abate the same, and for such purpose to relay the drains in rear of the houses in a certain way, and also to reconstruct the w.c.'s, and do other work within the houses. The notice was the ordinary notice for abatement of a nuisance, and was accompanied by a somewhat peremptory letter from the clerk to the council. The plaintiff's husband, who managed her property, replied by a letter of February 25 stating that the notice related to "a drain which is a combined drain or sewer." The clerk replied by a letter of February 27 that "the drains in question are repairable by the owner, and not by the local authority, and that the notice should be complied with without any further delay."

The plaintiff's husband replied by a letter dated February 28, in which he said that he would "in self-defence do these repairs to the drainage and enforce payment in a court of law." The plaintiff had to do both the work inside the houses included in the notices and also the work required to the nine-inch pipe. Under the direction of the defendants' surveyor the plaintiff took up the nine-inch pipe not only behind the three houses but also behind the house No. 3, which also belonged to her, adjoining to the houses named in the notice. The fall of the pipe was altered and a six-inch pipe substituted in the upper part. The plaintiff then brought this action to recover from the defendants the money expended on alteration of the nine-inch pipe and in remaking the connections with it (admitting, of course, that she must bear the expense of the inside work), on the ground that the work to the nine-inch pipe was work which the defendants ought themselves to have done.

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The first question which was argued was whether under these circumstances, even if the expense incurred by the plaintiff was in respect of work which the defendants ought themselves to have done, the plaintiff can recover, or whether she was merely in the position of a volunteer who had voluntarily chosen to perform the obligation of another person. If my decision in *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972 is correct, the plaintiff clearly can recover; but, in my opinion, the present case is stronger in favour of the plaintiff than that was. There, as in many of the cases, the plaintiff acquiesced at the time in the notice served on him, and only claimed to be reimbursed by the local authority when he subsequently discovered either facts or law which in his view threw the burden on the local authority. In the present case the plaintiff, through her husband, acting as her agent, protested at the time, and under protest submitted to the defendants' notice and threats. Under these circumstances, there is really no difficulty in implying the necessary promise on the part of the defendants to reimburse the expenditure, if their contention as to the liability proved to be wrong. I think still that my decision in *North v. Walthamstow Urban District Council* was right, and was entirely justified by the authority of *Andrew v. St. Olave's Board of Works*, 1898, 1 Q. B. 775; 67 L. J. Q. B. 592, on which it was based. I do not think any case except, possibly, *Oliver v. Camberwell Borough Council* (1904) 2 L. G. R. 617, in any way shakes such authority as it might otherwise have had. In that case (*Oliver v. Camberwell*) Wills J. expressly stated that he personally agreed with my view, and he and Kennedy J. decided that case on the ground that there had been only an intimation, and not a statutory notice, and they thought, rightly or wrongly, that certain cases to which they referred were authorities which showed the difference between an intimation and a notice to be important. It seems to me, I must say, that at least two of the cases to which they referred, including the one *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580, on which they really based their judgment, were quite different. *Thompson and Norris Manufacturing Co. v. Hawes*, and also *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31, were cases in which a tenant was suing his landlord for money paid under alleged compulsion of a local authority. It seems to me that there the tenant would have had to prove real compulsion. It is quite different from this case where one person sues another in respect of money alleged to have been paid by him by reason of pressure put upon him by the person whom he is suing. When suing a third party, such as his landlord, the plaintiff has to prove that he was actually compelled—that the proceedings against him were such as he could not have effectually resisted; whereas when a plaintiff is

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suing the person who put on the compulsion, that fact—of the compulsion being such as must succeed—would probably be fatal to his case. Here, if the plaintiff had defended the proceedings which would have followed on her non-compliance with the defendants' notice, she would have been entitled to ask the magistrate to say that she was not the person by whose act and default the nuisance had arisen, but that the defendants were. If that question had been decided against her by a court of competent jurisdiction, and the decision had stood without successful appeal, the plaintiff never could have recovered the money from the defendants, at all events, unless she could have shown, as is suggested by Lord Russell in *Andrew v. St. Olave's*, which she might possibly have done, that both were liable. On the whole, I come to the conclusion that on the facts before me the plaintiff may recover if she shows that the obligation to keep the nine-inch drain in repair was on the defendants. It is, as it seems to me, an ordinary case of recovering money extorted by duress and paid under protest.

I pass now to the question whether it was the duty of the defendants to do what was required to the nine-inch pipe. Dealing with the question, in the first instance, apart from the Act of 1890, the pipe was undoubtedly a sewer within section 4 of the Public Health Act, 1875, vested in, and under the control of, the defendants by section 13, and which, by section 15, unless a distinction can be drawn between "vested in" and "belonging to," the defendants had an express duty to repair. Wright J. has both in *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217, and in *Reg. v. Hastings Corporation*, 1897, 1 Q. B. 46; 66 L. J. Q. B. 80, suggested that there is no duty on a local authority to do specific works, and that the general duty of properly draining their district can only be enforced at the instance of the Local Government Board. This is so as regards the general duty (see *Pasmore v. Oswaldtwistle Urban District Council*, 1898, A. C. 387; 67 L. J. Q. B. 635); but where an existing sewer belonging to the local authority is out of repair they are bound by section 15 to repair it. If they were bound to repair the defects in this nine-inch pipe (which apart from the Act of 1890 they clearly were), I do not think they are at liberty to say that the works done at their instance and under the direction of their surveyor were not works necessary to remedy the defects in the pipe. This, I think, prevents the defendants saying that the works, the expense of which the plaintiff is seeking to recover, were different works from those, if any, which they would themselves have been liable to do. It is true they would have had a wider discretion as to what should be done; but they have, in my opinion, exercised their discretion so as to preclude themselves from objecting to what the plaintiff did, and they directed the works

behind the house No. 3 as well as those behind the other houses. If, therefore, the Act of 1890 had never been passed (subject to a small question of amount) the plaintiff's action would have been maintainable. It remains to consider the difficult question of the construction of section 19 of the Act of 1890, and its effect on the questions in this action. That section has been considered in *Self v. Hove Commissioners*, 1895, 1 Q. B. 685; 64 L. J. Q. B. 217; *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164; *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571; *Seal v. Merthyr Tydfil Urban Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37, possibly in other cases, and lastly in a case of *Thompson v. Eccles Corporation*, decided in the Divisional Court, and reported, since the argument of this case before me, in the June numbers of the "Law Reports" and "Law Journal" (1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497). I was a party to that last case, which is now said to be contrary to *Bradford v. Eastbourne Corporation*, and now that I have had the opportunity of examining the cases again, with the assistance of extremely clear arguments by Mr. Macmorran and Mr. Clavell Salter, I feel bound to say that I do not consider the last case a satisfactory decision. Whether it does differ from the *Eastbourne* case or not, and whether if it does it is right or wrong in so doing, the Court of Appeal, to which I understand the case has been taken, will, of course, decide; but I may say at once that although I adhere to what I appear to have said as to the curious effect of section 19 and its general construction, I see now that I omitted altogether to notice what I now think to be an important point in the case. Counsel in the *Eccles* case referred the Court to the *Eastbourne* case, but did not call our attention to it in detail. I did not have the report actually before me, nor, so far as I recollect, had my brothers. We all thought we knew, and no doubt we did know, the general effect. I do not desire to put the blame on counsel, for what they did was to attribute to me a more accurate knowledge of all the points decided in the *Eastbourne* case than I in fact possessed. The *Eccles* case was argued before us as if the question was whether the pipe was a sewer or whether it was a drain; it was suggested that it might be a sewer at one part of its course when it was serving several houses belonging to one owner, and that at another part of its course, when it was, in addition, serving another house belonging to another person, it would cease to be a sewer, and would become "a single private drain"; it was also suggested that the mere fact that it drained the houses of more than one owner made it *ipso facto* a drain as distinguished from a sewer, and, further, that it was not a case of 'houses belonging to different owners,' because two out of the twelve houses or so belonged to the same person. These arguments did not

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commend themselves to me then or now. They certainly show the difficulties arising out of the section, but it was not brought home to my mind that what was really decided in the *Eastbourne* case was that on the true construction of section 19 of the Act of 1890 a thing which for all other purposes was a sewer might for the purposes of that section be the thing referred to in that section as a single private drain. The reasoning of the Court on subsection (3) of this 19th section is very strong as to this when the case is carefully read. I cannot speak with the same freedom of the judgment of my learned brothers as I can of my own, but I do not think this point was present to their minds any more than it was to mine. I observe that what the Lord Chief Justice said of the matter was that it could not now be disputed that under the Act of 1875 a drain pipe which receives the drainage of more than one building is a sewer none the less because it is made entirely through private property. In that I agreed at the time and agree now, but I now think that it did not conclude the question, and that we ought to have gone on to consider the question whether, notwithstanding that the construction we had then to deal with was a sewer under the Public Health Act, 1875, it was not also a construction in respect of which the powers of section 19 of the Act of 1890 might be exercised. I think that the 19th section may be paraphrased thus, leaving out some immaterial words and altering others to show the meaning which I attach to them :—"Where two or more houses are connected with the public sewer, not by a separate drain for each house as the local authority may require them to be, but by one drain for all the houses, that drain, provided it is a private drain, and notwithstanding that it is for purposes other than this section, a sewer, may be dealt with under section 41 of the Public Health Act, 1875, notwithstanding that all the houses do not belong to the same owner, and the expenses may be recovered from the owners of the houses in such proportion as the surveyor may settle."

In this paraphrase, as in the section itself, the difficulty is to see what is meant by "private drain." Now the section is in an Act which local authorities have the option of adopting if they like. One would think that such an Act would be confined to machinery for enforcing and dealing with existing rights and liabilities, and would not be found to have the effect of substantially altering rights and creating new liabilities, or, at all events, that it would not enable a local authority by adopting the Act to relieve themselves from liability to repair existing structures, and to transfer that liability to private owners. Further, if it were really intended to transfer to private owners the liability of maintaining structures which before the adoption of the Act had been maintained by the public, it is inconceivable that it could have been

intentionally enacted that that liability should be so transferred when the houses did not all belong to the same owner, but that if the houses, though constructed and drained in precisely the same way, happened to belong to one person, that person should be entitled to have his drain kept in order at the expense of the public. There are, therefore, very strong grounds for holding that when the section contrasts, as it clearly does, "private drain" with "public sewer," the words "private" and "public" refer to the liability to repair being on private owners and on the public respectively. If I had to construe the section apart from the authority of the *Eastbourne* case, I should certainly say that if such things could be found as drains connecting more than one house with a public sewer, which were, apart from the Act of 1890, repairable by the owners of the houses, those were the things referred to as "private drains," and that the intent of the section was to provide machinery for dealing with such cases when there was more than one owner, and for apportioning expense. I agree that such things would not be numerous, but I do not at all think they are non-existent. In addition to the cases suggested by Cave J. in *Hill v. Hair*, 1895, 1 Q. B. 906; 64 L. J. M. C. 164, I think there are in fact a considerable number of cases of semi-detached houses or small rows of three or four houses where private owners repair either under provisions of a local Act more or less similar to the combined drainage clauses of the metropolitan Acts, or under conditions imposed by local authorities when asked to consent to such modes of drainage.

During the argument of this case before me, and upon my stating that I believed such cases did exist, a gentleman, who was clerk to a local authority, not engaged in this case, who happened to be in Court, stated through Mr. Macmorran, who was arguing the case, that he personally knew many such cases, and Mr. Macmorran, who himself has a large experience, was of the same opinion. I adhere, therefore, personally, to the opinion I expressed in *Thompson v. Eccles Corporation*, 1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497, that Cave J.'s view was the most logical solution of the difficulty arising from this section, though the instances are not, in my opinion, exhaustive. I think, however, after a careful consideration of the *Eastbourne* case, that the contrary was there decided, and I do not think it is open to me to disregard that decision, more especially as Cave J., in the subsequent case of *Seal v. Merthyr Tydfil Urban Council*, 1897, 2 Q. B. 543; 67 L. J. Q. B. 37, himself followed it. I must therefore hold that "private" in section 19 refers not to the private liability to repair as distinguished from public, but to the fact that the structure is on private ground. I doubt whether the Court in the *Eastbourne* case intended to hold that all sewers on private ground draining houses of more than

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one owner and communicating with a sewer in a highway were to be held to be "single private drains." To my mind, although "two or more" includes "more than two," and a hundred is more than two, yet "two or more" was never meant to include a hundred. Here there were a very considerable number of houses all drained into what seems to me to be not merely by a definition in the Public Health Act, 1875, but, in fact, a sewer, going along at the back of the houses instead of at the front and going through the back gardens, that is, no doubt, through private ground, but still in every respect what is ordinarily called a sewer. I am not sure that the judges who decided the *Eastbourne* case would really have held this to be a "single private drain," but there were a considerable number of houses involved in that decision, and still more apparently in *Seal v. Merthyr Tydfil Urban Council*, so I ought not to distinguish this case on that ground. I do not think the recent decision in *Thompson v. Eccles Corporation*—decided, as I think it was, by inadvertence—(unless distinguished on the last ground by reason of the number of houses) would justify me in disregarding the *Eastbourne* case. I have commented on the extraordinary result of this legislation that the same structure must be repaired by the local authority if it serves the houses of one person only, but that if it serves different owners those different owners may be required to repay the expense of making good. It is, however, right to point out that the thing which is extraordinary is not the enactment as to several owners but the omission to enact the same thing when there is only one owner. This omission appears clearly accidental. The draftsman of the section must have thought, and the Legislature which adopted his language must have thought, that this had been already provided, and consequently by a misapprehension omitted to provide for it. It is their omission that is mischievous rather than the enactment as interpreted in the *Eastbourne* case. But it is right to point out that the real difficulty in the way of the courts doing justice in so many of the cases on this subject arises from the automatic vesting in the local authorities of all sewers, and the automatic imposition of liability for their maintenance and repairs by reason merely of the form of the constructions and the purpose they serve, and without any assent or acceptance on the part of the local authority. If it were provided that no sewer should be repairable by a local authority until adopted and taken over, as is the case with a new highway, proper provision being of course made for requiring local authorities to take over such sewers on notice, and on their being put in proper order, all these difficulties would disappear. The difficulty as to surreptitious and wrongful junction of one drain with another, the difficulty of knowing on whom the liability to repair a particular

structure is, would all be got rid of, and, so far as I can see, the existing machinery would all work satisfactorily as regards all drains or sewers made after such an amendment of the law. It is a discredit to our Legislature, or the departments of the executive which have charge of such matters, that so simple an amendment of the law should not have been made long ago, as for the last fifteen years or more there has been constant litigation on these points. Of course, if there is to be an amendment of the law it would be desirable, besides the simple amendment required to prevent difficulty as to future constructions, to have some declaratory enactment dealing with existing structures, and I presume it is the difficulty of framing satisfactorily such a declaratory enactment which has led to there being as yet no amendment of the law.

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I have now to consider how the view I have expressed as to *Bradford v. Eastbourne Corporation* and *Thompson v. Eccles Corporation* affects the case now before me. I must hold that in the present case if the defendants had proceeded under the 41st section of the Act of 1875 and the 19th section of the Act of 1890 they would have been able to impose a proportion of the charge, the subject of this action, on the plaintiff. It would be a proportion only, because the cost, if the proceedings had been taken in that way, would have fallen not on the owner on whose property the defect happened to be, but on the owners jointly in proportions to be settled by the surveyor. The defendants did not, in fact, take any proceedings under that section. I do not lay any stress on the fact that the complaint of the nuisance was not in writing in the first instance, and was only put into writing by the authority when received, or that notice in writing of intention to enter was not given. These provisions (at any rate, the notice to enter) are clearly introduced for the benefit of the occupier, and may be waived by him, and were so, in this case. The reason, I say, the defendants were not really acting under this 19th section is that they did not give notice to all the owners, and were seeking to impose the whole liability on the plaintiff on the ground that the nuisance arose on her premises. It is necessary, however, to consider the case on the basis that proceedings ought to have been taken under the 19th section, because if the defendants were not solely liable to repair, but the owners jointly were, the plaintiff has a difficulty in showing that when incurring the expenses sued for she was performing the defendants' obligations, and was paying the money for the defendants. To meet this point *Reg. v. Hastings Corporation*, 1897, 1 Q. B. 46; 66 L. J. Q. B. 80, was quoted by Mr. Macmorran. There a *mandamus* appears to have been issued to a local authority to repair a structure to which the 19th section of the Act of 1890 was assumed, rightly or wrongly, to be applicable. It was, how-

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ever, said that no complaint of a nuisance existing had been made to the local authority, and until such complaint the powers of section 19 did not arise. This seems an authority that in cases under section 19 the burthen of repair does remain on the local authority, but with powers in a special case and by special proceedings to recover over against other persons. I think this as an authority is equally binding on me with the *Eastbourne* case, but it is not completely in point, because in the case before me I think there was a sufficient complaint to give the defendants jurisdiction to proceed under section 19. They did not, however, so proceed, and in particular the proportions to be payable by the various owners have never been assessed by the surveyor. The apportionment by the surveyor appears to me to be a condition precedent to any portion of these expenses becoming payable by the plaintiff. I must, therefore, hold, though not without considerable hesitation, that the defendants have by the duress of an erroneous notice in a case of nuisance, where prompt action was necessary, compelled the plaintiff to incur under protest expense which the defendants were, in the then existing state of things, themselves liable to. If the apportionment of the surveyor were a mere matter of form, and I had myself the materials for making the calculation of how much the plaintiff ought to bear, I should probably hold that the plaintiff could only recover the excess beyond her own proportion of the expenditure. But I have no materials for making an apportionment, and it appears to me a matter specially delegated to the surveyor. I do not, therefore, see how I can do otherwise than hold that the plaintiff is entitled to recover the whole expenses of this work, which I assess at £65. I think no deduction should be made for her part of the work done on No. 3, but I do not think that the loss of rent which was claimed was made out in such a way as to be recoverable.

I, therefore, give judgment for the plaintiff for £65, with costs.

Judgment for plaintiff.

Solicitors for the plaintiff—Emmanuel and Simmons.

Solicitors for the defendants—R. Miller, Wiggins, and Naylor.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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ATTORNEY-GENERAL (on the relation of the Monmouthshire County Council) AND THE MONMOUTHSHIRE COUNTY COUNCIL
v. SCOTT (No. 2).

June 14, 15,
16, 17, 20;
July 2.

Highways—Locomotives—Nuisance—Injunction—Repair—Standard of maintenance—Nuisance primarily due to default of road authority.

The defendant conducted traffic throughout a considerable period by means of a traction-engine over a main road repairable by the plaintiff council, and the road got into a condition so bad as to amount to a nuisance. The condition of the road was not caused primarily by the defendant's traffic, but, though that traffic with other traffic and the state of the weather were contributory causes, primarily by the failure of the plaintiff council to maintain the road in a fit state to bear the traffic over it, including the defendant's traction traffic, which was not more unusual or onerous than the council ought to have expected to come on it. The plaintiff council ultimately reconstructed the road in such a way that there was no appreciable risk, if ordinary care were exercised by the council, that in the future the defendant's traffic would cut up the road or reduce it to a condition such as to constitute a nuisance.

Held, that, under these circumstances, an injunction ought not to be granted, in an action brought by the Attorney-General on the relation of the plaintiff council and by the plaintiff council, to restrain the defendant from conducting traffic upon the road in such a way as to cause a public nuisance.

ACTION tried by Jelf J. without a jury, in which the Attorney-General, on the relation of the Monmouthshire County Council, claimed, and the council claimed, an injunction to restrain the defendant, his servants or agents from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic, upon the highway leading from Caldicott to Magor, situate in the parish of Llanrihangel Roggieth, in the county of Monmouth, in such a way as by damage to or obstruction of the said highway to cause a public nuisance.

The statement of claim set out that the county council for Monmouthshire were the local authority responsible for the maintenance and repair of the highway in question; that the defendant was the owner of a quarry in the parish, and the holder of a licence granted by the plaintiff council under the Locomotives Act, 1898, for the use of a locomotive engine within the county; that the defendant used

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a locomotive engine and carts for hauling stone from his quarry to the Severn Tunnel Junction Station of the Great Western Railway, over a part of the highway 893 yards or thereabouts in length near the Severn Tunnel; that he further used the engine and carts for hauling stone from another quarry belonging to Mrs. Hillier to the same railway station over a portion of the said part of the said highway 593 yards or thereabouts in length; that the traffic conducted by the defendant was extraordinary and unreasonable and its weight excessive and unreasonable, and an improper user of the road. He had cut up and damaged the road so as to make it impassable for ordinary traffic, and had made the road dangerous to wayfarers and obstructed the highway. By reason of this damage and obstruction the defendant had caused a serious nuisance to the inhabitants of the parish and to all members of the public who had occasion to pass along the highway.

By his defence the defendant denied that the traffic was excessive or unreasonable, or that the weight was excessive or unreasonable, and generally the allegations in the statement of claim.

He alleged that the quarrying of stone was and had for many years been a recognised industry in the county of Monmouth, and the hauling of the stone from quarries over highways in the county, including the highway in question, was and had been for many years the ordinary and usual traffic over the highways. The defendant had used the highway for the purpose of conveying stone from each of the quarries referred to in the statement of claim in a lawful manner, and if any damage had been done to the highway by his user thereof (which he did not admit), no more damage had been done thereto than was the necessary consequence of his using it in a proper and lawful manner; and the highway was cut up and damaged, if at all, owing to its not having been maintained and repaired so as to withstand the ordinary and usual traffic thereon. The defendant alleged that it was the duty of the plaintiff council to maintain the highway of a construction and strength sufficient to bear the passage over it of the defendant's locomotive drawing such trucks and weights as aforesaid, and counterclaimed for an order directing the plaintiff council to repair the highway so far as it was necessary to render it capable of bearing such traffic as aforesaid, and to maintain it thereafter in the said state of repair.

Pending the trial of the action, Phillimore J., at chambers, on evidence contained in affidavits filed by the parties, granted an interlocutory injunction substantially in terms of the writ, upon an undertaking by the county council in damages.

The defendant appealed to the Court of Appeal against the order

of Phillimore J., but the appeal was dismissed. The case in the Court of Appeal is reported 1904, 1 K. B. 404; 2 L. G. R. 461; 73 L. J. K. B. 196.

The nature of the evidence at the trial is sufficiently stated in the judgment of Jelf J.

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A. T. Lawrence, K.C., Macmorran, K.C., and J. R. Atkin for the plaintiffs. It is not suggested that the use of a locomotive on a highway is of itself unlawful, or that it becomes unlawful merely because it necessitates increased repairs to the road, but the evidence here establishes a clear case of public nuisance and of improper and unreasonable user of this section of this road in consequence of the exceptional nature and weight of the traffic. This traction traffic by the engine was more onerous than the plaintiff council had any reason to expect, and this fact in itself disposes of any suggestion that they had been dilatory in repairing or reconstructing the road. The case is in substance concluded by the decision of the Court of Appeal on the question of the interim injunction. The fact that this is a nuisance cannot be disputed, but the defendant contends that the plaintiffs ought to make a road to take his traffic.

The counterclaim must fail. It is well settled that an individual, without the aid of the Attorney-General, cannot proceed by action for the non-repair of a highway, and that is what the defendant attempts by his counterclaim.

Arthur Powell, K.C., R. C. Glen, and Bethune for the defendant.

The plaintiffs' claim in this action is a novelty and ought not to succeed. Traction-engine traffic is in itself legitimate, and is recognised by the Legislature as legitimate; and the provisions of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as to expenses of extraordinary traffic afford the appropriate remedy if the road authority are put to exceptional expense by such traffic: *Hill v. Thomas*, 1893, 2 Q. B. 333; 62 L. J. M. C. 161.

The decision of the Court of Appeal in the present proceedings had reference entirely to the question of an interim injunction, as all the Lords Justices are careful to point out. The object of such an injunction is to preserve the *status quo* till the matter at issue can be fully investigated. The evidence now shows that the real cause of the condition of the road was the default of the plaintiff council in maintaining the road up to the proper standard. The proper standard for repair varies as the traffic on the road varies. The road must be kept up to date, i.e., fit for what is for the time being ordinary traffic: *Wallington v. Hoskins* (1880) 6 Q. B. D. 206; 50 L. J. M. C. 19; *Hemsworth Rural District Council v. Micklethwaite* (1904) [now

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reported 2 L. G. R. 1084]; *Reg. v. High Halden* (1859) 1 F. & F. 678; *Reg. v. Henley* (1847) 2 Cox C. C. 334. The plaintiff council themselves have recognised their duty, and are now doing what they should have done before, reconstructing the road in a substantial way. There is, therefore, no reason to apprehend injury from the defendant's traffic in future, and for that reason alone the injunction should be refused.

The plaintiffs cannot put their case on the ground that the defendant's traffic interfered with their reconstruction of the road, for they never requested him to desist from carrying on the traffic temporarily pending the reconstruction.

The plaintiff council were guilty of laches in the matter, and their laches is material, though the Attorney-General is joined as plaintiff. The plaintiff council might, moreover, have made a bye-law restricting the traffic under section 6 of the Locomotives Act, 1898, but did not do so.

The counterclaim is maintainable. The defendant was specially damaged, and under Order XXV., r. 5, a declaration can be made whether any consequential relief is sought or not.

Macmorran. K.C., in reply. The complaint is of a nuisance. The defendant contends that he is entitled to put traction-engine traffic on the road as it is whether he damages it or not. Excessive weight on a high road is a nuisance. User of the highway must not be unreasonable in extent, even though lawful in character: *Attorney-General v. Brighton and Hove Co-operative Supply Association*, 1900, 1 Ch. 276; 69 L. J. Ch. 204. The Locomotives Acts are not enabling Acts, and leave the question of nuisance untouched: *Reg. v. Chittenden* (1885) 15 Cox C. C. 725; 49 J. P. 503. The contention of the defendant has throughout been that he had a right to do what he did even if it were a nuisance. This alone is a ground for an injunction. It is enough to say that what he does will probably cause a repetition of the injury: *Attorney-General v. Acton Local Board* (1882) 22 Ch. D. 221; 52 L. J. Ch. 108.

[*St. Helens Chemical Company v. St. Helens Corporation* (1876) 1 Ex. D. 196; 45 L. J. M. C. 150; *Sadler Great Western Railway*, 1896, A. C. 450; 65 L. J. Q. B. 462, and *Thorpe v. Brumfitt* (1873) 8 Ch. 650, were also referred to.]

Cur. adv. vult.

July 2. JELF J. This action is brought by the Attorney-General on the relation of the Monmouthshire County Council for a perpetual injunction "to restrain the defendant, his servants or agents from using or causing or procuring to be used any locomotive or otherwise conduct-

ing any traffic upon the highway leading from Caldicott to Magor, situate in the parish of Llanrihangel Roggieth, in the county of Monmouth, in such a way as by damage or obstruction of the said highway to cause a public nuisance." In accordance with the requirement of the Attorney-General usual in such cases, the Monmouthshire County Council are added as co-plaintiffs solely in order to make them responsible parties in the action. The writ was issued on December 7, 1903. By an order of Mr. Justice Phillimore, dated December 19, 1903, an interim injunction was obtained substantially in the above terms. This order was affirmed on January 12, 1904, by the Court of Appeal in *Attorney-General and Monmouthshire County Council v. Scott*, 1904, 1 K. B. 404; 2 L. G. R. 461; 73 L. J. K. B. 196. How far, if at all, my judgment and discretion are fettered by the judgments of the Master of the Rolls and Lords Justices Mathew and Cozens-Hardy in that interlocutory proceeding I will discuss later on.

The *locus in quo* is a section (893 yards in length) of a main road repairable by the county council, and leading from Caldicott to Magor. The defendant was a haulier, and the complaint of the county council was that he hauled stone with a traction engine and trucks over the said main road from a neighbouring quarry belonging to a Mrs. Hillier by contract with her, and also from a neighbouring quarry of his own, in such a way as to cut up the said section of the main road and render it dangerous and practically impassable, both for vehicles and pedestrians. This hauling from such quarries was, as to his own quarry, by a public road belonging to the Chepstowe District Council, and as to Mrs. Hillier's quarry by a private road, in each case on to the said section of the main road, and thence by another district council's road to the Severn Tunnel Junction Railway Station for the purpose of carriage by railway to certain blast furnaces, where there was a great demand for the stone in question.

This traffic by the defendant's traction engine began on May 2, 1902, and went on until it was stopped by the interim injunction of December 19, 1903. An attempt was made by the defendant after the injunction was granted to use the traction engine with less weights without infringing the injunction, but this was immediately followed by threatened proceedings for attachment, and since January 18, 1904, the use of the traction engine over the *locus in quo* has been entirely abandoned. The traction engine and trucks used by the defendant and the weights carried thereby were in all respects strictly in accordance with the Locomotive Acts. There was no evidence that the engine and trucks were improperly constructed or driven or handled, or that the traffic was conducted wantonly or recklessly or otherwise than in the honest and *bonâ fide* exercise of the defendant's legitimate

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business; nor was it the county council's case, although it was in the minds of some of their witnesses, that such traffic constituted a public nuisance in regard to smoke or noise or likelihood to frighten horses, or in any other way except cutting up or injuring the roadway. Nor was it contended that any single passage of the engine and loaded trucks over a road was unlawful or a nuisance, but it was alleged that the frequency of the journeys with heavy loads constituted or created a public nuisance.

Quarrying of stone had been for many years a recognised industry of the district, and for several years the defendant had hauled stone with carts and horses from Mrs. Hillier's, and from another neighbouring quarry belonging to a Mr. Perry, over the section of the road in question to the Severn Tunnel Junction Railway Station, although he did not begin hauling from his own quarry (which he did by carts as well as by traction engine) till May, 1903. The only way for such traffic to go was by the section of the road in question. Long before the year 1902 the haulage of stone by traction engines had become common throughout England and Wales, and, though the evidence was conflicting, I find as a fact that both for long and short distances such traction is more economical than carriage by horses and carts, and that the prohibition to use such traction over the *locus in quo* is, and will be if continued, a trade loss to the defendant, especially as his rivals in the trade are combining to obtain a private railway line instead of using this main road, from the use of which line he will be excluded.

The trial lasted five days. A number of witnesses were called before me on both sides, and the evidence was of a conflicting character as to the nature and construction of the main road in question, as to the repairs done to it by the county council, as to the state of the road before May, 1902, when the haulage of stone was by carts and horses, as compared with its state after the use of the traction engine and trucks began, as to the sort of traffic which the county council might have expected to come upon the road, as to the effect of the use of traction engines, and as to the state of the road between May, 1902, and the present time, and especially at the time when this action was commenced and the injunction against the alleged public nuisance asked for.

The evidence, generally speaking, on the part of the county council was to the effect that the road had been a fairly good country main road fit for ordinary traffic, and that though the stone hauled by carts and horses had made it rutty, it was not until the traction-engine traffic began that it became very bad, and that especially through the wet year 1902, and the still wetter year 1903, it got steadily worse, not-

withstanding the efforts of the county council to keep it in repair, and that towards the end of 1903 it was almost impassable, and even dangerous to life and limb. For the defendant, on the other hand, the evidence was to the effect that the road before 1902 was already in a bad condition, that there was no such substantial change for the worse when the traction engine began to be used, as alleged by the county council, and that in some respects the traction traffic rendered it better by flattening the ruts; that the cause of the deterioration of the road was due partly to the weather and to the ordinary traffic, but mainly to the neglect of the county council to repair, and also if necessary to reconstruct, it in October, 1902, and to the dilatoriness with which they carried out such reconstruction, not having even now finished it; that the road was not in December, 1903, impassable or dangerous, that no public nuisance existed, and that now the reconstruction is nearly complete, or, at least when the reconstruction is complete, the road will be fit, if ordinary care is taken of it by the county council, for the resumption of the defendant's traction traffic without causing any damage to the road.

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I think the evidence on the part of the relators was exaggerated, and that some of the witnesses, notably the rector of the parish, one of the chief movers in the matter, were actuated in a great measure by dislike of traction engines in general in regard to noise, smoke, and frightening of horses, none of which in themselves, in the case of a properly constructed and driven engine, however distasteful to individuals, could probably at the present day be successfully made—and were not in this case attempted to be made—the subject of an indictment or a proceeding by the Attorney-General as for a public nuisance. The truth probably lies between the extreme views of the witnesses on either side. I am not satisfied that there was so great a change for the worse dating from the time, or very soon after, the traction traffic began, as was alleged by the relators. But I think it is established that on December 7, 1903 (the date of the writ), and for some time previously the road had become by a combination of causes to be mentioned presently in a very rough and muddy condition and very inconvenient for traffic of all kinds, rendering necessary the use of great care by the public, particularly at night, although, in view of the fact that no accident was shown to have occurred, notwithstanding that the traffic had continued over the road during the whole of the years 1902 and 1903, I am not satisfied that the road was at any time before action actually dangerous to life or limb; nevertheless, I think the condition above described would, if primarily caused by the acts of the defendant, render him liable to be indicted for a public nuisance: see *Hawkins' "Pleas of the Crown,"* p. 700 of the 8th

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edition. There I find in section 10 these words: "There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch or making a hedge over-thwart it, or by laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people are public nuisances at common law." Also in Ventris' Reports, p. 4, I find this: "*Sir Thomas Griesly's case* (Mich., anno 20 Car. II.). Information against him for stopping of the highway: the word was *obstrupabat*. It was proved in evidence that he ploughed it up; and resolved, it did well maintain the information." The cases are also collected in "*Russell on Crimes*," p. 785 of the 6th edition. See as to lawful acts done so as to become a nuisance *Thorpe v. Brumfitt* (1873) L. R. 8 Ch. 650; *Attorney-General v. Brighton and Hove Co-operative Supply Association*, 1900, 1 Ch. 276; 69 L. J. Ch. 204; *St. Helens Chemical Company v. St. Helens Corporation* (1876) 1 Ex. D. 196; 45 L. J. M. C. 150; and *Lambton v. Mellish*, 1894. 3 Ch. 163; 63 L. J. Ch. 929. See as to obstruction by traction engine in order to be indictable having to be substantially greater than caused by carts, *Reg. v. Chittenden* (1885) 15 Cox C. C. 725; 49 J. P. 503; but note that in that case injury to the roadway was not established. The condition of the road, however, was, as I find as a fact, not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by the continual stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual or onerous than they ought to have expected to come upon it, and to the careless and dilatory way in which they proceeded with the reconstruction of the road, decided upon by them in October, 1902, and, as to part, not yet finished. Also, I find that though the difficulties of reconstructing the road by the county council were increased by the traction engine running over the partly completed road, they never asked the defendant to discontinue the use of the engine temporarily, till they could complete the road, and further, that now that the reconstruction is nearly completed, very little, if any, damage will in future be done by the resumption of the defendant's traction traffic, and that when the reconstruction is completed, which according to the statement of the county council will be in a month from the last day of the hearing, that is June 20, there will be no appreciable risk of the traction engine cutting up the reconstructed road, at all events, not to the extent of rendering it, if ordinary care is used by the county council to keep it in repair, so dangerous, or impassable, or incommodious as to constitute a public nuisance.

Now, after the decision of the Court of Appeal, I think it is too

late to argue, except in the House of Lords, that section 13 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70), namely: "Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use where, but for the passing of this Act, such indictment or action could be maintained," applies only to nuisances other than those caused by injury to the highway as to which a remedy is prescribed by compensation for extraordinary traffic: see Highways and Locomotives (Amendment) Act, 1878, s. 23. Nor do I think that either independently of the decision of the Court of Appeal such argument could succeed, because before the Act a user in itself lawful might become a nuisance if exercised in such a manner or with such frequency as to make the road dangerous: see *Thorpe v. Brumfit* (1873) L. R. 8 Ch. 650, and the other cases above referred to. It was, however, urged by counsel for the plaintiffs that the Court of Appeal intended to prevent the defendant from setting up the failure of the county council to provide and maintain a sufficient road as being the real primary cause of the mischief instead of his traction engine. On this point I think the Court of Appeal and Mr. Justice Phillimore only intended to enforce the interim injunction in order to protect the public in a case of apparently imminent danger by preserving the *status quo* pending the investigation of the facts and of the rights of the parties. I do not think, to take an extreme instance, in a case where the road authority is really wholly to blame for the road being unfit to bear the traffic which they ought to expect upon it, that the first person who brings any traffic upon it, however proper for the road as it ought to be, and in fact breaks it down because it is unfit, can be indicted for a nuisance as causing or creating it unless he does it deliberately, knowing that this will be, or will probably be, the result, still less that he can be in such a case perpetually enjoined in an action by the Attorney-General on the relation by such defaulting authority, from ever bringing such traffic on the road again. Nor do I think the Court of Appeal meant to so hold. See as to the duty of the road authority to repair to an up-to-date standard *Reg. v. Henley* (1847) 2 Cox C. C. 334; *Wallington v. Hoskins* (1880) 6 Q. B. D. 206; 50 L. J. M. C. 19; *Hemsworth Rural District Council v. Micklethwaite* (1904) 2 L. G. R. 1084, which was cited to me from the shorthand note; *Reg. v. High Halden* (1859) 1 F. & F. 678; and as to an injunction not being granted unless it is just and equitable in such a case, see *Kirkheaton Local Board v. Ainley*, 1892, 2 Q. B. 274; 61 L. J. Q. B.

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812. In that case Bowen L.J., at pages 285 and 286, makes a distinction, which I do not wish to lose sight of, between an action brought by the Attorney-General representing the public and an action brought by the local board themselves alone. He says: "Again, cases have been referred to in which the Attorney-General represented the Crown in asking for an injunction against nuisances. I do not think these cases have any bearing on the present. The Attorney-General represents the Crown and the public, and the conduct of the relator has not necessarily any bearing on the matter; unless in some way the position of the Attorney-General is tainted by the conduct of the relator, there is no reason why he should not succeed as representing the interests of the public, whatever the conduct of the relator may have been." Then later on he says: "It is, I think, matter for the consideration of the Court whether the plaintiffs' conduct is such as to make it unjust that the order should be made at their instance, and if so, on the general principles of justice, the Court ought to say that, whoever else may be aggrieved and entitled to complain, it does not lie in the mouth of the local board to do so." I have not lost sight, therefore, of the distinction between the case when the Attorney-General representing the public comes forward, and the case where the Attorney-General has not given his sanction to the action—that is to say, where it is not for the public; but I cannot help thinking that the Court, in granting or withholding the injunction, which is more or less a discretionary power, must have regard to such considerations as those which appear in this case.

It should not be forgotten that the county council might have placed restrictions upon the use of locomotives upon the road by framing bye-laws under section 6 of the Locomotives Act, 1898 (61 & 62 Vict., c. 29). This they have not done. Even if the defendant could have been rightly indicted or temporarily enjoined in respect of an intentional user by him of the road as it existed towards the end of 1903 so as to create a nuisance—although that nuisance would not have been created but for the default of the highway authority—it by no means follows that when that defaulting authority has put or is putting the road into a proper state presumably fit for this traffic, the defendant should at his peril be perpetually enjoined, unless he has shown an intention to continue to act unlawfully, which I find as a fact he has not done. Whether he has been or will be liable to contribute specially to the maintenance of the road owing to the extraordinary traffic is a question as to which I express no opinion.

There was a further point taken by the defendant to the effect that the county council had made no definite complaint of the user of the

traction engine from May, 1902, till October, 1903 (which is true), and that *laches* alone was an answer to this action. I incline to think, however, that the maxim, *Nullum tempus occurrit regi*, prevents *laches* by itself being successfully set up against the Attorney-General, and the case of *Attorney-General v. Sheffield Gas Consumers' Company* (1853) 22 L. J. Ch. 811; 3 De G. M. & G. 304; 17 J. P. 371 n., where the form of the indictment is reported, is not, when examined, an authority to the contrary. For the reasons already given, and exercising my discretion in the matter, I think the perpetual injunction asked for should be refused.

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As regards the counterclaim for a declaration as to the duty of the county council to repair the road to the extent mentioned therein, such counterclaim is not brought under the ægis of the Attorney-General, and is on the contrary set up against him. It was sought to be supported under Order XXV., rule 5, which, while not countenancing applications for declarations in the air, yet does seem to sanction the granting of a declaration as to the future in cases where it is definite and useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose; and I think that is the case here, especially as the extent of the obligation of the county council may vary considerably at different dates and under different circumstances. The defendant's counsel felt the force of these considerations, and ultimately agreed to raise his contention as to the duty of the county council by way of argument in opposition to the claim, and to drop it as a counterclaim. The counterclaim was accordingly treated by both parties practically as struck out, and I order it to be struck out without costs.

As to the claim I give judgment for the defendant, with costs against the county council, refusing the perpetual injunction claimed, and so dissolving the interim injunction, subject only to the undertaking given to me by the defendant in open Court that if the injunction were dissolved he would undertake not to use the road with his traction engine till the expiration of the month within which the county council say the reconstruction will be completed, namely, by July 20th instant, and I give liberty to apply.

Judgment accordingly.

Solicitor for the plaintiffs—Herbert M. Davis, for H. S. Gustard, Newport, Mon.

Solicitors for the defendant—Hicks, Davis, and Hunt.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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HAMPSTEAD BOROUGH COUNCIL *v.* MIDLAND RAILWAY COMPANY.

Streets—Paving expenses—Metropolis—"Owner"—Land subject to statutory incapacity to yield rent under enactment for benefit of individual—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 106, 250—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77—Midland Railway Act, 1900 (63 & 64 Vict. c. cxliii.), s. 18.

A provision in a local Act restricting the user of land in such a way as to render it incapable of yielding a rent inserted in the Act for the benefit of individuals does not prevent the persons to whom the land belongs from being "owners" thereof within the meaning of the Metropolis Management Acts, and liable accordingly to contribute to the expenses of paving a new street on which the land abuts, for the statutory restrictions may at any time be removed by agreement between the parties, and the land be thus rendered capable of yielding a rent, without the aid of further legislation.

SPECIAL case stated under Order XXXIV., r. 1, as follows:—

1. This is a statement of a question of law arising in this action by agreement of the parties thereto in the form of a special case for the opinion of the Court.
2. The dispute between the parties is as to the liability of the defendants to the plaintiffs to contribute to the estimated expenses of paving a certain portion of a "new street" known as Westbere Road, in the metropolitan borough of Hampstead.
3. The plaintiffs are by virtue of the Metropolis Management Act, 1855, and the Acts amending the same, and the London Government Act, 1899, the local authority for the metropolitan borough of Hampstead, and the body charged with the duty of paving new streets in the said borough.
4. By section 105 of the Metropolis Management Act, 1855, it is provided as follows:—"In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way

and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

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5. By section 77 of the Metropolis Management Act Amendment Act, 1862, it is provided as follows:—"Where any vestry or district board shall, under the powers given by the one hundred and fifth section of the firstly recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

6. By section 250 of the Metropolis Management Act, 1855, it is provided (*inter alia*) as follows:—"The word 'owner' shall . . . mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent; . . ."

7. By the Midland Railway Act, 1900 (63 & 64 Vict. c. cxliii.),

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certain additional powers were conferred upon the defendants, the Midland Railway Company, in the said Act referred to as "the company," and particularly by section 18 of the said Act it was provided as follows:—

"The following provisions shall unless otherwise agreed apply and have effect for the protection of Percy Horace Gordon Powell-Cotton and his trustees (in this section called 'the owners') :—

"(1) The company shall not use any part of the sidings to be placed upon the land to be acquired from the owners and coloured red upon the plan signed by John Allen McDonald on behalf of the company and by Percival Fox Tuckett on behalf of the owners for any purpose except for the standing of empty passenger trains :

"(2) The company shall acquire all land of the owners up to Westbere Road and shall leave a strip of land twenty feet wide along the whole length of such Westbere Road and shall at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners and shall at the like expense and to the like satisfaction fence off the said lands from the Westbere Road by an open unclimbable iron fence seven feet high such planting and fencing to be carried out within one year from the company obtaining possession of such lands and to be maintained by the company."

8. In accordance with the provision of subsection (2) of the said section of the said Act the defendants duly acquired the land therein referred to, and left a strip of land twenty feet wide along and contiguous to the whole length of the west side of Westbere Road aforesaid, and have planted and dealt with the same in manner in the said section provided. They have also fenced off the said lands from the Westbere Road by an open unclimbable iron fence seven feet high in pursuance of the said section, and planted a quick-set hedge immediately inside the same fence along its whole length. On the other side of the said strip the said land slopes down to the edge of their railway, a cutting having been made for the purpose of constructing the same. A plan of the said road and of the said strip of land and of the bank or slope and railway lines is annexed to this case and marked A, and may be referred to as part of the case.

9. On the 4th day of June, 1903, the plaintiffs, pursuant to the provisions of the Metropolis Management Acts, 1855 and 1862, duly passed a resolution in the following terms :—"That inasmuch as the remaining private portion of the new street in this borough called and known as Westbere Road is not paved to the satisfaction of this council, this council deem it necessary and expedient that the same should be paved in manner following, that is to say, that the footways be paved throughout the whole width with patent non-slip hard York paving on

proper foundations ; that the existing kerb be relaid on Portland cement concrete foundations, any deficiency therein to be made good with new 12-inch by 8-inch Norway kerb ; that channels be laid on concrete foundations of 12-inch by 6-inch granite one stone wide edged on the outer side by 6-inch Enderby granite setts one stone wide ; that the crossings (if any) be paved with 3-inch by 6-inch Enderby granite setts on Portland cement concrete foundations, and that the roadway be made up with 12 inches of hard core, 3 inches of gravel, and 3 inches of Enderby granite, and that the estimated expenses, amounting to £2,364 12s., of providing and laying such pavement be and the same are hereby apportioned to and charged upon the respective owners of the houses and land forming or bounding or abutting on the said portion of the said new street in manner following and be demanded and recovered accordingly."

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10. The apportioned amount of the said sum of £2,364 12s., being the estimated cost as determined by the surveyor for the time being to the council of paving the road and footways in accordance with the above resolution of the council chargeable according to the determination of the council upon the owners of the said land in Westbere Road, is £1,200 12s.

11. By notice dated the 25th day of September, 1903, and signed by Arthur P. Johnson, the town clerk to the plaintiffs, which was served on the defendants on the same day, the said sum of £1,200 12s. was duly demanded of the defendants. A copy of the said notice is annexed to this case and marked B, and may be referred to as part of this case.

12. The plaintiffs contend that the defendants are "the owners" of the land "bounding or abutting" on the said new street known as Westbere Road aforesaid within the meaning of the Metropolis Management Act aforesaid, and are liable to contribute to the expenses or to the estimated expenses of paving the same the sum of £1,200 12s.

13. The defendants contend (a) that the said land is not land bounding or abutting on the said street within the meaning of section 77 of the Metropolis Management Amendment Act, 1862 ; (b) that the said land is subject in perpetuity to the burden of public and private rights which deprive it of all beneficial value to the defendants, and is not such land as is intended by the said section ; and (c) that the defendants are not owners of the said land within the meaning of the enactments mentioned in paragraphs 4, 5, and 6, and that they are, therefore, not liable to contribute to the said paving expenses.

14. The questions submitted for the opinion of the Court are :—

(1) Whether on the true construction of the Metropolis Management Acts, 1855 and 1862, and having regard to the said provisions of the Midland Railway Act, 1900, the defendants are

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liable to pay to the plaintiffs the amount claimed in this action in respect of the estimated expenses of paving the new street known as Westbere Road ; and

(2) By whom the costs of this action and special case ought to be paid.

Macmorran, K.C., and *Courthope Munroe* for the Hampstead Borough Council. The Midland Railway Company are the owners of this strip of land within the meaning of section 250 of the Metropolis Management Act, 1855, so as to be liable for the expenses of paving a new street on which it abuts : *London County Council v. Wandsworth Borough*, 1903, 1 K. B. 797 ; 1 L. G. R. 462 ; 72 L. J. K. B. 399. To succeed the company must show that the land is subject in perpetuity to rights which deprive it of all beneficial value : *Wright v. Ingle* (1885) 16 Q. B. D. 379 ; 55 L. J. M. C. 17 ; *Hornsey District Council v. Smith*, 1897, 1 Ch. 843 ; 66 L. J. Ch. 476 ; *Hackney Borough Council v. Lee Conservancy Board*, 1904, 2 K. B. 541 ; 2 L. G. R. 1144 ; 73 L. J. K. B. 766. That is not the case with reference to this strip of land, for the restriction on the user of the land may at any moment be put an end to by agreement with the persons for whose benefit it was enacted : *Goldsmid v. Great Eastern Railway* (1883) 25 Ch. D. 511 ; 53 L. J. Ch. 371, affirmed *sub. nom. Great Eastern Railway v. Goldsmid*, 9 App. Cas. 927 ; 54 L. J. Ch. 162 ; *Savin v. Hoylake Railway* (1865) L. R. 1 Ex. 9 ; 35 L. J. Ex. 52 ; *Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1882) 7 App. Cas. 694.

Montagu Lush, K.C., and *William Wills* for the Midland Railway Company. The strip of land is *extra commercium* within the principle established by the House of Lords in *Great Eastern Railway v. Hackney District Board* (1883) 8 App. Cas. 687 ; 52 L. J. M. C. 105. The provisions of the Midland Railway Company Act, 1900, rendering the land sterile and incapable of being let at a rent are not of the character of those in question in *Goldsmid v. Great Eastern Railway Co.*, and they cannot be waived.

Macmorran, K.C., replied.

Cur. adv. vult.

Aug. 2, 1904. BIGHAM J. I have had an opportunity of examining the cases that were cited before me, and I think the result of them is that where land is incapable of yielding a rack rent by reason of its being subjected to some public user, the owner is not liable. For instance, where it has been dedicated as a highway, or where a church has been built upon it, or where the land has been appropriated by Act of Parliament to some public purpose. But where the incapacity is

created in favour of an individual, or of a particular class of persons, then the owner does not escape liability; for instance, where the owner has covenanted not to use the land for any purpose of profit, or where he has voluntarily devoted it to a purpose which is inconsistent with the receiving of rent as in the case of a Wesleyan chapel.

The reason for the distinction seems to me to be that in the one case nothing short of an Act of Parliament can restore to the land its capacity to yield rents, whereas in the other case the capacity can be restored by the mere act of the parties who have for the time destroyed it. Then in which category does the present case fall? I think in the second. It is true that the restriction which prevents the railway company from turning the land to a profitable use is embodied in an Act of Parliament, but the Act creates no public right; it does no more than give a legislative sanction to an agreement between Mr. Powell-Cotton and his trustees on the one hand and the railway company on the other. Such an agreement can be put an end to by the parties to it at any moment, apparently, without the intervention of the Legislature: see *Goldsmid v. Great Eastern Railway* (1883) 25 Ch. D. 511; 53 L. J. Ch. 371. The arguments adduced by Mr. Lush yesterday were put forward in that case by Mr. Hemming, and are to be found at p. 533, and were dismissed as insufficient. It therefore does not afford any answer to the claim of the local authority to be paid the amount sued for. There must be judgment for the plaintiffs with costs. There will be a stay of execution for ten days. If within that time the defendants give notice of appeal there will be a stay until the hearing of the appeal.

Judgment for plaintiffs.

Solicitor for the plaintiffs—Arthur P. Johnson.

Solicitors for the defendants—Beale & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It will be observed that section 18 of the Midland Railway Act, 1900, is expressed in terms as to apply and have effect only "unless otherwise agreed." However, Bigham J. does not base his judgment on these words, indeed he does not refer to them, and it seems clear that his decision would have been the same even if they had been omitted from the section.

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KING'S BENCH DIVISION.

June 28.

ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL AND OTHERS.

Revenue—Income tax—Deduction of income tax from interest on loans—Accountability of borrower—Loan charged on lands of local authority—Lands occupied by local authority—Interest exceeding value of lands—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. rule 10.—Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24 (3).

In round figures the London County Council in the year 1900-1 paid £1,371,000 in interest on loans, and in the same year received rents and profits, charged to income tax partly under schedule A, and partly under schedule D, amounting to £837,000, and themselves occupied lands and buildings of which they were themselves the owners of the annual value of £118,000 in respect of which they paid income tax under schedule A.

The Council's loans and the interest thereon were charged on, inter alia, the lands and buildings of the Council, including those in their own occupation, and the rates levied by them.

Held, that under the circumstances, the Council were entitled to retain for their own use, out of the deductions of income tax made by them on paying interest on their loans, the equivalent of the income tax on the lands of the annual value of £118,000 in their own occupation, as well as the equivalent of the income tax paid by them on their revenue of £837,000, and were accountable to the Crown for the residue of the income tax deducted only.

INFORMATION by the Attorney-General, on behalf of His Majesty, as follows :—

1. By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), it was, amongst other things, enacted as follows :—

Section 4. The board, for the purpose of raising such portion of the loans authorised by the Acts mentioned in the first schedule to this Act for the purposes of those Acts as the Treasury may from time to time sanction, may create capital stock, to be called the metropolitan consolidated stock, in this Act referred to as consolidated stock, and to be issued in such amounts and manner, at such price and times, on such terms, subject to such conditions, with such dividends, and redeemable (at the option of the board) at par at such times and on such conditions as the Treasury, before the creation thereof, may from time to time approve.

Section 5. No holder of any portion of consolidated stock shall have any priority or preference by reason of the prior creation of such

stock or otherwise, and all consolidated stock created for the purposes of the Acts mentioned in the first schedule to this Act, or of any Act hereafter to be passed, and the dividends thereon, and the sums required for the redemption thereof, shall be charged indifferently on the whole of the lands, rents, and property belonging to the board, under the Acts mentioned in the first schedule to this Act, and on all moneys which can be raised by the board by rates under this Act, and on the improvement fund, subject to all charges existing at the passing of this Act on such lands, rents, property, moneys, and fund respectively, and shall be a first charge thereon after those charges; and all moneys required for the payment of the dividends on such stock and the sums required to be raised for the redemption of such stock as mentioned in this Act, shall be raised out of the improvement fund and metropolitan consolidated rate as in this Act mentioned.

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Section 22. The board, for the purpose of paying the dividends on and redeeming the consolidated stock, and also of defraying the expenses authorised to be incurred and incurred by them in the obtaining or the execution of the Acts mentioned in the first schedule to this Act or any of them, and of defraying the sums required for the payment of the principal and interest of, and the sinking funds for any securities granted by the board for the purposes of those Acts or any of them, before the passing of this Act, shall (in lieu of all rates or assessments authorised at the passing of this Act to be assessed by them generally over the Metropolis) from time to time assess and raise a rate to be called the metropolitan consolidated rate, in this Act referred to as the consolidated rate.

* * * * *

Every precept issued by the board for the purposes of the metropolitan consolidated rate shall specify, first the proportion of the amount named in the precept which is required for the purpose of paying the principal and interest of and sinking fund for securities granted by them before the passing of this Act, and the dividends on and the sums required for the redemption of consolidated stock under this Act, and, secondly, the proportion of such amount which is required for all other purposes of the board.

* * * * *

Section 26. For the purpose of paying the dividends on and redeeming consolidated stock created under this Act there shall be established a fund to be called the consolidated loans fund of the metropolis, in this Act referred to as the consolidated loan fund, and, subject to the provisions of this Act, the board shall keep a separate account of such fund.

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Section 27. The board shall carry to the consolidated loans fund the moneys following (after providing for all charges on such moneys existing at the passing of this Act and to which the same shall for the time being be applicable); that is to say:—

(1) All moneys whether in the nature of capital or otherwise arising from the sale, lease, or other disposition of lands, rents, and property belonging to the board;

(2) The residue of the improvement fund which may come into their hands in the manner mentioned in this Act;

(3) Such an annual sum in every year out of the consolidated rate, and out of the contributions paid to the board in pursuance of the Fire Brigade Act or out of one of such sources as may be equal to two per cent. on the total nominal amount of consolidated stock, whether it has been cancelled or not; or

(4) Such greater or less annual sum as the Treasury may from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the consolidated stock in sixty years from the date of the creation thereof.

2. By the said Act and divers subsequent Acts of Parliament (Metropolis Money Acts) the said board and the defendant county council were empowered to lend to divers local authorities sums of money, and by the said Acts it was and is directed that the interest paid and principal repaid by the local authorities in respect of such loans should be carried to the metropolitan consolidated loans fund.

3. The defendant council succeeded the said board on April 1, 1889.

4. By section 15 of the London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), it was enacted (in lieu of certain provisions in that behalf in section 28 of the Metropolitan Board of Works (Loans) Act, 1869) that the consolidated loans fund should, subject to regulations approved by the Treasury, be first applied in the payment of the dividends on consolidated stock, and in other ways mentioned in the said section.

5. Acting under the powers created by section 15 of the London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), the Treasury on February 19, 1891, approved certain regulations, of which the following is one:—

“(1) The account to be kept, by the Council, of the consolidated loans fund, shall be divided into two parts, an income account and a capital account.

To the income account shall be credited all interest received by the Council on loans granted, and on investments made by them, and all rents, interest, and other annual income received by them into the

consolidated loans fund; and debited all payments for dividends, interest, rents, and all other payments properly chargeable to the income of the consolidated loans fund.

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To the capital account shall be credited all moneys received by the Council (except income) applicable to the payment or redemption of debt, including moneys received by realisation of temporary investments of capital money; and debited all moneys paid in redemption of debt, and all temporary investments of capital money."

6. By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), it is enacted:—

Section 24 (3). Upon payment of any interest of money or annuities charged with income tax under schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly; and the provision contained in section 8 of the Act of the thirteenth and fourteenth years of Her Majesty's reign, cap. 97, now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax.

7. The said board and the defendant council, from time to time being thereunto authorised by divers Acts of Parliament, raised large sums by the creation and issue of consolidated stock, in accordance with the provisions of the said Acts hereinbefore referred to, and have paid interest on such stock to the holders thereof for the time being. The defendant council have also become liable to pay and have paid interest on sundry loans transferred to them from the counties of Middlesex and Surrey. The last-mentioned interest is a payment properly chargeable to the income of the consolidated loans fund.

8. The defendant council have also lent large sums to local authorities, the interest on which has been paid into the said consolidated loans fund, under the enactments hereinbefore referred to, and credited, in accordance with the Treasury regulation hereinbefore set out, to the income account of the said fund. The interest so received from local authorities was received after deduction of income tax on the same by the said local authorities respectively, under the provisions in that behalf contained in the Income Tax Acts.

9. The defendant council have also received, after similar deduction

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of income tax, and paid into the consolidated loans fund and credited to the income account of the said fund, in accordance with the Treasury regulation, divers rents and other annual income properly falling to be credited to the said income account. Further sums, derived from the consolidated rate (now, in fact, called the county rate), and not charged or chargeable with income tax, were also paid into the consolidated loans fund and duly credited to the income account thereof.

10. During the year April 1, 1900, to March 31, 1901, the defendant council paid by way of dividends and interest on loans the sum of £1,371,633 6s. 9d., on which pursuant to the Customs and Inland Revenue Act, 1888, s. 24 (3), hereinbefore set out, they deducted income tax partly at 8d. and partly at 1s. in the pound, amounting in all (after allowing for non-deduction in the case of exempted holders and in respect of fractions of a penny) to the sum of £63,722 18s. 9d.

11. The whole of the said £1,371,633 6s. 9d. was, in accordance with the Treasury regulation hereinbefore referred to, paid out of the income account of the consolidated fund, and was to the extent of £833,335 3s. 3d. paid out of the interest, rents, and other annual income paid into that fund, as mentioned in paragraphs 8 and 9 hereof, that is to say, out of profits or gains brought into charge to income tax within the meaning of section 24 (3) of the Customs and Inland Revenue Act, 1888, but the residue of the said sum of £1,371,633 6s. 9d., amounting to £538,298 3s. 6d. was not paid out of profits or gains so brought into charge, but out of money paid into the said consolidated loans fund from the consolidated or county rate, and not so brought into charge.

12. Of the sum of £63,722 18s. 9d. deducted for income tax by the defendant council, as in paragraph 10 hereof mentioned, the sum of £40,162 13s. 3d., and no more, was deducted in respect of the interest, amounting to £833,335 3s. 3d., paid, as in paragraph 11 hereof mentioned, out of profits and gains brought into charge to income tax, leaving a balance of £23,560 5s. 6d. out of the said sum of £63,722 18s. 9d., for which sum of £23,560 5s. 6d. the defendant council became and were liable under the said Customs and Inland Revenue Act, 1888, s. 24 (3), to account to the Commissioners of Inland Revenue, but the defendant council have accounted for and paid, or are ready to pay, the sum of £17,646 15s. 4d. only, leaving a balance for which they refuse to account of £5,913 10s. 2d. [Here followed a letter from the London County Council to the secretary of Inland Revenue, enclosing an account furnished by their comptroller. The figures used by Channell J. in his judgment were taken from this account, which showed, *inter alia*, that the sum for which the Council refused to account, represented income tax under schedule A on

lands, of the annual value of £118,306 6s. 1d., of which they were both owners and occupiers.] 1904.

13. The Attorney-General charges that, amongst others, the following questions are at issue between His Majesty and the defendant council, *videlicet*, (1) Whether any and what part of the dividends and interest paid by the defendant council were paid out of any and what profits or gains brought into charge to income tax? (2) What part of the said dividends and interest paid by the defendant council were not paid out of profits or gains brought into charge to the income tax? (3) What was the amount deducted for income tax by the defendant council on paying the said dividends and interest during the year from April 1, 1900, to March 31, 1901, and for how much of such amount they are liable to account to His Majesty? (4) What inquiries should be directed and accounts taken in regard to the premises?

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14. Under the circumstances aforesaid, the Attorney-General informs this Honourable Court that the matters in question in this suit touch and concern His Majesty's revenue and the due collection thereof, and that His Majesty cannot have adequate relief in the premises at law or otherwise than in this Honourable Court.

15. The defendants have now, or lately had in their respective possession, custody, power, or control, and in the possession, power, custody, or control of their solicitors and agents, divers letters, deeds, manuscript and other books, papers, writings, memoranda, notes, bills, accounts, instruments, and other documents relating to the matters in question which they ought to produce.

16. The defendants, Lord Monkswell and George Laurence Gomme, are respectively chairman and clerk of the defendant council, and are made defendants here for the purposes of discovery only.

The Attorney-General on behalf of His Majesty prays as follows:—

1. An order for the payment by the defendant council within a time to be limited in that behalf of the said sum of £5,913 10s. 2d., with lawful interest thereon.

2. If necessary, an inquiry as to the dividends and interest paid by the defendant council, with the tax deducted by them thereon, and as to the fund out of which they were paid, and how far they were paid out of profits or gains brought into charge to the income tax.

3. Payment by the defendant council of the amount which shall be found to have been deducted by the defendant council, out of so much of the said dividends and interest as were not paid out of profits or gains brought into charge to the income tax, with lawful interest thereon.

4. That the defendants may be ordered to give full particulars of the dividends and interest paid, and tax deducted by the defendant council, out of the funds from which the said dividends and interest were paid.

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5. That the defendants may be ordered to make full discovery in the premises.

6. That the Attorney-General, on behalf of His Majesty, may have such further or other relief as the case may require.

N.B.—The Attorney-General seeks no relief against the defendants other than the defendant council except that prayed by paragraphs 4, 5, and 6 of the prayer.

The Attorney-General (Sir R. B. Finlay, K.C.) and Rowlatt for the Crown. This case turns on section 24 (3) of the Customs and Inland Revenue Act, 1888, which subsection has already been the subject of consideration by the House of Lords in *London County Council v. Attorney-General*, 1901, A. C. 26; 70 L. J. Q. B. 77. It was there decided that, under section 24 (3), the County Council were entitled to retain for their own use so much of the income tax deducted by them from the interest payable on their loans as was referable to interest paid out of rents which the Council received from their property and on which they paid income tax under schedule A, as well as so much of the deductions as was referable to interest paid out of income chargeable under schedule D. The contention for the Crown in that case was that the subsection where it speaks of "profits or gains brought into charge to such tax" was speaking of income tax under schedule D only; and that, therefore, where interest on a loan was paid out of profits brought into charge, not under schedule D, but under schedule A, no right of retention arose. The House of Lords decided that that contention was erroneous; that "such tax" means income tax under any schedule; and that if the interest was paid by the Council out of profits which had already paid income tax under any schedule, the Council were not bound to hand over the income tax deducted by them from that interest to the Crown. In the present case the County Council seek to go a step further. Besides the lands from which they receive rents they own certain land and buildings which they themselves occupy, and from which they receive no rent, but in respect of which they pay income tax under schedule A. And they contend that they are entitled to retain out of the income tax deducted by them from the interest on their loans, the equivalent of income tax on the annual value of the property they thus own and occupy. The answer of the Crown is that the right of retention arises only where interest is paid out of profits and gains brought into charge, and that in fact none of the interest on the County Council's loans is paid out of profits arising from this property. There are no such profits, and the interest, so far as it is not paid out of rents, &c., which the Council actually receive, is paid out of rates. The whole difficulty arises from the fact that income derived by a public

body from the rates is not the subject of income tax. Using round figures the position is this. The County Council occupy property of their own of the value of £118,000 a year. The total interest the Council have to pay is £1,300,000 a year. They have a revenue of £800,000 a year derived from rents, &c. That leaves £500,000 which the County Council have to find. If the Council obtained the £500,000 a year from taxable sources, the Crown would get income tax on that sum and income tax also on the £118,000. That is, the Crown would get income tax on £618,000 altogether. The Crown contend that precisely the same thing happens although the £500,000 is raised by means of rates. The County Council on the other hand claim the right to retain the income tax on £118,000 out of the £500,000 to pay the income tax on the property they themselves own and occupy. It is submitted that inasmuch as income tax is laid ultimately on the recipient of annual interest, and is only paid in the first instance by those who pay the interest, the circumstance that the payers—the London County Council—are not obliged to pay income tax on the rates which they levy ought to make no difference to the Crown.

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The County Council rely upon the fact that the premises in question which they own and occupy are included among the matters charged as security for the loans. If the property had not been included in the charge, the County Council would be out of Court: *Aberdeenshire Commissioners v. Russell* (1890) 17 R. 942 ; 2 Tax Cas. 643. They must have paid income tax upon the property, and could not have contested their accountability for the tax which they deducted from the interest paid out of rates. But in fact the County Council have been in precisely the same position as if the premises had not been included in the charge. They have had the full value of the land. It cannot be that the mere inclusion of the premises in a charge, which has had no effective operation as regards these premises, should make all the difference to the rights of the Crown. It is submitted that the test is whether the interest, the tax on which the Council seek to retain, has or has not in fact been paid out of profits brought into charge. That was the test accepted by the House of Lords in the case already referred to, and is conclusive against the County Council. The County Council, however, contend that, even though the interest may not have been paid out of profits brought into charge, they are entitled to retain the income tax under section 60, No. IV. r. 10 of the Income Tax Act, 1842, which provides that "where any such lands, tenements, or hereditaments, are subject or liable to the payment of any rent-charge . . . or other rent or annual payment thereupon reserved or charged . . . the owner or proprietor being also occupier and charged to the said duties, shall deduct and retain out of every such rent-charge . . . or other rent or annual

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payment aforesaid" the amount of the tax on the rent-charge, &c. That rule, however, is concerned with income tax under schedule A and not with income tax under schedule D at all.

[They also referred to sections 100, 102, 104, and 159 of the Income Tax Act, 1842, and section 40 of the Income Tax Act, 1853.]

Sir E. Clarke, K.C., Dickens, K.C., and Ryde for the London County Council. There is no such distinction between the different schedules under which income tax is charged as the Crown seek to draw. The different schedules simply indicate the way in which what is substantially a single tax is to be obtained in different circumstances: *London County Council v. Attorney-General*, 1901, A. C. 26; 70 L. J. Q. B. 77. The present case falls precisely within the terms of section 60, No. IV., r. 10 of the Income Tax Act, 1842. The property is charged with the payment of the interest on the Council's loans as appears from the information. The Council are owners and also occupiers and they are charged with duties under schedule A. The scheme of the legislation is that where a person has mortgaged his property so that he derives no benefit from it, he, though taxable in the first instance, is to be allowed to deduct the tax from the interest he pays, so that the tax falls ultimately upon the mortgagee who really has the benefit of the profits of the land. That is precisely the position of the County Council. If the argument for the Crown prevails the Crown will really be getting the tax twice over. It can make no difference whether the County Council occupy the land themselves or let it, and it is common ground that if they did let the land they would be entitled to retain the tax on so much of the interest as was paid out of the rent.

Rowlatt in reply.

CHANNELL J. In this case the matter which I have to decide seems to me to come to this:—The London County Council have property which produces an annual income of, in round figures, £837,000, out of which, of course, income tax is paid, in some cases possibly paid before they receive it, by way of deduction, and in other cases paid by them. £837,000 is the amount of their available income, upon which they pay tax, in addition, of course, to what I suppose is practically unlimited, namely, the power of rating. Then, in addition to that, they have property which they occupy themselves, and upon which therefore income tax is paid under Schedule A, the annual value of which is, in round figures, £118,000. The total annual value of their property, apart from the power of rating, therefore amounts to £955,000 a year. Then they have borrowed a large sum of money, and the annual charge for interest in respect of that borrowed money is, again in round figures, £1,371,000, as against the £955,000. It is a sum

which exceeds substantially the total amount of the annual value of their property. Upon that £1,371,000, which they pay by way of interest upon the metropolitan consolidated stock, the Crown is, of course, entitled to income tax, and as to the portion of it which exceeds the annual value of the Council's property - that is to say, £416,000 a year—it is admitted that the London County Council are accountable to the Crown. They deduct income tax upon the entire interest which they pay. And as to the £416,000 a year, it is admitted that they are collecting income tax due by the stock holders to the Crown, and that for that they are accountable. The questions which have arisen, one of which has been decided already by the House of Lords, and another has to be considered by me now, are as to whether the London County Council are accountable to the Crown for the tax on any other part of the interest beyond the £416,000 a year. The House of Lords decided that the Council are not accountable for the tax upon the £837,000, which is received by them annually, and in respect of which they pay tax. That much was decided by the House of Lords. Now I have to decide as to the £118,000, whether the Council are accountable to the Crown for the tax upon that, which is deducted from the payments made to the stock holders, as having collected it for the Crown; or whether they are entitled to retain it as a recoupment for the tax upon that amount which they themselves have paid to the Crown by reason of their being taxed for that amount under Schedule A. That is the point I have to decide. It turns upon the interpretation of the various sections of the Statutes, but the House of Lords have indicated that those statutes are to be approached from the point of view of the substance of the matter, which is that the income tax is a tax upon income, and that all income, or almost all income—of course, in this case there is the special and peculiar income arising from the rates, which is not taxable—is taxable once, but once only. Speaking generally, if any individual has property upon which in one sense he gets income into his pocket, but in another sense he does not get it, because the property is encumbered to the full amount of its value, then he really pays nothing. He pays the tax in the first instance, but he deducts it from that which he pays to the encumbrancer; and, therefore, having no income really, because his debts exceed his income, he pays no tax in the end. That is the general principle which is applicable to these statutes; and one expects to find in the end, after all the machinery that is provided by the Acts has been applied, that a person who has no income pays no tax. In the case of property falling under Schedule A the tax is payable upon the annual value of the property, if the owner of the property occupies it, or upon the net annual receipts from it if he does not occupy it, which would be the

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same amount in practice. If a person has property taxed under Schedule A, and it is mortgaged, he is entitled by section 60, No. IV., rule 10, of the Income Tax Act, 1842, to deduct and retain the tax upon the annual charge on his property. He is entitled to do that, both when he occupies the property himself, and when he does not occupy it, but receives rents from it. In each case he is entitled to deduct and retain the tax upon the annual charge upon his property. When he occupies the property himself it is obvious that he cannot pay the annual charge out of the actual receipts from the property, because there are none. He therefore pays it, if he pays it at all, from other sources. But he is entitled to deduct and retain the tax upon the annual charge that he pays independently of the source from which he finds the money to pay it. In all ordinary cases the source from which he pays must be income which is taxed for income tax in some way, so that no difficulty arises. In the present case the difficulty arises solely from the fact that the London County Council have this exceptional power of raising income by the rates. That source of income is not taxable, and that is what causes the difficulty.

The point that strikes me with regard to the matter is this, that under section 60, No. IV., rule 10 of the Income Tax Act, 1842, the deduction is authorised from the payment which the mortgagor makes to his mortgagee entirely irrespective of whence he gets the money to pay with; and the reason why the mortgagor, who deducts income tax from the interest paid to his mortgagee, is entitled to put it into his own pocket is that he really has no taxable income out of the property, or only a taxable income out of the property to the extent by which the value of the property exceeds the value of the charge. He is allowed to retain the money, because the real person who has the income out of that property is the mortgagee—I speak, of course, of a case of a mortgage to the full amount. He may have, as the London County Council have in this case, the right to the annual income of £118,000, but if there is a charge upon the property to the amount of £118,000 a year, then he has no taxable income out of it. The person who has the taxable income out of it is the person who has the mortgage on which the annual interest is the £118,000, and he is the person who ought to be taxed in respect of that property, not the person who has the nominal ownership of it, but no beneficial income out of it.

Now, applying that to the present case, the position of things seems to me to be this: The London County Council have really no available income other than their power of rating the Metropolis. The annual income of £837,000 from the property is clearly charged to the extent of £1,371,000 a year. It is clearly charged, and is paid away towards defraying the charge, in fact, because, as was pointed out by the learned

Law Lords in *London County Council v. Attorney-General*, 1901, A. C. 26; 70 L. J. Q. B. 77, it is the duty of the Council to apply their annual income, in the first instance, towards the annual charges, and, as Lord Macnaghten pointed out, they are not only bound to do that on general principles, but they are directed to do so by the Treasury regulations as to the way of keeping the accounts of the consolidated loans fund. But as to the £118,000, which is the annual value of the property occupied by the Council, I have to consider into which category it falls. I do not say that there is no difficulty in coming to a conclusion, because there is the change of expression, to which Lord Macnaghten alludes, in section 24 (3) of the Customs and Inland Revenue Act, 1888, between "payable" in the first part of the subsection and "paid" in the latter part. That does undoubtedly create some difficulty. I do not see that I can say that the £118,000 which is paid to the stock holders, is, in fact, paid out of the annual value of this land; it is not so paid because the annual value of the land is not received in cash, since the Council occupy the land themselves. It is received in kind, if I may say so, because if the Council did not occupy the property or land themselves—I assume, of course, that they require its occupation for the purposes of their duties—they would have to rent property for the purpose elsewhere, and would have to pay for it, and would have to raise out of the rates this £118,000. In point of fact what they do is this; they pay their £1,371,000 of interest by paying away £837,000 which they receive as income, and by raising £534,000 out of the rates. That £534,000 is made up of the £416,000 and the £118,000. The £416,000 there is no question about in this case, but the £118,000 is a sum which in fact they raise out of the rates, and having raised it out of the rates they apply it in payment of so much of the interest on their stock. But I think one must look at the substance of the matter, and in substance they raise that £118,000 out of the rates to pay for their occupation of the land in question for the purpose of their duties. The land in question really has no value to them if it is charged to its full amount.

Now, the statutes authorising the borrowing of the money and the issue of the metropolitan consolidated stock clearly do charge the loans on all the property. Consequently it seems to me that the Council are precisely in the position of an ordinary owner of property whose property is charged with an annual payment which, although he pays it annually and regularly, he does not pay out of the actual proceeds of the land because he occupies the land himself and has no proceeds out of which to pay it. I do not see any difference between this case and the ordinary case of a mortgagor in possession of land mortgaged

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to its full annual value. It seems to me that the substance of the case is that the London County Council have no income chargeable to income tax, because their whole available property is charged with an annual charge exceeding the total of its annual value. The Crown is entitled to get the tax on the land and does get it, because it is charged under schedule A. The Crown is, however, in effect claiming to get it twice, because the claim of the Crown is to get so much of the tax as is collected from the stock holders in the same way as it does get, and is entitled to get, the tax on the £416,000. But if the Crown gets it, it is getting it twice in respect of the same income, unless it can be said that the mere fact that the Council pay the money from a non-taxable source—the rates—alters the case. I do not see myself why it should. The power of taxing is only to tax the surplus, the amount by which the annual interest on the borrowed money exceeds the annual income from other property, or I think I should express it more accurately by saying the annual value of the other property. I think this matter must be looked at in the way in which the House of Lords looked at it, namely, as a matter of substance. Looking at the matter in this way, the London County Council have no income upon which they are liable to income tax, neither the income which they actually receive and pay away as interest to their stock holders, nor the annual value of the property which they occupy, and which is charged to the full amount of its annual value. I think they must be taken to find the money to pay for their occupation of this land out of the rates, and to apply the value of it towards the payment of the charge upon it. The substance of the case seems to me to be that they have no really taxable income, and that consequently they are entitled to retain so much of the tax which they collect from their stock holders as is sufficient to recoup them for the entire amount of the income tax which they pay, including that which they pay under schedule A for the property they occupy themselves. I think that follows from the principles which were laid down in the House of Lords, therefore I do not think it necessary for me, under the circumstances, to go through the words of the various statutes which have been gone through, and to which my attention has been fully called by counsel on both sides, because I base my judgment upon the substance of the matter, and it seems to me that the substance of the matter is that as to this £118,000 a year the London County Council are not tax collectors for the Crown, merely collecting for the Crown the tax to that amount coming from the stock holders, but that they are entitled to retain that amount to recoup themselves for the tax which they have paid under schedule A in respect of the property which they own but which has no available value to them, because it is charged to the full amount and more of its annual value.

On these grounds, therefore, I give judgment for the London County Council. 1904.

Judgment for the defendants.

Solicitor for the Crown—Solicitor of Inland Revenue.

Solicitor for the London County Council—W. A. Blaxland.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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COURT OF APPEAL.

June 17.

July 7.

HACKNEY BOROUGH COUNCIL *v.* LEE CONSERVANCY BOARD.

Streets—Metropolis—Paving Expenses—“Owner”—Land held for purposes of navigation of river—Metropolis Management Act 1855 (18 & 19 Viet. c. 120), ss. 105, 250—Metropolis Management (Amendment) Act, 1862 (25 & 26 Viet. c. 102), s. 77.

The Lee Conservancy Board are a statutory body constituted for the conservation of the river Lee. Under their Acts they derive a revenue from tolls, the sale of water from the river in bulk, and like sources, but their revenue is applicable entirely to the expenses of carrying out their Acts and of the repayment with interest of moneys borrowed by the Board or their predecessors for the purposes of those Acts, and not in any other sense to purposes of profit. They have power to construct docks, wharfs, and other works in connection with the navigation, to acquire land for the purposes of their Acts, and to dispose of superfluous lands.

Held, that the Board were “owners,” within the meaning of the Metropolis Management Acts, of land acquired and held by them for the purpose of strengthening the bank of a navigable cut of the river, so as to be liable to contribute to the expenses of paving a new street on which the land abutted.

Decision of Wright J., reported 2 L. G. R. 74, reversed.

APPEAL from a judgment of Wright J., sitting without a jury.

The action was brought by the Hackney Borough Council to recover £300 2s. 6d., being the share apportioned on the defendants of the expenses of paving Maiwand Road as a new street, under the Metropolis Management Acts. The sum was apportioned on the defendants as owners of the strip of land abutting on Maiwand Road described below.

By their defence the defendants did not admit that Maiwand Road was a new street; they denied that their land bounded or abutted on Maiwand Road, and alternatively denied that they were owners of the land within the meaning of the Metropolis Management Acts.

Wright J. held that the street in question was a new street, and that the defendants' land did in fact bound or abut on the street; but gave judgment for the defendants on the ground that they were trustees for public purposes of a nature inconsistent with the land being let at a rack rent, and were therefore not “owners” of the land within the meaning of the Metropolis Management Acts.

The decision of Wright J. is reported 2 L. G. R. 74.

The plaintiffs appealed, and the question upon which the appeal was

argued was solely whether the defendants were the "owners" of the land within the Acts.

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The facts bearing on this question were as follows :—

The land in question, which bounded Maiwand Road on the one side, was a strip of land some 26 feet in width, used for strengthening the bank of the Hackney Cut, a navigable cut of the River Lee, made by the Trustees of the Lee Navigation, the predecessors of the Lee Conservancy Board, under the Act of 1766, referred to below.

The strip was purchased by the Trustees of the Lee Navigation in 1849, for the purpose of strengthening the bank of the Hackney Cut. The conveyance of the strip to them contained a reservation to the vendors, their heirs and assigns, or other the owner or owners for the time being of the land immediately adjoining the strip conveyed on the south west side, during the lives of all the parties to the conveyance and of all the then trustees of the navigation, and the lives and life of the survivors and survivor, and during twenty-one years from the decease of such survivor, to make, form, and construct on the strip of land conveyed, or partly upon it and partly upon the adjoining land, a dock or docks, landing place or landing places, wharf or wharves, so as to be able and have the right and privilege at all times thereafter to use and take advantage of the River Lee and the navigation thereof for the shipment, landing, &c., of all kinds of goods and materials free of charge or duty. The period during which this right was reserved had not expired when the question in the present case arose.

The powers of the Lee Conservancy Board were derived from a long and voluminous series of Acts beginning with the Act of 1571 (13 Eliz. c. 18) and ending with the Lee Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.).

For the purposes of the present report it will suffice to refer to a few provisions in a few of these Acts only.

By an Act of 1766 (7 Geo. III. c. 51) intituled "an Act for improving the Navigation of the River Lee, from the town of Hertford to the River Thames ; and for extending the said Navigation to the Floodgates belonging to the town mill, in the said town of Hertford," a body of trustees was established for "the making, extending, improving, and maintaining, the navigation of the said River Lee" from Hertford to the Thames. The trustees were empowered, *inter alia*, to make certain new cuts, including the Hackney Cut, to communicate with the Lee, and to be used for the said navigation, to execute various other works, and generally to do and perform all acts, matters, and things, necessary for the making, extending, improving, and maintaining the navigation. It was declared that the navigation, should be a free navigation for all

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the King's liege people, subject to certain rates and duties which the trustees were authorised to collect. Provisions were made for certain payments to be made by the New River Company to the trustees. The moneys raised by the trustees were to be applied in discharging the expenses of obtaining the Act, in making the payments and discharging the contracts directed and authorised by the Act, and for improving, completing, and maintaining the navigation and carrying out the Act and for no other purpose. The trustees were empowered to borrow on the security of the rates and duties they were authorised to levy, and the money so borrowed was to be applied for the purposes to which moneys raised under the Act were applicable.

By the Lee Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.), the next Act to which it is necessary to refer particularly, and which was in effect incorporated with the Act of 1766 and certain intervening amending Acts (section 1), the trustees of the navigation were incorporated (section 3). They were empowered to make and maintain certain further new cuts, to execute certain specified works, and were given general power to cleanse and improve the course of the Lee and to construct works, including locks, docks, wharfs, embankments, &c., for those purposes (sections 12-14). Certain rights conferred on the East London Waterworks Company, by the Acts of that Company, to take water from the Lee upon payment to the trustees were enlarged and regulated (sections 32-36). And the trustees were empowered to enter into agreements with water companies and others for the sale to them of water from the Lee in bulk (section 68).

By the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), the Lee Conservancy Board was established as a body corporate (section 5). The trustees of the navigation were dissolved, and the navigation and the property, powers, rights, &c., of the trustees were transferred to the Conservancy Board; and the Conservancy Board were substituted for the trustees for the purposes of the earlier Acts, in the Act called the Lee Navigation Improvement Acts (sections 61, 62, 64).

The tolls levied and the income received by the Conservancy Board (other than the additional income provided by the Act) were, while any portion of the debentures granted by the trustees before the Act remained undischarged, to be applied solely to the purposes for which income of the trustees was by law applicable, but, after the discharge of the debentures, were to be applied to the purposes of the Lee Navigation Improvement Acts and of the Act of 1868 (section 63). And it was declared that the expenses incident to all the powers and duties under the Lee Navigation Improvement Acts should be considered as among the purposes for which income raised by the trustees under

those Acts was at the passing of the Act of 1868 by law applicable (section 64). The Board were given power to acquire by agreement land required for any purposes of the Act (sections 112, 113), and were empowered, subject to the provisions of the Act, to sell and dispose of lands for the time being vested in them and in their judgment not required for the purposes of the Act (section 115). The charging of certain additional tolls was authorised, and there were provisions prohibiting the reduction of tolls so as to prejudice the security of the interest and annual sums charged on the property of the Board or to render their funds in any year insufficient to meet expenditure (sections 129, 130). And additional payments were made payable to the Board by the New River Co. and the East London Waterworks Co., to be applied towards the discharge of their functions in preserving the purity of the Lee and its tributaries (sections 131-133).

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It does not seem necessary to refer particularly to any of the later Acts.

Beven (Macmorran, K.C., with him) for the plaintiffs. Wright J. held that the defendant board were not liable to the charge sought to be imposed on them, on the ground that they were not "owners" of the land in respect of which the charge was imposed within the Metropolis Management Acts, because, as he thought, the terms on which the land is held by the Board were inconsistent with its being let at a rack rent. It is submitted that he applied a mistaken test. It is not enough for the defendants to show that the land, while held by them, cannot be actually let. They must show that the land is placed by statute permanently *extra commercium*, so as to be incapable for ever of yielding revenue either in their hands or in the hands of anyone else: *Great Eastern Railway v. Hackney Board of Works* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105; *Wright v. Ingle* (1885) 16 Q. B. D. 379; 55 L. J. M. C. 17. It is not admitted that the defendants could not themselves let the land; but even if the land is permanently rendered incapable of being let, it is still the subject of ownership within the Metropolis Management Acts so long as it is revenue producing or capable of producing revenue: *St. Giles, Camberwell, Vestry v. London Cemetery Co.* 1894, 1 Q. B. 699; 63 L. J. M. C. 74. The Board do, in fact, derive a large revenue from the navigation, and this land contributes, or is at least capable of contributing, to that revenue. The case is not like *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399, where the London County Council were held not to be "owners" within the Metropolis Management Acts of a common vested in them for purposes of use by the public for recreation, and thus rendered for ever incapable of producing a revenue.

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It is immaterial that the income of the Board is devoted by statute to purposes other than that of private profit. In principle the present case is governed on this point by the cases which show that such property as that now in question is rateable to the poor rate in the hands of public trustees: *Mersey Docks v. Cameron* (1865) 11 H. L. C. 443; 35 L. J. M. C. 1; *Clyde Navigation v. Adamson* (1865) 4 Macq. 931; *Leith Harbour Commissioners v. Inspector of Poor* (1866) L. R. 1 H. L. Sc. 17; *Greig v. Edinburgh University* (1868) 1 H. L. Sc. 348. It had been actually held, before these cases, that the trustees of the Lee Navigation were rateable in respect of the property in their occupation, and that their funds were by implication applicable in payment of the poor rate: *Reg v. River Lee Trustees* (1855) 19 J. P. 310. That the funds of a body of public trustees applicable to statutory purposes are applicable, without express provision in that behalf, to satisfying obligations arising out of their proceedings or out of their possession of property is also shown by such cases as *Forbes v. Lee Conservancy Board* (1879) 4 Ex. D. 116; 48 L. J. Ex. 402; and *Mersey Docks v. Gibbs* (1866) L. R. 1 H. L. 93; 11 H. L. C. 686; 35 L. J. Ex. 225.

Avory, K.C. (*E. Morten* with him), for the defendants. The land in question is substantially part of the bank of a navigable river, and the conservators of the navigation are, it is submitted, no more "owners" of the bank within the meaning of the Metropolis Management Acts than they are "owners" of the bed of the river. Their whole undertaking is held by them for the purpose of maintaining the river as a highway. The land may be rateable, though *Lambeth Overseers v. London County Council*, 1897, A. C. 625; 66 L. J. Q. B. 806, shows that land dedicated by statute to purposes analogous with those of a public highway, such as those of a recreation ground, is not rateable. But the question of liability to paving expenses, the foundation of which is benefit or possible benefit to the land charged, is not analogous with the question of rateability. The question is whether the land is capable of being let at a rack rent. And it is submitted that as a practical matter it is clear that no one would give a rent for this land at all. The case, it is submitted, is governed by *Great Eastern Railway v. Hackney District Board* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105; *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399; and *Plumstead Board of Works v. British Land Co.* (1875) L. R. 10 Q. B. 203; 44 L. J. Q. B. 38, 43. In *Thames Conservators v. Port of London Sanitary Authority*, 1894, 1 Q. B. 647; 63 L. J. M. C. 121, it was held that the Conservators of the Thames, a body with functions similar to those of the Lee Conservancy Board, though the freehold of the bed of the Thames was vested in them, and they actually let portions of it for

moorings, &c., were not "owners" of the land within a definition in the Public Health (London) Act, 1891, practically identical with that in the Metropolis Management Acts. The ground of the decision was that the Conservators were owners of the bed of the river for limited purposes only. The same considerations are applicable to the Lee Conservancy Board in the present case.

Beven replied.

July 7. The following judgments were read:—

COLLINS M.R. The question in this appeal is whether the respondents, the Lee Conservancy Board, are liable to pay paving rates as owners of a piece of land running along the side of the Hackney Cut, which forms a part of the Lee Navigation. The land in question bounds and abuts upon a new street recently paved by the appellants, and the action is brought to recover from the respondents the duly assessed amount of their contribution to these expenses. The liability, if any, of the respondents arises under the joint operation of 25 & 26 Vict. c. 102, s. 77, and 18 & 19 Vict. c. 120, s. 250. By the former, "where any vestry or district board shall, under the powers given by the one hundred and fifth section of the firstly recited Act" [18 & 19 Vict. c. 120], "have paved or be about to pave any new street, the owners of the land bounding and abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same"; and by the latter (that is, section 250 of 18 & 19 Vict. c. 120), the word "owner" shall mean "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." Wright J. has held that the respondents are not "owners" within the meaning of the above section, inasmuch as they hold the land "as trustees for public purposes inconsistent with the land being rack rented as between landlord and tenant."

The question is whether the conditions under which the respondents hold the land in question are such as to support the learned judge's conclusion. Mr. Beven, in his able argument for the appellants, referred to the poor rate cases, and particularly to the leading case of *Mersey Docks v. Cameron* (1865) 11 H. L. C. 443; 35 L. J. M. C. 1. It is said that those authorities have only an indirect bearing upon the point in question. If, indeed, it could be shown that the land was, to use Lord Watson's phrase, *extra commercium*, so as not to be subject to the poor rate, it would equally excuse its owners from contributing to paving expenses. In such case they could not be deemed to be owners of land within the definition of section 250 (see the cases cited *infra*).

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But it was contended for the respondents that it would not follow that, though the conditions of its occupation were such as to ground liability to the poor rate, its owners would be liable to the paving rate; for, though the subject of beneficial occupation, it might not be capable of being let at a rack rent, which, as they contended, is the test of liability to the paving rate. Mr. Beven satisfied me that the occupation of the trustees of the land in question is beneficial within the meaning of the poor rate authorities, and that the land is, therefore, not *extra commercium*. But, assuming the respondents' contention on this point to be well founded, it still has to be decided whether the land in question must be deemed incapable of being let at a rack rent. The fact that it is not actually let at a rack rent is immaterial if in given circumstances it might be let at a rack rent: *Wright v. Ingle* (1885) 16 Q. B. D. 379; 55 L. J. M. C. 17. The incapacity, to excuse the owners, must be not temporary, but perpetual: see per A. L. Smith L.J. in delivering the judgment of the Court of Appeal in *Hornsey District Council v. Smith*, 1897, 1 Ch. 843, at p. 362; 66 L. J. Ch. 476: "These two cases"—that is, *Plumstead Board of Works v. British Land Company* (1875) L. R. 10 Q. B. 203; 44 L. J. Q. B. 38, 43, and *Great Eastern Railway v. Hackney Board of Works* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105—"in our judgment show that, if land be by statute for ever incapable of yielding a rack rent, the owner thereof is not 'owner' within the meaning of the Acts." The passage in Lord Watson's judgment in *Great Eastern Railway v. Hackney Board of Works* on the same point is as follows: "The authorities cited in the course of the argument appear to me to establish this proposition—that the person vested with the property of heritable subjects, which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." On going through the Acts regulating the powers and duties of the trustees, as placed before us by Mr. Beven, I am by no means satisfied that they have not power to let the land in question at a rack rent while they still retain it for the purposes of the navigation. They are certainly owners in fact, and by the Lee Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.), s. 14, they have power to construct all such new locks, docks, wharves, towing-paths, and other works as the trustees in their discretion may think proper. They could, therefore, utilise the land in question for any of such constructions, and there does not appear to be any statutory inhibition upon their letting them for purposes ancillary to their undertaking. But however this may be, they are empowered by their Act of 1868 (31 & 32 Vict. c. cliv.), s. 115, to sell, convey, or otherwise dispose of any lands for the time being

vested in them which, in their judgment, are not required for any of the purposes of the Act. The land in question was bought by the trustees for the purpose of enabling them to strengthen the banks of the cut, but if they chose to substitute, as they might do, a retaining wall, they might dispose of the portion of the land no longer required. It is, however, contended by the respondents that, even if theoretically such user of the land were possible, it is at best only a fantastic and ingenious suggestion such as that which was urged with respect to the bridge parapets in *Great Eastern Railway v. Hackney Board of Works*. It is to be remarked, however, that the point so dealt with in that case was merely as to the parapets in question, which, it was suggested, might be utilised for advertisements, but which were, in fact, as pointed out by Lord Watson, imposed as a burden to be accepted by the company as a condition of carrying the road over the railway. Here we are dealing with a strip of land about 26 feet wide, and running a considerable length along the cut. I think that the principle *de minimis* cannot be applied to such a considerable piece of land, and it was, I think, on that principle only that Lord Blackburn assented to the view that the parapets might be treated as *extra commercium*. The Court below in *Great Eastern Railway v. Hackney Board of Works* (1882) 9 Q. B. D. 412; 51 L. J. Q. B. 451, following *London and North-Western Railway v. St. Pancras Vestry* (1868) 17 L. T. 654, had treated them as capable of grounding ownership, and their view and the decision on which it was founded were not questioned by the House of Lords, or disposed of otherwise than by the operation of the maxim *de minimis*, which does not seem to me to be applicable in this case. Indeed, Lord Watson expressly approved of *London and North-Western Railway v. St. Pancras Vestry* on grounds which make it directly applicable to this case. He pointed out that the wall there "was necessary for the construction of the line and the protection of traffic upon it, and in short, formed part of the works from which the company were deriving profit."

The land in question, therefore, is not *in consimili casu* with the parapets in the *Great Eastern Railway* case, and cannot be excluded from rateability on the same ground. The result is that the nature of the undertaking itself and the conditions under which it is carried on do not place the land in question *extra commercium*, and even if it be assumed that incapacity to let land, which is capable of beneficial occupation and is being actually beneficially occupied, would excuse from liability to paying rates, there is no such inability in this case. Of course, we are not concerned with the amount, but only with the principle of liability.

On these grounds I am of opinion that this appeal must be allowed.

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STIRLING L.J. In my opinion this case is not governed by the decisions in *Great Eastern Railway v. Hackney Board of Works* (1883) 8 App. Cas. 687; 52 L. J. M. C. 105, and *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399. Those cases were decided, as I understand them, on the ground that the lands there sought to be made liable for paving expenses were, in the language of A. L. Smith L.J., "by statute for ever incapable of yielding a rack rent": *Hornsey District Council v. Smith*, 1897, 1 Ch. 843, at p. 862; 66 L. J. Ch. 476. That is not so here, for the Lee Conservancy Board has (under the Lee Conservancy Act, 1868, s. 115) a power of sale which might be exercised at any moment; and if the land were sold it might be let at a rack rent. The absence of any express statutory power of letting was much relied on in argument; but even if it be assumed that the defendants have no power to let the case is not concluded. It was pointed out in *Wright v. Ingle* (1885) 16 Q. B. D. 379, at p. 402, 55 L. J. M. C. 17, by Bowen L.J. that "section 250 does not confine the term 'owner' to those persons who could receive a rack rent from the particular premises, or who could let them at a rack rent; it includes those persons who would receive the rack rent if the premises were let at such a rent, and I think *Bowditch v. Wakefield Local Board* (1871) L. R. 6 Q. B. 567; 40 L. J. M. C. 214, is a conclusive authority, if authority were wanted, to show that a man is not the less the 'owner' of premises because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack rent." In *Wright v. Ingle* it was decided that the trustees of a chapel who held it upon trust to permit it to be used as a place of religious worship in connection with the Wesleyan body, with power of sale but without power to let, were liable to contribute to paving expenses. In *London and North-Western Railway v. St. Pancras Vestry* (1868) 17 L. T. 654, it was held that a retaining wall of a railway cutting was land abutting on a street and liable to be charged with paving expenses. This decision was approved in *Great Eastern Railway v. Hackney Board of Works*, by Lord Watson, who says (at page 693 of the Law Reports):—"It is obvious that the wall was necessary for the construction of the line and the protection of traffic upon it, and, in short, formed part of the works from which the company were deriving profit." It may be observed that as a general rule a railway company possesses no power to let either the undertaking as a whole or separate portions of it: see *Mulliner v. Midland Railway* (1879) 11 Ch. D. 611; 48 L. J. Ch. 258. In the present case the piece of land in question is used as an embankment for preventing the escape of the waters of the River Lee and preserving the river in a navigable condition,

so that the Conservancy Board may earn the tolls which the statutes authorise them to charge. If the navigation were managed by an incorporated company of shareholders to whom dividends were payable, the case would be undistinguishable from that of a railway company. The money necessary to enable the board to perform its statutory duties has been raised by borrowing money on mortgage, and the tolls are applicable to pay the interest on the mortgages. The mortgagees have in substance contributed the capital by which the undertaking is carried on, and although there is no body of shareholders, and the Conservancy Board acts without reward, yet, as was pointed out by Blackburn J. in advising the House of Lords in *Mersey Docks v. Gibbs* (1866) 11 H. L. Cas. 686, at p. 707; L. R. 1 H. L. 93; 35 L. J. Ex. 225, such a corporation is in its very nature a substitution on a large scale for individual enterprise. It was there laid down that "in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." In the present case, so far from the statutes showing any contrary intent, the course of legislation points in favour of the application of the rule. An early Act dealing with the Lee navigation is 7 Geo. III. c. 51, section 84 of which provides that all sums of money to be raised or paid by virtue of the Act should be applied in the first place in discharging the expenses incurred in and in relation to the obtaining of the Act, and afterwards in paying certain annual payments thereinbefore directed to be made and in performing the contracts entered into by the trustees in pursuance thereof, and for improving, completing, and maintaining the navigation and carrying the Act and the several provisions, powers, and authorities therein contained into effectual execution, and to no other use or purpose whatever. In *Reg. v. River Lee Trustees*, 19 J. P. 310, decided in 1855, it was held by the Court of Queen's Bench that the trustees were not, by reason of the negative words at the close of section 84, exempted from payment of poor rates, and that the section only applied to moneys remaining in their hands after paying all lawful charges, including poor rates. Subsequently, by the Lee Conservancy Act, 1868, s. 64, it was expressly enacted that "the expenses incident to all the powers and duties under the Lee Navigation Improvement Acts shall be considered as among the purposes for which income received by the trustees under those Acts is at the passing of this Act by law applicable." The Legislature thus sanctioned by express enactment the construction placed by the Court of Queen's Bench on section 84 of the Act of George III.,

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and authorised its application to other cases. Both these enactments still remain in force; and it appears to me that, regard being had to them, the Lee Conservancy Board cannot claim exemption from the incidents of ownership of land acquired for the purposes of the undertaking, and that the paving expenses now in question are authorised and ought to be paid by the Board.

The appeal in my opinion ought therefore to be allowed.

MATHEW L.J. I agree. The undertaking managed by the defendants is in its nature commercial and capable of beneficial use. Its character in this respect is not altered by reason of the statutory provisions which were intended to limit the receipts from the property of the defendants to the amount of the outgoings, so as to render the business carried on by them self-supporting. It was not disputed that the whole undertaking and each part of the property held by the defendants were rateable. The land in question had been acquired upon terms which showed that it was considered capable of being profitably employed. It might have been purchased or taken on lease. In either case I cannot agree that the land in the possession of the defendants ceased to be of any value. But, as was pointed out, the question is not whether the embankment was rateable, but whether the defendants were "owners" within the definition in the Metropolis Management Act, 1855, s. 250. There seems to me to be sufficient evidence to show that the embankment without impairing its efficiency as a protection to adjoining lands might be made the site of a building or might in other ways be turned to profitable account in connection with the defendants' business. The defendants' liability for paving expenses seems to me to be analogous to the obligation of a railway company, or of a waterworks company under the Waterworks Clauses Act. I am unable to agree with the reasoning of my brother Wright, and am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitor for the plaintiffs—W. A. Williams.

Solicitors for the defendants—Clapham, Fitch, & Co.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

BAKER AND WIFE *v.* WICKS AND OTHERS.

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March 19.

Poor Law — Officers — Overseers — Assistant overseers — Poor rate — Recovery — Distress — Illegal distress by assistant overseer — Responsibility of overseers — Poor Relief Act, 1819 (59 Geo. III. c. 12), s. 7.

Overseers of the poor are not liable for illegal acts of an assistant overseer, duly appointed to perform all the duties of an overseer, committed in the execution of a distress warrant for non-payment of rates directed to the overseers and constables.

FURTHER consideration by Lord Alverstone C.J. of an action tried without a jury at Lewes Assizes.

The action was brought by the plaintiffs against E. Wicks and W. Wright, overseers of the parish of Ringmer, Sussex, and J. Webster, an auctioneer, for damages for illegal and excessive distress. The assistant overseer of the parish, named Washer, who had been appointed in 1892 to perform all the duties of an overseer, was brought in by the defendant Webster as third party to the action.

In June, 1903, the plaintiff, D. Baker, a farmer and ratepayer at Ringmer, in Sussex, was served with a demand for a poor rate amounting to £7 19s. 7½d. He wished to protest against such part of the rate as was applicable to the support of voluntary or non-provided schools under the Education Act, 1902, and told the assistant overseer that he would not pay the rate, and was prepared to be summoned for the amount of it.

On July 7, 1903, a distress warrant was issued by the justices against the plaintiff, and certain other ratepayers who had not paid their rates, in the form given in the schedule to the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), addressed to "the overseers of the poor of the parish of Ringmer, in the county of Sussex, and to the constables of the East Sussex Constabulary, and to all other peace officers in the said county." The distress warrant was, in the first instance, placed in the hands of a police-constable for execution, but he, acting as it was supposed upon the instructions of the chief constable, declined to execute it, and handed it to the defendant, E. Wicks, who passed it on to Washer, the assistant overseer. On July 16 the plaintiff paid Washer the amount of the rate less 15s., which he estimated to be the portion of the rate applicable to educational purposes. Other ratepayers, whose names were included in the distress warrant, also refused to pay

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the portion of the rate applicable to educational purposes ; and Washer, the assistant overseer, procured the defendant Webster, an auctioneer at Belper, in Derbyshire, as being a stranger in the neighbourhood, to execute the warrant and effect the distress.

On September 3, 1903, Washer and the defendant Webster, purporting to act under the warrant of distress, seized and removed from the plaintiff's house at Ringmer goods and furniture estimated to be of the value of upwards of £100 to satisfy the claim of 15s., portion of the unpaid rate. They were at the time informed that the bulk of the furniture and goods was the property of Mrs. Baker, wife of plaintiff, D. Baker, and that only some £5 worth belonged to D. Baker. The defendant overseers, E. Wicks and W. Wright, were not present when the goods were seized, the latter being abroad, and did not authorise the seizure of Mrs. Baker's goods. The goods were taken to an inn at Lewes, and kept there for about three weeks, when the defendant E. Wicks caused them to be restored to the plaintiffs.

By their statement of claim the plaintiffs, D. Baker and his wife, alleged that on September 3, 1903, the defendants entered the dwelling-house of the plaintiffs and unlawfully, wrongfully, and forcibly took possession of certain furniture and effects of the plaintiffs, and removed them from the plaintiffs' dwelling-house to the premises of an inn at Lewes, and detained the whole of the furniture and effects from the plaintiffs for some nineteen days, when they restored a part only of the same. Alternatively, that the plaintiff, D. Baker, had suffered damage by reason of the defendants having wrongfully distrained for 15s. (balance of the rate due) goods of the plaintiff of much greater value than the amount of such balance, although part of the goods was then sufficient to have satisfied the balance of 15s., and the defendants thereby made an excessive and unreasonable distress.

The defence of the defendants, E. Wicks and W. Wright, the overseers, was that if the acts complained of were done and committed by them, which they denied, the same were done and committed in a peaceable manner upon the furniture and effects of the plaintiff D. Baker only, and under the authority of the justices' distress warrant; that the warrant was issued against D. Baker on July 7, 1903, for non-payment of rates due by him amounting to £7 19s. 7½d.; that the plaintiff afterwards paid £7 4s. 7½d., but refused to pay the balance of 15s., and at the date of the alleged distress 15s. and costs were still due and owing by the plaintiff under the warrant. Further, that if any wrongful acts were committed, the same were not done or committed by their agents or servants, but by Washer, the assistant overseer, without their knowledge or authority, and that they were in no way responsible.

The defence of the defendant Webster, the auctioneer, was that if any of the acts complained of were done by him, the same were done in the lawful, peaceable, and proper execution of the warrant against the goods and chattels of the plaintiff D. Baker only. 1904.
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Boxall, K.C., and *E. E. Humphreys* for the plaintiffs. The defendant overseers are liable for the acts of the assistant overseer and of the auctioneer. It is no defence that they did not authorise the assistant overseer to commit the illegal acts complained of, for the distress warrant was addressed to them, and the duty of executing it imposed upon them. A distress for rates is in the nature of an execution: *Hutchins v. Chambers* (1758) 1 Burr. 579, per Lord Mansfield, at p. 588, and differs from a distress for rent. The distress warrant was addressed to the defendant overseers in the form of the schedule to the Distress for Rates Act, 1849, and therefore they were in the same position as a sheriff who is required to levy under a writ of *feri facias*, and just as the sheriff is responsible for the acts of a subordinate to whom he delegates his powers, so the overseers are responsible for an illegal act on the part of their subordinate, the assistant overseer, in the execution of a distress warrant: *Gregory v. Cotterell* (1855) 5 E. & B. 571; 25 L. J. Q. B. 33. The overseers have no power to delegate their authority to an assistant overseer to execute a distress warrant so as to relieve themselves of the responsibility for its proper execution. In the present case the warrant was addressed to the defendant overseers themselves, and not to the assistant overseer, although he had been empowered by the vestry, under the provisions of the Poor Relief Act, 1819 (59 Geo. III. c. 12), s. 7, and the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 61, to perform all the duties of an overseer. In the present case, therefore, the assistant overseer must be taken to have been acting as the servant or bailiff of the overseers themselves. If the present defendant overseers be held to be not liable because their assistant was appointed under statute, that circumstance will not relieve them of liability in regard to the auctioneer, the defendant Webster, who was not appointed under any statute, and who actually levied the distress. At least the defendant, *E. Wicks*, who ratified what was done by Washer, the assistant overseer, is liable, but it is submitted that the plaintiffs are entitled to recover against all three defendants.

Avory, K.C., and *Lawless* for the defendant overseers. An assistant overseer is not the servant of the overseers, and they are not liable for his acts. Except so far as recent legislation has transferred the power of making the appointment to other bodies, he is appointed by the justices on the nomination of the vestry. In the present instance

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Washer was appointed as long ago as 1892, and has ever since been continued in his employment, by the terms of which he is to perform all the duties of an overseer. An under-sheriff or sheriff's officer is directly appointed by the sheriff, and has no statutory position apart from the sheriff, but an assistant overseer is not appointed by the overseers. He has a position, apart from them, recognised by section 7 of the Poor Relief Act, 1819. He is not the servant of the overseers of the parish, but of the vestry or other body from whom he receives his authority: per Lord Denman C.J. in *Reg. v. Watts* (1837) 7 A. & E. 461, at p. 469, 7 L. J. M. C. 72; *Points v. Attwood* (1848) 6 C. B. 38; 18 L. J. C. P. 19. If the circumstance of the warrant being addressed to the defendant overseers in this instance is to render them liable, then upon the same principle the constables of the East Sussex Constabulary would be equally liable since the warrant is addressed to them as well as the overseers. The defendant, E. Wicks, did not render himself liable by handing the warrant to Washer, the assistant overseer, nor did he make Washer his agent and thus incur liability for the illegal acts of the latter. The defendant, W. Wright, the other overseer, was abroad the whole time and, except for his position of overseer, cannot be held liable. But neither he nor his co defendant, E. Wicks, are liable from the fact of their being overseers. A judgment creditor who hands a writ of *fiery facias* to a sheriff for execution is not liable if the sheriff seizes the goods of the wrong person: *Smith v. Keal* (1882) 9 Q. B. D. 340; *Morris v. Salberg* (1889) 22 Q. B. D. 614; 58 L. J. Q. B. 275. There is no evidence of ratification by E. Wicks of what was done by Washer, and if there were it would not avail, for the subsequent ratification of a wrongful act, done without authority, is a nullity: *Woollen v. Wright* (1862) 1 H. & C. 554: 31 L. J. Ex. 513.

Lailey for the defendant Webster.

Boxall, K.C., replied.

LORD ALVERSTONE C.J. It is to be regretted that the plaintiff, D. Baker, was not better advised than to have adopted the course he has done in these proceedings, for the means he has thought proper to adopt in raising his objection to pay this rate for educational purposes are in no sense happy. He might have put forward his objection with equal or greater dignity by paying under protest the amount he objected to pay. It is also a matter of regret that the police declined to execute the warrant; had they not done so the difficulty would have been avoided. The present action for damages for excessive and unreasonable distress is brought against the two overseers of Ringmer and the auctioneer who levied, and the latter, in his turn, brought in

Washer, the assistant overseer, as a third party. Washer had in 1892 been appointed by the justices, on the nomination of the vestry, to perform all the duties of an overseer of the poor, and was at the time in question acting under such appointment. The distress warrant addressed to the overseers, the defendants E. Wicks and W. Wright, upon the execution of which the present action arises, was, at the date of the execution effective for the sum of 15s. and no more, since the plaintiff had paid the balance of £7 4s. 7½d. As regards the defendant, W. Wright, it is shown that he was abroad the whole time, and had nothing to do with the matter; but if it be that overseers are in the position of sheriffs the plaintiffs would certainly be entitled to judgment against the defendant, E. Wicks, for he placed the matter in the hands of Washer, the assistant overseer. Had the defendant Webster, the auctioneer, merely taken an inventory of the goods by the direction of the assistant overseer, he would not have been liable for illegal distress; but the evidence is that he did more. He was a principal in levying the distress, and his conduct was improper because the distress was wrongful and excessive. The plaintiffs' contention is that E. Wicks is responsible for these unlawful acts; and upon this the question arises whether overseers are responsible for the conduct of an assistant overseer appointed by the justices on the nomination of the vestry, and whether in cases of this kind the same principle ought to be applied which is applicable in the case of sheriffs who are responsible for everything done by their officers in levying an execution. That principle has apparently been laid down in *Gregory v. Colterell* (1855) 5 E. & B. 571; 25 L. J. Q. B. 33, and if that case governs the present the plaintiffs are entitled to judgment against the defendant overseers. But, although a sheriff is no doubt responsible for the acts of his officers, I am of opinion that overseers of the poor are not in the position of the sheriff, and that therefore the principles which apply to sheriffs and their subordinates do not apply in cases of overseers and assistant overseers, where the latter are by statute appointed to perform the whole duty of overseers. An assistant overseer is the servant of the vestry, or body taking the place of the vestry, and not of the overseers; and the overseers are not liable for any act done by the assistant overseer to which they are in no way party, and which they have not authorised. It is by virtue of his own authority that the assistant overseer carries out his duties, where, as here, there is a statutory recognition of his office. I am, therefore, of opinion that the law as to the sheriff's responsibility for the acts of his officers does not apply in the present case. *Reg. v. Watts* (1837) 7 A. & E 461; 7 L. J. M. C. 72, and *Points v. Attwood* (1848) 6 C. B. 38; 18 L. J. C. P. 19, are authorities that the principle applicable in the case of a

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sheriff has no application in the case of overseers of the poor. In these cases it was clearly laid down that the assistant overseer was not the servant of the overseers but of the vestry. Again, the Poor Relief Act, 1819, and the Poor Law Amendment Act, 1844, recognise that assistant overseers can perform all the duties of overseers; therefore, apart from binding authority, it is seen that the Legislature itself recognises the assistant overseer as a statutory officer, and has empowered him to perform all the acts that overseers themselves can perform. Therefore I come to the conclusion that nothing was done in the present case by the defendant overseers, E. Wicks and W. Wright, rendering them responsible for the levying and taking the goods of Mrs. Baker, and my judgment must be for them, with costs. With regard to the defendant Webster, I find that he did levy the distress, and that he took part in an illegal act. Further, I find that his third party notice against Washer, the assistant overseer, fails, for he had no remedy over as against him. There will, therefore, be judgment for the plaintiffs against Webster for £50 and costs; and judgment for the defendants, E. Wicks and W. Wright, with costs.

Judgment accordingly.

Solicitor for the plaintiffs—S. Lithgow, for D. A. Davies, Hove.

Solicitors for the defendants, Wicks and Wright—Beal and Payne, for E. Bedford, Newhaven.

Solicitors for the defendant Webster—Needham, Tyer, and Barrow, for E. G. and F. J. Jackson, Belper.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

1904.

GARBUIT v. DURHAM JOINT COMMITTEE.

June 28.

Police—Pension—Reckoning of service for pension—Discontinuous service—Certificate of approved service—Conclusiveness of certificate—“Sufficient evidence”—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 4, 5, 10, 21, 36.

The twenty-five years approved service, which will, under the Police Act, 1890, entitle a police constable to a pension for life on retirement from a police force, must be continuous service, except in the cases where the Act expressly provides for the reckoning together of separate periods of service.

So held by a majority of the Court (Collins M.R. and Stirling L.J., Mathew L.J. dissenting), upholding the decision of the Divisional Court reported, 1904, 1 K. B. 522 ; 2 L. G. R. 251 ; 73 L. J. K. B. 289.

APPEAL from a judgment of the Divisional Court (Lord Alverstone C.J., Lawrance and Kennedy JJ.), on a case stated by the quarter sessions for the county of Durham on an application by the appellant Garbutt under section 11 of the Police Act, 1890, by way of appeal against the refusal of the respondent committee to order payment of a pension to him under that Act.

The case stated by quarter sessions was as follows :—

At the hearing of the application the appellant relied upon a certificate of approved service for upwards of 25 years, which was produced to us, and which (save for the objection hereinafter mentioned) was admitted to be a certificate duly given under the said Act, and to refer to the appellant.

The respondents contended that the certificate, though “sufficient evidence,” was not conclusive, and tendered evidence to the effect that the service of the appellant during the said period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service, and was not conclusive evidence, and that the acting chief constable could not certify as to character, which appeared from the police records, and that the joint committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The appellant contended that it was not open to the respondents to contradict the certificate, and that such evidence was therefore inadmissible. On this point we agreed with the contention of the appellant, and refused to receive evidence as to the character of the appellant.

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The respondents further contended that upon the true construction of the Act it was necessary that the whole period of service of 25 years should be continuous in order to entitle the appellant to a pension in respect thereof. The appellant contended that the period need not be continuous, and further contended that even if so the certificate of approved service, once given, precluded the respondents from raising this point.

We considered that the Act required that the whole period should be continuous, and inasmuch as the certificate showed on its face that there had been two breaks in the period of service, we considered that it was open to the respondents to raise this point. We accordingly dismissed the application of the appellant.

The questions for the opinion of the Court are (1) whether we were right in dismissing the application on the ground stated, and (2) whether we were right in rejecting the evidence tendered on behalf of the respondents.

If the Court shall be of opinion in the affirmative on the first question, then the said order of quarter sessions is to be affirmed; if the Court is of opinion in the negative on the first question, and in the affirmative on the second question, the order of quarter sessions is to be quashed, and an order made that the appellant is entitled to the pension he claims. If the Court is of opinion in the negative on both questions, the case is to be remitted to quarter sessions to be reheard.

The certificate signed by the acting chief constable, which was headed, "Return of service of Police Constable Thos. P. Garbutt, No. 366. recommended for an ordinary pension," showed that the appellant had served in all for a period of 25 years and 99 days, made up of three distinct periods of 4 years 236 days, 7 years 167 days, and 13 years 61 days, there being intervals between the first and second period and between the second and third period during which the appellant was not in the police force. The certificate concluded with the words, "I certify that the term of approved service entered above has been diligent and faithful service within the meaning of section 4 of the Act."

The Divisional Court dismissed the appeal, holding that the 25 years' approved service necessary under the Police Act, 1890, to entitle a police constable to a pension on retirement must be continuous service, except in the cases where the Act expressly provides for the reckoning together of separate periods of service. The case in the Divisional Court is reported, 1904, 1 K. B. 522; 2 L. G. R. 251; 73 L. J. K. B. 289.

The appellant appealed.

The following provisions of the Police Act, 1890 (53 & 54 Vict. c. 45) are material :—

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Section 1: Subject to the provisions of this Act, every constable in a police force—

(a) if he has completed not less than twenty-five years' approved service, and where a limit of age is prescribed by the pension scale in force under this Act, is of an age not less than the age so prescribed, shall, on the expiration of such time not exceeding four months after he has given written notice to the police authority of his desire to retire as the police authority may fix, be entitled without a medical certificate to retire and receive a pension for life.

Section 4 (1). The service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression "approved service" shall for the purposes of this Act mean such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service, but shall not, unless the regulations of the police force otherwise prescribe, include service before twenty-one years of age.

(2) A certificate signed by the chief officer of a police force as to the period of a constable's approved service in that force shall be sufficient evidence thereof.

* * * * *

(4) Where a constable has served in more than one police force in any part of the United Kingdom, approved service in any such police force in which he has completed not less than three years' approved service, and from which he has with the written sanction of the chief officer of that force removed to another force, shall be reckoned as approved service in the force in which the constable is serving at the time of his retirement.

(5) Where a constable with the knowledge of the police authority or of the chief officer of his police force belongs to the Army Reserve, and is called out for training or for permanent service, he shall be entitled, on returning to the police force after the end of such training or service, to reckon any approved service which he was entitled to reckon at the commencement thereof.

Section 5. (3) Where a pension is granted to a constable on the ground of incapacity for the performance of his duty, the police authority shall, yearly or otherwise, until the power under this Act of requiring the constable to serve again ceases, satisfy themselves that the incapacity continues . . .

(4) In the event of the incapacity ceasing before the time at which the constable would, if he had continued to serve, have been entitled without a medical certificate to retire and receive a pension for life, the police authority may cancel his pension and require him to serve again in the police force . . .

(5) Where a constable so serves again, the provisions of this Act as to retirement and pensions, allowances, and gratuities shall apply as if he had not previously retired, save that, except in the case of pensions for non-accidental injuries received in the execution of duty, he shall not reckon as approved service the time which elapsed between his former retirement and the commencement of his service again.

Section 11. In any of the following cases

* * * * *

(b) Where a constable is dismissed without a pension to which he would be otherwise entitled . . . and the police authority do not admit the claim . . . the constable . . . may apply to the police authority for a reconsideration of the claim to

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the pension or allowance, and if aggrieved by the decision upon such reconsideration may apply to the next practicable court of quarter sessions for the county within which the constable last served . . .

Pickersgill and *J. A. Johnston* (*Simey* with them) for the appellant. The Divisional Court was wrong in holding that the service necessary to give a police constable a right to a pension on retirement must be continuous. Section 1 of the Police Act, 1890, which gives the right to a pension, merely requires "not less than twenty-five years' approved service." And section 4 (1) defines "approved service" as such service as may after certain deductions be certified by order of the police authority. Neither section 1 nor section 4 (1) requires in terms that the service should be continuous; and in their natural significance the words "twenty-five years' approved service" include discontinuous service as well as continuous service. If the Legislature had meant that the service must be continuous, the Act would have so provided expressly. The argument of the respondents which prevailed in the Court below is that there are provisions in the Act, particularly sections 4 (5) and 5 (5) which are superfluous unless the service required to entitle a constable to a pension must in general be continuous; and that therefore the Court should read into section 1 words that are not there imposing a condition that the service must be continuous. This method of construction is, however, illegitimate: *King v. Burrell* (1840) 12 A. & E. 460, at p. 468; 9 L. J. Q. B. 337; *Williams v. Roberts* (1835) 1 C. M. & R. 676, at p. 680; 4 L. J. Ex. 78; *Hough v. Windus* (1884) 12 Q. B. D. 224, at p. 229; 53 L. J. Q. B. 165; *Grey v. Pearson* (1857) 6 H. L. C. 61, at p. 106; 26 L. J. Ch. 473, where Lord Wensleydale laid down what has been referred to as the golden rule on the interpretation of statutes in cases of this kind. Sections 4 (5) and 5 (5) may have been enacted *ex abundante cautela*; and are, moreover, not altogether superfluous even if discontinuous service does confer a right to a pension. Section 4 (5), it is submitted, gives a constable called out as a member of the Army reserve a right to return to the police service when his military duty is over. Again, section 5 (5) deals with the special case of a constable incapacitated from duty and granted a pension, and then recovering and returning to duty. It was not unreasonable to provide specially for this case. *Walker v. Simpson*, 1903, A. C. 208; 72 L. J. P. C. 58, is in favour of the view that the service need not be continuous. Under the earlier Police Acts, continuous service was not necessary to render a constable eligible for a pension: County Police Act, 1840 (3 & 4 Vict. c. 88), s. 11; County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 9. It is not to be supposed that the Legislature intended to depart from the policy of the earlier Acts in this respect in the absence of express provisions

requiring the service to be continuous. The appellant was in service as a constable at the passing of the Police Act, 1890, and his right to reckon previous service is preserved by sections 30 (8, 9) and 36 (2).

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Secondly, the quarter sessions were right in rejecting evidence of misconduct. On this matter the chief constable's certificate is conclusive. The words in section 4 (2) that the certificate is to be sufficient evidence mean that it is to be conclusive evidence, not merely *primâ facie* evidence. Bigham J. so construed the words "sufficient evidence" in section 193 (3) of the Merchant Shipping Act, 1894, in *Board of Trade v. Sailing Ship Glenpark*, 1903, 2 K. B. 324; 72 L. J. K. B. 697. In the Court of Appeal (1904, 1 K. B. 682; 73 L. J. K. B. 315) the judgment of Bigham J. was affirmed on other grounds, no opinion being expressed on this point. *Barraclough v. Greenhough* (1867) L. R. 2 Q. B. 612; 36 L. J. Q. B. 251, and *Hewitt v. Taylor*, 1896, 1 Q. B. 287; 65 L. J. M. C. 68, where the words "sufficient evidence" were held not to mean conclusive evidence turned upon the special provisions of the Acts considered in these cases.

Montague Shearman, K.C., and *Meynell* for the respondents. The words of section 1 (a) themselves import that the service must be continuous; or at highest they are ambiguous and are as consistent with the intention that the service must be continuous as that it may be either continuous or discontinuous. If the section is intrinsically ambiguous, then clearly the remainder of the Act may be looked at to see which construction should prevail: *Colquhoun v. Brooks* (1889) 14 App. Cas. 493, at p. 506; 59 L. J. Q. B. 53. The later sections of the Act show clearly that continuous service must have been meant. Sections 4 (5) and 5 (5) would be superfluous if the service was not intended to be continuous. The suggestion that section 4 (5) gives a constable absent on military duty under the circumstances referred to a right to return to the police force is untenable. Section 21 also is inconsistent with the view that the service may be discontinuous.

Secondly, the chief constable's certificate is not conclusive. Section 4 (1) defines "approved service" as service certified under order of the police authority as diligent and faithful service. Then section 4 (2) provides that a certificate signed by the chief constable as to the period of service of a constable's approved service shall be sufficient evidence thereof. The certificate contemplated by section 4 (2) is a certificate merely as to the length of service, and that is all that has been given in the present case. No certificate such as is contemplated by section 4 (1) has been given. Further, the words "sufficient evidence" do not mean conclusive evidence. The only authority for that interpretation is the judgment of Bigham J. in *Board of Trade v. Sailing Ship Glenpark*, 1903, 2 K. B. 324; 72 L. J. K. B. 697. And

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in that case the Court of Appeal (1904, 1 K. B. 682; 73 L. J. K. B. 315) did not adopt the view of Bigham J. on this point. In favour of the other contention are *Barraclough v. Greenhough* (1867) L. R. 2 Q. B. 612; 36 L. J. Q. B. 251; *Hewitt v. Taylor*, 1896, 1 Q. B. 287; 65 L. J. M. C. 68; and *Reg. v. Fordham* (1873) L. R. 8 Q. B. 501; 42 L. J. M. C. 153.

Pickersgill in reply.

COLLINS M.R. This is an appeal upon a special case stated by quarter sessions, and the question is whether or not a certain police officer is entitled to a pension which he claims. Two questions are put in the case. The first is whether the service to entitle the officer to a pension must be continuous service; the second is whether the certificate given by the chief constable was conclusive so as to debar the police authority who wished to impugn it from giving evidence to contradict it.

The Divisional Court held that the appellant was not entitled to a pension, upon the ground that the Police Act, 1890, contemplates continuous service as a condition necessary to entitle a constable to a pension, and that in the present case the service was not continuous. There were breaks in the appellant's service, but in the aggregate his period of service did extend to the 25 years specified in section 1 (a) of the Act of 1890. [His Lordship read section 1 (a) of the Act and continued:—] It was contended before the Divisional Court and before this Court that that section in itself and upon its face means that the 25 years' approved service need not be continuous service, inasmuch as it speaks merely of "twenty-five years' approved service." It is said that 25 years' service is on the face of the section enough to entitle a man to a pension, and that it is not a right mode of construction to spell out of other sections of the Act some conclusion which would contradict that which was contended to be the proper meaning of the section. Now, to start with, I cannot assent to the interpretation of the words in section 1 relied on by the appellant. In my opinion the section is at the utmost equally consistent with continuous or non-continuous service. But I go further, and I think it is *prima facie* continuous service that the section means. It is not necessary to go so far as that, because I think it cannot be properly put higher than that the words of the section are consistent with either broken service or continuous service. The words are capable of bearing two reasonable constructions. Therefore there is an ambiguity, and that being so we are entitled to look at the other provisions in the Act to see what light they throw upon the section in question. Even without any authority, it is clear that we should be so entitled, because the

provisions of an Act must be construed together. But there is an authority which Mr. Shearman brought to our notice which is exactly in point, namely, the opinion of Lord Herschell in *Colquhoun v. Brooks* (1889) 14 App. Cas. 493, at p. 506; 59 L. J. Q. B. 53, who there says: "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act." That shows that we are entitled to look at the other sections of the Act in order to see what the meaning is that ought to be placed on the section the meaning of which is doubtful. Now, turning to the Act, I find a series of other sections which throw light upon section 1. It is not necessary for me to go through them, and to repeat the arguments derived from them, as that is fully done in the judgment of Lord Alverstone C.J., in which the other members of the Divisional Court concurred, though Kennedy J. seems to have had some misgivings. Putting the matter shortly, there are some four or five sections, all of which seem to me to start from the standpoint that the service to entitle a constable to a pension must be unbroken service—a series of provisions dealing with special cases in which service that is broken may count for the purposes of a pension. In my view those sections cannot but be read as pointing clearly to continuous service. I cannot explain or account for them from any other standpoint. Nor does the argument that those sections were inserted in the Act *ex majori cautela* alter my opinion, although it might have had some weight with me if there had been only one such section. I find on looking through the Act four or five such provisions, and all of them starting from the standpoint that *prima facie* a break in the service destroys a claim to a pension. These sections are clearly framed for the express purpose of mitigating the hardship in particular circumstances. If the primary enactment had contained a clear statement that 25 years' broken service should be as effective as 25 years' continuous service, not one of these provisions would have been needed. The only way I can account for those sections being in the Act is that, upon the true construction, the primary enactment in section 1 means that the service to entitle a constable to a pension must be continuous service. With the purport of those sections the Lord Chief Justice dealt fully, and it would be a waste of time if I were to repeat what he said. I desire to add but one observation on the argument based upon former legislation. It seems to me that the consideration of that argument does not really help us at all. The Act of 1890 was a new departure, and

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for the first time gave a constable a right to a pension which before was in the nature of a gratuity in the discretion of the police authority. It is new legislation, and I do not find any terms in the Act itself which would tie our hands by reference to any provisions in an Act previously passed. The Act of 1890 was a new departure, and it must be construed by itself.

In my opinion the judgment of the Divisional Court was right, and must be affirmed.

With regard to the second question—the conclusiveness of the certificate—I do not desire, as it is unnecessary to decide it in this appeal, to express or to be taken to have expressed during the argument any authoritative opinion upon it. But while saying this, I may add I am not at present at all satisfied that “sufficient evidence” means conclusive evidence.

STIRLING L.J. I am of the same opinion. I confess that I share to a considerable degree the doubts and regrets expressed by Kennedy J., but I have come to the conclusion that I ought not to differ from the decision of the Divisional Court. I think that the language of section 1 (a) of the Police Act of 1890 is consistent with either of the views pressed upon us—that is to say, that the words “if he has completed not less than twenty-five years’ approved service” may mean either continuous service or service that may be broken. In that state of things we are entitled, and indeed bound, to look at the rest of the Act to see if there is anything in the following sections which throws light upon the meaning of section 1. So doing, it appears to me that section 4 (5) is very important, and I find it impossible to explain it except upon the view that the draughtsman of this Act had in his mind the necessity for the service being continuous. I think the same is true, though to a less degree, of section 5 (5) and section 21.

For these reasons in my opinion the appeal fails.

I would add that I desire to express no opinion upon the second question.

MATHEW L.J. I regret that I am unable to agree with the conclusion arrived at by the Divisional Court and my learned brethren. I am, however, somewhat consoled, if I may use that expression, by hearing from my brother Stirling that he shares the doubts entertained by Kennedy J. in the Court below. It seems to me we defeat the obvious intention of the Legislature if we say that the 25 years’ service required by section 1 (a) of the Act of 1890 must be continuous service. If that section stood alone, how could it be said that the service must be continuous? Could it be said that a man who was absent through illness was debarred from claiming a pension by reason of the break? If the service must be continuous it means that the man must serve day

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and night without suffering any of the ordinary misfortunes of humanity. The Act of 1890 was intended to afford additional security to police officers in the matter of pensions. Previously to the passing of the Act a police officer was not entitled to a pension, but the matter was in the discretion of the police authority. No doubt the police authority endeavoured to exercise that discretion fairly, but it was desirable that their exercise of it should be subject to appeal, and the Act of 1890 conferred a right of appeal to quarter sessions. The object of the Act was to secure pensions to police officers when they had served the specified time. Why should that service be continuous? In the present case the first breach occurred in 1881, when the appellant resigned and was reinstated a few months afterwards. He then served with a short break of two or three weeks until 1902, when he resigned, as he was entitled, although not compelled to do. Why should he be punished for that? Why is he not entitled to a pension? I can see no reason why it should be imputed to the Legislature that they intended to deprive him of his deferred pay—for the pension is deferred pay—because his 25 years' service was not continuous. I can, I confess, see no reason whatever. A constable may be a perfectly efficient officer before he resigns, and may come back afterwards and be an efficient officer for many years—in this case for something like 20 years. Why should he lose his pension in such a case because there happened to have been a break in his 25 years of efficient service. In my opinion to withhold the pension claimed here would be to give ground for great dissatisfaction being expressed by the force. An argument was addressed to us based upon the later sections of the Act, which it was said varied the otherwise clear meaning of the words in section 1 on this point. We are bound to give effect to words used by the Legislature if they are clear, however unreasonable they may be; but here the words of section 1 present no such difficulty. It seems to me that a critical examination of sections in the way suggested by the learned counsel does not do justice to the intention of the Legislature, who must be taken to have intended to act reasonably. Section 1 is the first important section of the Act. That section says in plain language that a constable shall be entitled to a pension if he has completed not less than 25 years' approved service. It was said that the section must be read as if the words were "continuous service." I can gather nothing of the kind from the language used. It is true that in construing the Act we must read all the sections together, and it was said that light was thrown upon section 1 by subsequent sections. It was suggested that sub-sections (4) and (5) of section 4 made it necessary to introduce the words "if continuous" into section 1. But those words are not there.

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Nor do I see any reason why we should read those subsections as a proviso introduced to throw light upon the substantive enactment in section 1. In my opinion those subsections were introduced *alie intuitu* without any intention to affect the substantive enactment in section 1. Subsection (4) of section 4 was absolutely necessary to meet the case of a constable removed from one district to another, because there is a different police force for each county or district, and it was necessary to provide for a constable's pension, if he removed from one force to another. That is made clear by section 15 (2). Then subsection (5) of section 4, which deals with the case of an Army Reserve man, and section 5 (5), which deals with the case of a constable retiring owing to incapacity for duty and his rejoining the force, seem to me to throw no light upon the question whether or not the service mentioned in section 1 (a) must be continuous. I do not agree that the subsection entitling an Army Reserve man to go back at the end of his training or service was introduced to qualify section 1. These subsections which I have referred to all seem to me to have a totally different object than to qualify section 1. Sections 10 and 21 have also been referred to, but I do not think they affect the construction of section 1. Section 30 (2) shows that the whole of the constable's service under the previous Acts must be looked at, and the service need not be continuous. In my opinion, therefore, the appeal should be allowed. If the view of the construction of section 1 which my brothers feel themselves constrained to come to stands, then in my opinion legislation is necessary for the better protection of the men in the force. I would point out, again, that the object of the Act of 1890 was to secure pensions being granted after the prescribed term of approved service had been completed, and I cannot imagine a more serious blunder in view of the object of the Act than has here been made by the Legislature if the opinion expressed on the substantive enactment in section 1 is correct. In any fresh legislation I would point out the importance of protecting a constable who applies for a pension from being called upon, after a certificate of approved service has been granted, to explain his whole career, it might be, for 20 years. It is obvious from what I have said that the matter ought to go farther.

On the other question I express no opinion.

Solicitors for the appellant—Bell, Brodrick, and Gray, for A. Geipel, West Hartlepool.

Solicitors for the respondents—Maude and Tunnicliffe, for L. S. Iliffe, Sunderland.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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July 12, 13.

Landlord and tenant—Tenant's covenant to pay rates, &c.—Underground bakehouse—Structural alterations—Certificate of suitability—Expenses—Place "let as a bakehouse"—Jurisdiction of court of summary jurisdiction to order contribution by owner—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 101 (1), (2), (8).

A covenant by the lessee of an underground bakehouse to pay "outgoings" covers the expenses of structural alterations necessary before the certificate required by section 101 of the Factory and Workshop Act, 1901, can be obtained; and where an underground bakehouse has been let as a bakehouse by a lease containing such a covenant a court of summary jurisdiction has no power under subsection (3) of the section to order the owner to contribute to the expenses of such alterations.

Goldstein v. Hollingsworth, 1904, 2 K. B. 578; 2 L. G. R. 879; 73 L. J. K. B. 826, followed.

Quære, as to the meaning of the expression in the section "let as a bakehouse."

CASE stated by a metropolitan police magistrate who had, upon an information preferred by the respondent Beal, under section 101 of the Factory and Workshop Act, 1901, against Francis Morris, the appellant, alleging that the appellant was the owner of the premises, No. 169, Cambridge Road, Kilburn, a place let as a bakehouse, and for which a certificate required by that section could not be obtained unless structural alterations were made, and that the whole expenses of the alteration ought to be borne by the appellant, made an order that the appellant should pay to the respondent £70 in respect of the said expenses and 20 guineas for costs.

The facts, &c., were stated in paragraphs 5 *et seq.* of the case as follows:—

5. (a) That the premises, No. 169, Cambridge Road, Kilburn, were demised by one G. H. Morris to one G. Ashby by an indenture dated April 17, 1886, for a term of 21 years from December 25, 1885, upon the terms in the said indenture contained.

(b) That the premises were by an indenture dated March 24, 1899, assigned by the said G. Ashby to the respondent for the then unexpired residue of the said term.

(c) That the premises were demised by the said G. H. Morris to the respondent by an indenture dated July 25, 1899, for a term of 21 years from June 24, 1899, upon the terms in such indenture contained.

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[By this indenture the lessee covenanted that he would during the term pay "all existing and future taxes, rates, assessments, and outgoings, whether Parliamentary, parochial or otherwise, for the time being payable either by the landlord or tenant in respect of the said premises except landlord's property tax," and that he would not without the written consent of the lessee carry on or permit to be carried on upon the premises any trade or business other than that of a bread and biscuit baker and confectioner.]

(d) That for upwards of 16 years before the date of the information an underground bakehouse existed and was used upon the premises.

(e) That the certificate required by section 101 of the Factory and Workshop Act, 1901, could not be obtained in respect of the bakehouse unless the work included in the under-mentioned builder's certificate was carried out on the premises. The account was an account of one C. Simmons against the respondent, dated January 1, 1904, for the sum of £133 17s. 6d.

(f) That the work included in the account was carried out upon the premises, and the amount of the account was paid by the respondent.

(g) On the part of the appellant it was contended that it must be found that the premises were let as a bakehouse, and that, for the purposes of ascertaining whether the premises were so let, I ought only to have regard to the terms of the current lease thereof being the indenture dated July 25, 1899; and it was objected on the appellant's behalf that the indentures dated respectively April 17, 1886, and March 24, 1899, and the parole testimony of the respondent, that for a period of 16 years next before the date of the information an underground bakehouse existed and was used upon the premises, were not admissible in evidence. I overruled the objection, and received in evidence the said two last-mentioned documents and the said parole testimony, and found as a fact that the premises were during the whole of the said period and still were used as a bakehouse.

6. On the part of the appellant it was contended that on the true construction of the indenture dated July 25, 1899, the premises had not been let as a bakehouse, and that unless so let I had no jurisdiction to make any order under section 101 (8) of the Act.

7. On the part of the appellant it was further contended that by the covenants on the respondent's part contained in the indenture of July 25, 1899, he became and was liable to pay and bear all such expenses as were in the information referred to, and that regard being had to the terms of the covenants it was not just and equitable under the circumstances of the case that an order should be made for payment of any part of such expenses by the appellant, on whose behalf my attention was called to the under-mentioned reported

cases: *Thompson v. Lapworth* (1868) L. R. 3 C. P. 149; 37 L. J. C. P. 74; *Aldridge v. Ferne* (1886) 17 Q. B. D. 212; 55 L. J. Q. B. 587; and *Crosse v. Raw* (1874) L. R. 9 Ex. 209; 43 L. J. Ex. 144. 1804.
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On the part of the respondent it was contended, and I was of opinion that the covenants did not impose on the respondent the obligation to pay the said expenses, and that it was just and equitable to make the order.

The question for the opinion of the Court was whether the magistrate, upon the above statement of facts, had come to a correct determination and decision in point of law.

Section 101 of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), provides as follows:—

(1) An underground bakehouse shall not be used as a bakehouse unless it was so used at the passing of this Act.

(2) Subject to the foregoing provision, after the first day of January one thousand nine hundred and four an underground bakehouse shall not be used unless certified by the district council to be suitable for that purpose.

* * * * *

(8) Where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a court of summary jurisdiction, and that court may make such order concerning the expenses or their apportionment as appears to the court to be just and equitable, under the circumstances of the case, regard being had to the terms of any contract between the parties, or in the alternative the court may, at the request of the occupier, determine the lease.

Lailey for the appellant. The first question is the same as in *Goldstein v. Hollingsworth*, 1894, 2 K. B. 578; 2 L. G. R. 879; 73 L. J. K. B. 826, namely, whether the respondent's covenant to pay outgoings covers the expenditure in question. In that case it was held that expenses of structural alterations in an underground bakehouse necessary before the certificate of the suitability of the premises for use as a bakehouse required by section 101 can be obtained come within a tenant's covenant to pay impositions and outgoings in respect of the premises, and that it is not just and equitable for a magistrate to order the lessor of premises to pay expenses of structural alterations when he can at once call upon his lessee to repay them under such a covenant. On this point it is submitted that *Goldstein v. Hollingsworth* covers the present case, and that the respondent is liable for these expenses under his covenant to pay outgoings, so that it is not just and equitable for the magistrate to order the appellant to pay a proportion.

Secondly, it is submitted that the premises were not within the

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meaning of the section "let as a bakehouse"; they were not let as such *eo nomine*, although the respondent is described as a baker, and Farwell J. held in the course of proceedings in Chancery between the parties relative to these premises that they had not been let as a bakehouse.

Danckwerts, K.C., and *Arthur Hutton* for the respondent. The premises were let as a bakehouse. The respondent is described as a baker, and there is a covenant on his part not to carry on any other trade than that of a baker. The expression "let as a bakehouse" means nothing more than that it should have been in the contemplation of the lessor that the premises would be used by the tenant as a bakehouse.

If the premises were let as a bakehouse, the magistrate had jurisdiction to make the order that he did. In the first place, the expenses of the alterations do not come within the covenant on the tenant's part to pay outgoings. Such a covenant, as it was laid down by *Collins M.R.* in *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, covers only matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of the contract. In the present case the lease was granted before the Act of 1901, which for the first time made a certificate of suitability requisite in the case of an underground bakehouse, and it cannot have been in the contemplation of the parties that such an Act would be passed. The case in this respect resembles *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305, where Farwell J. held that an agreement by a yearly tenant of a cottage to pay outgoings did not include expenses of structural alterations which the parties could not have contemplated as being to be paid by the tenant. *Goldstein v. Hollingsworth* is not against this contention, for there the lease was subsequent to the Act of 1901 and to the decision in *Foulger v. Arding*, circumstances relied on by Lord Alverstone C.J. in his judgment. Secondly, even assuming that the expenses come within the covenant, the effect of section 101 (8) of the Act of 1901 is to give the magistrate jurisdiction to override the covenant. True he is to "have regard to the terms of any contract between the parties"; but that merely means that he is to treat the contract as one of the matters by which his discretion is to be guided, not that he is to be bound by the contract. In *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441, it was held that the jurisdiction given to a county court judge by section 7 of the Factory and Workshop Act, 1891, now replaced by section 14 of the Act of 1901, to entertain an application by the landlord of a factory who has been called upon to provide means of escape from fire for an order on his tenant to contribute to the expense, and to "make such order as

appears to the court just and equitable under all the circumstances of the case," enables the county court judge to override the terms of the contract between the parties. The legislation in section 101 (8) of the Act of 1901 is of similar character, and should be similarly construed. *Goldstein v. Hollingsworth* does not bind the Court on this point. The only question there was whether the expense came within the covenant. The magistrate had determined that if the expense did come within the covenant, he would not in his discretion make any order on the owner, so that the question whether he had jurisdiction so to do was not before the Court.

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LORD ALVERSTONE C.J. The real point in this case stripped of all surplusage is whether we can distinguish it from *Goldstein v. Hollingsworth*, 1904, 2 K. B. 578; 2 L. G. R. 879; 73 L. J. K. B. 826. All we have to consider is whether there is any substantial distinction between that case and the one before us, which, as it may go further, must receive our careful attention. With regard to *Goldstein v. Hollingsworth*, I desire to say this in correction or explanation of my judgment in that case. It is quite true that I did point out there that the lease was granted after the passing of the Factory and Workshop Act, 1901, and also after the decision of the Court of Appeal in *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, but I did not intend to say, nor was the language I used intended to bear the construction that that was the ground upon which I construed the covenants in that case as I did. My ground for construing the covenant as I did in *Goldstein's* case was the construction that had been put by the Court of Appeal upon a similar covenant in *Foulger v. Arding*. I agree with the contention made on behalf of the respondent that these premises were let to him as a bakehouse. I do not think that Farwell J.'s decision gave effect to anything that could support the appellant's contention, because the learned judge was dealing with a state of things very different from those which were brought before the magistrate in the present case. This, therefore, brings us back to the single point, namely, whether there is sufficient ground to distinguish the case before us from *Goldstein v. Hollingsworth*. In that case the magistrate had held that if the covenant did apply to the outgoings in question, he should decline to apportion the expenses; and we, sitting in the Divisional Court, considered that the covenant did apply, and affirmed the decision of the magistrate. In the present case the magistrate was of opinion and held that the covenants did not impose on the respondent the obligation to pay the expenses, and that therefore it was just and equitable that the order should be made.

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Mr. Danckwerts has pressed us to say that what the magistrate intended to hold was that it was unjust and inequitable that the expenses should be paid by the respondent, the lessee. I am, however, of opinion that the principle laid down in *Goldstein v. Hollingsworth* is applicable to the present case, and is binding upon us in deciding it. I should like to point out that in that case both my brothers Wills and Kennedy held that where there was a covenant to pay outgoings, which would cover these expenses, the question whether it were just and equitable for the magistrate to apportion them did not arise, because the only point for his consideration was whether the expenses fell within the covenant to pay outgoings, and when he found that they did, any question as to their apportionment dropped.

Speaking for myself, I am of opinion that a strong argument in support of that view is to be gathered from the circumstance that the Factory and Workshop Act, 1901, has empowered the magistrate to put an end to the lease if the lessee can prove that the burden imposed upon him by the covenant is too great. Therefore, I am of opinion that the argument on the part of the appellant addressed to us in view of distinguishing *Goldstein v. Hollingsworth* fails, whatever may happen in the Court of Appeal, and that there is no real distinction between that case and the present. It seems to me, therefore, that we are bound to hold that the magistrate was wrong in deciding that the lessor, the appellant, should bear an apportioned part of these expenses. The appeal will accordingly be allowed.

KENNEDY J. I am of the same opinion. Upon the point as to whether these premises were or were not let as a bakehouse I desire, however, to express no settled opinion. Speaking for myself, I think it would not be an unfair construction to put upon section 101 (8) that the premises must be let as a bakehouse in such a way as to prevent the lessee using them for any other purpose. Upon the other point in the case, I am clearly of opinion that we are bound by *Goldstein v. Hollingsworth*, and I am not the less satisfied with the correctness of our decision in that case after having heard the arguments which have been addressed to us in the present case. That decision is certainly an authority for our present decision. In the case before us the magistrate has found in terms, which I can only read in one way, that the covenants did not impose on the respondent the obligation to pay the expenses, and that it was just and equitable to make the order he did in apportioning them. For the reasons I have given I am of opinion that this decision was wrong, because the covenant did, in fact, cover the expenses, and that the appeal must be allowed.

PHILLIMORE J. I am entirely of the same opinion. I entertain no

doubt as to the correctness of the decision in *Goldstein v. Hollingsworth*, and it is clearly a binding authority on the case before us. I quite agree with what has fallen from my brother Kennedy as to expressing no decided opinion upon the point whether or not these premises can properly be found to have been let as a bakehouse. It seems to me, however, that where a magistrate is called upon to adjudicate under subsection (8) of section 101, he ought to ascertain definitely not only that the premises had been used as a bakehouse, but that they had been let as a bakehouse. The case before us contains no statement that the premises were let as a bakehouse.

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Appeal allowed. Order rescinded.

Solicitor for the appellant—G. B. Crook.

Solicitors for the respondent—Young and Sons.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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High Court of Justice.

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KING'S BENCH DIVISION.

July 13.

BERTIE v. WALTHAMSTOW OVERSEERS.

Poor-rate—Occupation—House to let—Caretaker—House inhabited by servant of owner as caretaker and for the purpose of service—Master's occupation by servant.

Although, semble, the circumstance that the owner of a house which is otherwise empty puts a caretaker to live in it for the mere purpose of guarding it from depredation, does not render the owner rateable as being in rateable occupation of the house by his servant, the owner of a house otherwise empty is rateable in respect of it, as being in occupation by his servant, if he causes his servant to live in the house not only for the purpose of guarding the house but also for the purpose of discharging other duties devolving upon him as such servant.

CASE stated by three of His Majesty's justices of the peace for the county of Essex. The facts, &c., were stated in paragraphs 3 *et seq.*, as follows :—

3. A rate for the relief of the poor of the parish of Walthamstow was duly made and allowed on October 24, 1903, and a general district rate for the urban district of Walthamstow was duly made and allowed on October 28, 1903. Both the said rates were duly published and payment duly demanded, and all requirements necessary to the validity of the rates were duly observed.

4. In the said rates the appellant was rated as the occupier of a house and garden, known as No. 45, Rectory Road, in the said parish and urban district, at a rateable value of £30 10s., amounting to £4 5s. 5d. and £2 8s. 3½d., respectively.

5. The said premises, No. 45, Rectory Road, comprised a seven-roomed dwelling-house and a small garden or yard in the rear thereof.

6. The said house was erected by the appellant, who is the owner thereof, and of other houses erected by him in the said road and the road adjoining at the back thereof. He has built, or is building, between fifty and sixty houses there. A clerk in his employ is constantly about his premises with the view of disposing of his property.

7. Harry Lee, a carpenter by trade, was in the service of the appellant as his building foreman, at a salary of £2 15s. per week, and had been so employed for about the last five years. Evidence was

adduced before us, and we were satisfied that this was the full wage of a foreman. 1904.

8. Harry Lee resided at 45, Rectory Road, with his wife and family of eight children, and had so lived there for about three years last past. The said Harry Lee and his family occupied the whole of the premises, with the exception of one bedroom which, however, he was at liberty to use if he had wished to do so. He did not pay and never had paid rent to the appellant in respect of the occupation of the premises and he remained there subject to removal by the appellant to any of the other houses as they became built and finished, on twenty-four hours' notice. Prior to this period Harry Lee resided and lived rent free at 9, Rectory Road, a dwelling-house then belonging to the appellant, for about twelve months when a tenant having been found he left at about a week's notice, and afterwards lived at No. 16, Howard Road, a dwelling-house in a road next to Rectory Road, belonging to another owner, for about nine months, but in pursuance of an arrangement made between the appellant and the said other owner that Harry Lee should take care of No. 16, Howard Road, until such time as a tenant or purchaser was found. All the furniture on the said premises belongs to Lee. Nothing therein of any kind belongs to the appellant.

9. The object of the arrangement between the appellant and Harry Lee, by which the latter resided with his family at 45, Rectory Road, was that Harry Lee might look after the appellant's property—this and other new buildings (dwelling-houses) in Rectory Road. The appellant had a number of houses for sale, and it was the duty of Harry Lee to answer at any time enquiries made by persons respecting them, with a view to the sale of the said houses for the appellant, and, when necessary or expedient, to refer such persons to the appellant at his private address. Harry Lee also supervised the workmen engaged in erecting houses aforesaid by the appellant, and generally looked after the said property.

10. During the time Harry Lee occupied No. 45, Rectory Road, notices were placed on the said premises announcing, "This house to be sold on very easy terms if desired. For particulars apply within," and Harry Lee was liable to receive from the appellant at any time notice to quit the premises. Efforts were made to sell or let the premises without avail.

11. The said premises were occupied as above mentioned at the time of making and during the currency of the said rates. The rates were duly demanded on or about November 24, 1903, but the appellant refused to pay the same.

12. The appellant contended that there was no occupation on his part, and that he was not liable to be and ought not to have been rated.

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13. The respondents contended that the appellant was the occupier of the premises through his servant, Harry Lee, that he had been properly rated as above mentioned, and that they were entitled to enforce payment of the rates and to have a distress warrant for the poor rate and an order for payment of the general district rate issued for the purpose.

14. The following cases were referred to (*inter alia*), viz., *Yates v. Chorlton-on-Medlock Union* (1883) 47 J. P. 630; *Hicks v. Dunstable Overseers* (1883) 48 J. P. 326; *North Dublin Union v. Scott* (1850) 1 Ir. C. L. R. 76, and *Limerick Guardians v. White* (1852) 2 Ir. C. L. R. 630.

15. We were of opinion and, so far as we were able to do so, found as a fact—

(a) That there was an actual occupation of 45, Rectory Road.

(b) That Harry Lee was in occupation of 45, Rectory Road, for the purpose of carrying out his duties as servant of the appellant, and that such occupation was not part of his remuneration.

(c) That such occupation was that of the appellant through his servant, the said Harry Lee.

The magistrates therefore issued a warrant of distress to enforce payment of the poor rate by the appellant, and an order for the payment and in default of payment a distress warrant, to enforce payment of the general district rate by the appellant.

The question for the opinion of the Court was whether their said determination was right in point of law.

H. Cohen for the appellant. That this caretaker was doing no more than to take care of the premises is conclusively proved by paragraph 9 of the case, which shows that he was simply passed on from house to house as they were finished and required the protection of someone's presence, and as soon as the particular house he might be taking care of was let to a tenant. Premises held by the owner for the purpose of letting to a tenant are not rateable: *North Dublin Union v. Scott* (1850) 1 Ir. C. L. R. 76; *Limerick Union v. White* (1852) 2 Ir. C. L. R. 630. [LORD ALVERSTONE C.J. It appears that in reality the respondent kept an office there, and that Lee was his agent to show people over houses. This object of the employment of a caretaker is to prevent depredation. This man seems to have been more than a mere caretaker.] This case is to be distinguished from *Marquis de Santurce v. St. George's Union* (1890) Ryde's Rating Appeals, 1886-90, 207, for there pictures and furniture were left. Here, all the caretaker does is to refer possible tenants to the appellant. *Bootle Overseers v. Liverpool Warehousing Co.* (1901) 65 J. P. 740, is in point, and *Hicks v. Dunstable Overseers*

(1883) 48 J. P. 326, distinguishable, for the evidence shows here that this man Lee had done nothing more than merely take care of the premises in the way he had formerly taken care of numbers of other houses belonging to the appellant.

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Naldrett, for the respondents, was not called upon to argue.

LORD ALVERSTONE C.J. Mr. Cohen has attempted to show that this man, Harry Lee, was nothing more than a caretaker in the appellant's employ. If he be a mere caretaker, put in simply for the purpose of guarding the premises and securing them from depredation, he is not to be rated and his master is not rateable because he has no occupation. In such a case there is no beneficial occupation by the master. But here the justices have found the three following facts upon the evidence set out in this case, namely, that there was an actual occupation of 45, Rectory Road; that Harry Lee was in occupation of 45, Rectory Road, for the purpose of carrying out his duties as servant of the appellant, and that such occupation was not part of his remuneration; also, that such occupation was that of the appellant through his servant, the said Harry Lee. I think in effect the justices have stated the appellant out of court; Mr. Cohen has said all that can possibly be put forward on his behalf, but in the face of the statements in the case and of the justices' findings upon them it is impossible for us to disturb their decision. In my opinion they were quite right and could have come to no other conclusion upon the evidence as presented to them, and quite properly issued their distress warrant. The appeal therefore fails.

KENNEDY J. I am of the same opinion.

PHILLIMORE J. I entirely agree.

Appeal dismissed.

Solicitor for the appellant—Bertie.

Solicitor for the respondents—Rudd.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

Though in Ireland it appears to be definitely settled that the owner of a house otherwise unoccupied and unused is not rateable in respect thereof merely because a caretaker resides there (see in addition to the cases cited in the argument in the above case, *Middleton Union v. M'Donnell*, 1896, 2 Ir. R. 228), the question whether the owner is rateable in such a case has never yet been definitely decided in any reported English case; and in *Hicks v. Dunstable Overseers* (1883) 48 J. P. 326, and *Bursledon Overseers v. Clarke* (1897) 61 J. P. 261 where that case was followed, the Court studiously avoided any expression of opinion on the point. The above case is therefore of very considerable importance on account, not so much of the actual decision, as of the dictum of Lord Alverstone C.J. that the owner is not rateable for a house otherwise unoccupied merely because he puts a caretaker in the strict sense to live in the house.

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KING'S BENCH DIVISION.

July 13.

BELLAMY v. LIVERPOOL UNITED GAS LIGHT COMPANY.

Streets—Lighting—Lamp fixed by local authority in private passage—Objection by owner of passage to the laying of gas pipe—Proceedings by local authority against gas company—Gasworks Clauses Act, 1847 (10 Vict. c. 15), ss. 6, 7—Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), ss. 24, 27, 36—Liverpool Improvement Act, 1842 (5 & 6 Vict. c. cvi.), ss. 152, 156—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

Where an urban authority take proceedings for penalties against a gas company, with whose Acts the Gasworks Clauses Acts are incorporated, under section 36 of the Gasworks Clauses Act, 1871, in respect of the failure of the company to supply gas to a public lamp which the urban authority have erected within fifty yards of one of the company's mains, it is a good defence, having regard to section 7 of the Gasworks Clauses Act, 1847, for the company to show that the lamp is in a passage not dedicated to the public use, and that the owners of the passage object to the laying of a pipe in the passage to connect the lamp with the main, notwithstanding that the passage may be a "street" within the Public Health Act, 1875, in which the urban authority could cause means of lighting to be provided under section 150 of that Act.

Quære, whether proceedings under section 36 of the Act of 1871 for refusal to supply gas to a public lamp are available in any case until the lamp has actually been connected with the main.

CASE stated by a stipendiary magistrate for the city of Liverpool.

1. The Liverpool United Gas Light Company (hereinafter called the respondents) were, at a petty sessions of the peace held on March 11, 1904, charged by Charles Revill Bellamy (hereinafter called the appellant) in and by a certain information laid under the 36th section of the Gasworks Clauses Act, 1871, for that they, the respondents, being the undertakers within the meaning of the Act mentioned, on February 9, 1904, did neglect to supply gas as by that Act required to a certain passage off Livingstone Avenue, in the said city, in accordance with the provisions of the said Act, contrary to the statute in such case made and provided, the said parties being then present, and the evidence, both in support of and against the same, was duly heard by me.

2. The following facts were at the said hearing proved or admitted before me:—

(a) The respondents are the undertakers within the meaning of the Gasworks Clauses Act, 1871.

(b) On March 23, 1903, the appellant, who is the city lighting engineer (acting on the instructions of the lighting committee of the Corporation of Liverpool), served a notice upon the respondents requiring them under the provisions of section 24 of the same Act to supply gas to twenty-seven lamps, including one which had been fitted by the Corporation upon a blank wall adjoining a narrow passage off a private unadopted street or roadway not dedicated to the public use, called "Livingstone Avenue," in the said city, which lamp the appellant alleged was a public lamp.

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(c) The passage in question is bounded on the one side by the blank wall referred to, through which there is no door or right of access to the passage, and on the other by the boundary and yard wall of a house, No. 11, Livingstone Avenue, and the passage affords access only to the back doors of that house and of Nos. 12, 13, and 14, ending at the back door of No. 14.

(d) The appellant placed the lamp on the top of the said blank wall, within fifty yards of the respondents' mains.

(e) On November 30, 1903, the respondents' workmen attended to lay the necessary pipes from the respondents' nearest main (which is in Livingstone Avenue) along the said passage, which afforded the only means available to the respondents, in order to supply gas to the lamp, but were stopped by persons representing themselves to be the owners of the passage, who objected to the work being done; the workmen accordingly desisted from proceeding with it, and information of the cause of non-compliance with the lighting committee's request as to this lamp (the remaining twenty-six included in the same notice having been supplied with gas as requested) was communicated to the town clerk, to whom one of the owners had previously written intimating his objection.

(f) The passage in question belongs to two owners of the four houses above mentioned, and was formed on land belonging to themselves, and has been ever since maintained and repaired at their own expense as a private passage, and has never been dedicated to the public use. One of these owners attended as a witness on the hearing of the information, and stated that he and his co-owner still strongly objected to the proposed laying down of pipes in the passage.

3. The following Acts of Parliament were mentioned or referred to, viz. :—

(a) Sections 6 and 7 of the Gasworks Clauses Act, 1847 (10 Vict. c. 15), which provide as follows :—

Section 6. The undertakers, under such superintendence as is herein after specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and

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may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps, and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.

Section 7. Provided always, that nothing herein shall authorise or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof; except that the undertakers may at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down.

(b) Sections 24, 27, and 36 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), which provide as follows:—

Section 24. The undertakers shall supply gas to any public lamps within the distance of fifty yards from any of the mains of the undertakers in such quantities as the local authority of each district or the trustees of any turnpike road or any highway board within the limits of the special Act may from time to time require to be supplied, and the price to be charged by the undertakers and to be paid to them for all gas so supplied shall be settled by agreement between the local authorities and the undertakers, and in case of difference by arbitration, regard being had to the circumstances of the case and the prices charged to private consumers in the district.

Section 27. Any difference which may arise between the undertakers and any local authority in relation to the supply or consumption of gas to or by such local authority shall be from time to time settled by arbitration in manner provided by the Companies Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration.

Section 36. . . . Whenever the undertakers neglect or refuse to supply gas as by this Act required to all or any of the public lamps in

accordance with the provisions of this Act, they shall be liable to a penalty not exceeding forty shillings for each default. . . .

(c) Sections 152 and 156 of the Liverpool Improvement Act, 1842 (5 & 6 Vict. c. cvi.), which provide as follows:—

Section 152. That it shall be lawful for the Council from time to time to procure the several streets within the borough or such of them as they shall think proper, to be lighted by one or both of the present public gas companies in the said borough or by any other public gas company to be hereafter empowered and regulated by Act of Parliament with gas, oil or otherwise at such times as the Council shall think fit and by themselves or their contractors to provide such lamps, posts, lamp-irons, pipes and other works as may be necessary for that purpose.

Section 156. That for the purpose of lighting the borough or any part or parts thereof it shall be lawful for the Council from time to time to contract with any such company or companies as aforesaid for lighting the same streets or any of them or any part thereof either with oil or with gas or with any other material, or in any other manner whatsoever or for furnishing lamps, lamp-irons, lamp posts and other things necessary for the purposes aforesaid or any materials for the same.

(d) Section 161 of the Public Health Act, 1875, which gives similar powers.

(e) Section 150 of the Public Health Act, 1875, which provides as follows:—

Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require . . . to be lighted, require them to . . . provide proper means for lighting the same. . . .

(f) By the interpretation clause in the Gasworks Clauses Act, 1847, the word "street" includes any square, court or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act.

The interpretation clauses in the Liverpool Improvement Act, 1842, and the Public Health Act, 1875, as to the meaning of the word "street" are very similar.

Upon the facts it was contended for the appellant and denied for the respondent company—

That the lamp was a public lamp.

That the said passage was a "street" within the meaning of the Gasworks Clauses Act, 1847.

That by the above-mentioned provisions of the Liverpool Improve-

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ment Act, 1842, and the Public Health Act, 1875, the Corporation were empowered to light streets and to provide such lamps, pipes and other works as might be necessary for the purpose, or to contract with the respondents to do the work, and that therefore the Corporation had power to authorise the respondents to lay pipes along the said passage, whether the same was adopted or unadopted.

That clause 6 of the Gasworks Clauses Act, 1847, authorised the respondents to lay the pipes along the said passage.

That the passage was not "land not dedicated to the public use" within the meaning of section 7 of the same Act.

That section 27 (arbitration clause) of the Gasworks Clauses Act, 1871, did not apply to the facts hereinbefore set out.

The respondents also contended—

That if on the facts stated the local authority had any ground of complaint against the respondent gas company, the matter in dispute should be settled by arbitration under section 27 of the Gasworks Clauses Act, 1871, and could not be dealt with under section 36.

That as the passage in which the pipes necessary for supplying gas to the lamp in question were required to be laid was land not dedicated to the public use, and the owners and occupiers thereof refused consent, and objected to the pipes being laid therein, the respondents were not authorised or empowered to lay the same, and if they had proceeded to do so they would have been committing a trespass, which the Corporation could not authorise them to do.

That a question of title was involved, and therefore the jurisdiction of the court was ousted.

I was of opinion, on the facts above stated and proved or admitted, that the respondents were not guilty of neglect or refusal (within the meaning of section 36 of the Gasworks Clauses Act, 1871), to supply gas to the lamp. I was of opinion that the arbitration clause did not apply. I dismissed the summons, being of opinion that the respondents had a fair and reasonable belief, which they were in law justified in entertaining, that they would be committing a trespass if they laid the pipe, and that a question of title being involved, the jurisdiction of the court was ousted.

The question for the opinion of the Court was whether the decision by the magistrate was a right one. If so, the dismissal of the information was to stand. If not, the case was to be remitted to him with the opinion of the Court thereon.

Asquith, K.C., and *F. E. Smith* for the appellant. The question is whether the Corporation of Liverpool can compel the gas company to supply gas to lamps which they call public lamps in certain passages.

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There are a good many thousands of these lamps in Liverpool and other places, and the matter is one of considerable importance. The respondents were summoned under section 36 of the Gasworks Clauses Act, 1871, for a penalty for not supplying gas. Section 24 of the same Act casts the obligation upon the undertakers, the respondents, to supply gas, at the requirement of the appellants, to any lamp that satisfies the description of a "public lamp" within the distance of 50 yards from any of their mains. Whether the provisions of the Liverpool Improvement Act, 1842, or those of the Public Health Act, 1875, are regarded, the same point arises, namely, that it is in the power of the appellants as local authority in a case where any street within their city is not lighted to their satisfaction, to require the frontagers to provide means of lighting it. Since the appellants have that power, the objection of the owners of the passage to permit means of lighting to be provided is, as against the appellants, an unavailing objection. [PHILLIMORE J. Apparently we are asked to determine a point adversely to the owners without hearing them.] If the appellants had required the owners of these four houses, the back doors of which abut on this passage, who are owners also of the soil of the passage, to provide means of lighting the passage under section 150 of the Public Health Act, 1875, they would have had no answer, and would have been compelled to provide means of lighting it or let the appellants do so for them. No doubt section 7 of the Gasworks Clauses Act, 1847, says that the owners may object, but the Public Health Act, 1875, says that the objection of the owners is unavailing. In other words, it gives the local authority power to override section 7 of the Act of 1847. Under the Gasworks Clauses Act, 1871, an independent gas company supplying a town with gas are brought for this purpose under the jurisdiction of the local authority, who may require the work to be done. The question is, are the respondents entitled to refuse? They have received an order *primâ facie* lawful under section 24 to supply gas to a lamp within 50 yards of their main. They cannot do this without putting down a pipe, for which perhaps the appellants may have to pay, but that is another matter. The obligation to supply gas to a lamp 50 yards away from their main imposed by this section must *primâ facie* impose an obligation to convey it by the ordinary and necessary means, namely, through a pipe. [PHILLIMORE J. But it does not apply to a private owner.] Inasmuch as the local authority have an express statutory power which gets rid of what under the Gasworks Clauses Act, 1847, undoubtedly would be an insuperable obstacle to the carrying out of this operation, and they have also power under section 24 of the Gasworks Clauses Act, 1871, whenever they themselves can exercise that right, to require the undertakers to exer-

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cise it, the combined effect of the two sets of enactments gets rid of any question of trespass to private property, and makes it an immaterial consideration. Upon that ground the magistrate came to a wrong conclusion. On the question of whether his jurisdiction was ousted, it is submitted that the present case does not fall within the class of cases in which such a point can be supported. Had there been a question as to whose was the property in the land constituting this passage, some question of title might have arisen; but this is not a question of title. The question is simply what is the interpretation of the statutory obligation, and whether or not it applies to the respondent gas company.

Macmorran, K.C., and *A. H. Maxwell*, for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. I wish to say nothing that would in any way limit the rights or powers and duties of the Liverpool Corporation to get this place lighted. As to that I say nothing, but I am clearly of opinion that they have mistaken their remedy. In the present case they have thought fit to summon the gas company under section 36 of the Gasworks Clauses Act, 1871, because the company did not supply gas to a public lamp. I wish to leave open entirely for future consideration the point as to which I think there may be a good deal to say, namely, as to whether there could be neglect to supply gas until the proper steps had been taken to get a communication pipe put down from the main to the lamp. I assume all that in favour of the appellants; but the point that arises is this: the owners of the property undoubtedly possess certain rights, and they objected, under section 7 of the Gasworks Clauses Act, 1847, to the gas company's officials breaking up their private property. They undoubtedly had a right to raise that objection, and probably could prevent the work being carried out. Mr. Asquith contends that that is got rid of by the statutory duty and power of the Corporation to light the public lamp, and to light the public lamp in this place, assuming, also in his favour, that it is a place they can light compulsorily. All I say is that if so the Corporation have not pursued their right remedy. Whether they can go under section 150 of the Public Health Act, 1875, and having gone under that section they would be able to lay a pipe, or whether the owners may have power to demand any terms as to that, I express no opinion. When the appellants here have done nothing more than to call upon the respondent gas company to lay a pipe from their mains on to private property, and the only statutory power enabling them is by proceedings under section 150 of the Public Health Act, 1875, it would be jumping over a great many stiles to contend that the appel-

lants could summon the respondent gas company for a penalty for not supplying gas when they have said they cannot supply gas at present because they have no right to lay down this pipe. I am clearly of opinion that the substantial point taken by the magistrate is right. I agree with Mr. Asquith that perhaps the mere form in which he has expressed it does not express it in the way I should have done, but I think the magistrate was perfectly right in holding that there was no offence of which he could convict the respondent gas company.

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KENNEDY J. I entirely agree.

PHILLIMORE J. I also agree.

Appeal dismissed.

Solicitors for the appellant—F. Venn & Co., for Pickmere, Town Clerk, Liverpool.

Solicitors for the respondents—Eyre, Dowling, & Co.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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Aug. 10.

KING'S BENCH DIVISION.

HORNER *v.* FRANKLIN.

Landlord and Tenant—Factory—Means of escape in case of fire—Expense of complying with requirements of local authority—Lessee's covenant to pay "outgoings"—Jurisdiction of county court—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 14.

The lessor of a factory, who has, in compliance with the requirements of the local authority, under section 7 of the Factory and Workshop Act, 1891 (now replaced by the provisions of section 14 of the Factory and Workshop Act, 1901), incurred expenses of structural alteration in providing means of escape in case of fire, is precluded from suing in the High Court to recover the amount so expended by him from his lessee under a covenant by the latter to pay "outgoings" by the provisions of section 7 (2) of the Act of 1891 (now section 14 (4) of the Act of 1901), providing that an owner put to expense under the section, may, if he alleges that the occupier ought to bear or contribute to such expense, apply to the county court, and that the county court may make such order as appears just and equitable under all the circumstances of the case.

Monk v. Arnold, 1902, 1 K. B. 761; 71 L. J. K. B. 441, followed.

Shepherd v. Barber (1902) 1 L. G. R. 157, not followed.

ACTION tried by Darling J. without a jury.

The action was brought by the plaintiff, the owner of premises constituting a factory within the meaning of the Factory and Workshop Acts, to recover from the defendants, his tenants, under the covenants in their lease from him, the sum of £185 12s. expended by him on the provision of means of escape from fire in the factory in compliance with a notice served upon him by the London County Council under section 7 of the Factory and Workshop Act, 1891.

The factory in question consisted of two warehouses or sheds at the rear of No. 27, Lamb Street, Spitalfields, which the plaintiff had demised to the defendants by a lease dated May 8, 1890, for the term of 21 years from March 25, 1890, at the annual rent of £60. By the terms of the lease the defendants covenanted, *inter alia*, that they would "during the said term pay all the existing and future taxes sewers rates and rates assessments and outgoings of every description for the time being payable by landlord or tenant in respect of the said demised premises (the landlord's property tax alone excepted);" and the plaintiff on his part covenanted, *inter alia*, that he would within

one month after the execution of the lease brick up in a proper and workmanlike manner the two doorways leading from the premises into 27, Lamb Street and into the stable yard respectively.

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The notice given by the London County Council was dated February 7, 1901, and specified various works to be carried out by the plaintiff for the purpose of providing means of escape from fire, including the erection of staircases, the provision of means of exit, and the unblocking of the doorways which the plaintiff had covenanted to block up and had in fact blocked up in pursuance of his covenant.

The plaintiff executed this work at the expense of £185 12s., which he now sought to recover from the defendants as "outgoings" within the meaning of their covenant.

By their defence the defendants denied that the said sum or any part thereof was due from them to the plaintiff under the covenant in the lease or at all. In the alternative, if the plaintiff did provide and carry out the works pursuant to the requirements of the London County Council, the council had not power under the Factory and Workshop Acts, 1878 to 1895, to give the plaintiff notice to carry out such works. As a further alternative the defendants pleaded that under section 7 (2) of the Factory and Workshop Act, 1891, it was a condition precedent to recovery by the plaintiff from the defendants of costs and expenses required by the London County Council that the plaintiff should have applied to the county court having jurisdiction where the premises were situate for an order determining what amount of expense was payable by the defendants. The plaintiff had carried out the works in compliance with notice under section 7, and had not applied to the county court, and no order had been made by that court with respect to the expenses the plaintiff alleged the defendants ought to bear.

Section 7 of the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75, now repealed), provided as follows:—

(1) Every factory of which the construction is commenced after the first day of January one thousand eight hundred and ninety-two, and in which more than forty persons are employed, shall be furnished with a certificate from the sanitary authority . . . that the factory is provided on the storeys above the ground floor with such means of escape in case of fire for the persons employed therein as can reasonably be required under the circumstances of each case . . .

(2) With respect to all factories to which the foregoing provisions of this section do not apply, and in which more than forty persons are employed, it shall be the duty of the sanitary authority of every district . . . to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and, in the case of any factory which is not so provided, to serve on the person being within the meaning of the Public Health Act, 1875, the owner of the factory a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date . . . and unless such

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requirements are so complied with, such owner shall be liable to a fine not exceeding one pound for every day that such non-compliance continues . . . If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court . . . and thereupon the county court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case.

(4) In the application of this section to the administrative county of London the London County Council shall take the place of the sanitary authority . . .

The above provisions of the Act of 1891 are now replaced by provisions in sections 14 and 153 of the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), substantially identical with them except that they extend to workshops as well as to factories.

Poyser for the plaintiff. The plaintiff is entitled to recover. The case is on all fours with *Shephard v. Barber* (1902) 1 L. G. R. 157, where Lawrance J. held, first, on the authority of *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, that expenses incurred by the owner of a factory in providing means of escape from fire in pursuance of a notice from the local authority came within a tenant's covenant substantially to the same effect as the tenants' covenant in the present case; and, secondly, that the provisions in section 7 (2) of the Act of 1891, enabling the owner to apply to the county court, did not prevent his suing on the covenant in the High Court. The provisions in question are, as Lawrance J. thought, intended to meet a case where there is no contract between the parties as to which of them shall bear the burden of such expenses. *Stockdale v. Ascherberg*, 1904, 1 K. B. 447; 2 L. G. R. 529; 73 L. J. K. B. 206, supports the contention that expenses such as these come within the tenants' covenant.

The defendants will rely on *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441, where, no doubt, Channell J. suggested that the provisions of section 7 (2) of the Act of 1891 might prevent the owner from suing his tenant in the High Court on the tenant's covenant to pay outgoings. But, as was pointed out in *Shephard v. Barber*, his opinion did not form the basis of the decision.

The two recent cases of *Goldstein v. Hollingsworth*, 1904, 2 K. B. 578; 2 L. G. R. 879; 73 L. J. K. B. 826, and *Morris v. Beal*, 1904, 2 K. B. 585; 2 L. G. R. 1171; 73 L. J. K. B. 830, support the contention that the jurisdiction given to the county court by section 7 (2) of the Act of 1891 is not intended to enable the tenant to escape from the burden of a covenant to pay outgoings with reference to expenses incurred by the landlord under the section. These cases were decisions on section 101 (8) of the Factory and Workshop Act, 1901, which gives a court of summary jurisdiction powers for the apportionment of the expenses of structural alterations required pursuant to the Act to be

carried out in underground bakehouses between landlord and tenant very similar to the powers given to the county court by section 7 (2) of the Act of 1891, except that the position is reversed, the expenses primarily falling on the occupier, and the power in the court of summary jurisdiction being to call upon the owner to contribute. In both cases it was held that the court of summary jurisdiction could not override a covenant on the tenant's part to pay outgoings. The cases also support the plaintiff's contention that the expenses in question in the present case come within the tenants' covenant.

R. Cunningham Glen for the defendants. The expenses in question are not "outgoings in respect of the demised premises" within the tenants' covenant. They are not outgoings in respect of the premises as demised. They are expenses of making additions to the demised premises; and such expenses are totally different in character from the expenses of abating nuisances and other similar expenses which have come in question in such cases as *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499, and *Stockdale v. Ascherberg*, 1904, 1 K. B. 447; 2 L. G. R. 529; 73 L. J. K. B. 206. Further, a tenant's covenant to pay outgoings will only cover expenses such as may have been in the contemplation of the parties: *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305. In the present case the lease was granted before the Act of 1891, the legislation in which, as to escape from fire, was a new departure, and the expenses of providing such means of escape cannot, therefore, have been contemplated by the parties. Indeed, the unblocking of the doors was certainly contrary to their express agreement.

Secondly, *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441, establishes that application to the county court under section 7 (2) of the Act of 1891 is a condition precedent to any right on the owner's part to recover any part of expenses incurred by him under the section from the tenant; and that the county court has power, whatever the contract between the parties may be, to make such order as is just and equitable. The authority of that case is not shaken by the cases under section 101 of the Factory and Workshop Act, 1901. For those cases turned on provisions requiring the court of summary jurisdiction to have regard to any contract between the parties to which there are no corresponding provisions in section 7 (2) of the Act of 1891.

[He also cited *Arding v. Economic Printing Co.* (1898) 79 L. T. 622.]
Poyser in reply.

DARLING J. Whatever may be the proper decision in this case, it is perfectly plain that the question raised is one of difficulty and considerable complexity, and I shall feel some surprise if the party

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against whom I decide remains content with my decision. The matter arises in this way. In 1890 the defendants took a lease from the plaintiff of certain premises, and in consequence of something that was done to them they became a factory within the meaning of the Factory and Workshop Act, 1891. The lease, which was granted on May 8, 1890, for a term of 21 years from March 25, 1890, contained a covenant by the defendants, the lessees, that they would during the said term "pay all the existing and future taxes sewers rates and rates assessments and outgoings of every description for the time being payable by landlord or tenant in respect of the said demised premises (the landlord's property tax alone excepted)." It also contained a covenant on the part of the plaintiff, as follows:—"and the lessor hereby further covenants with the lessees that he will within one month after the execution of these presents brick up in a proper and workman-like manner the two doorways leading from the premises hereby demised into the premises 27, Lamb Street, and into the stable yard respectively." This the plaintiff did in pursuance of his covenant, and afterwards the London County Council, acting under the Factory and Workshop Act, 1891, s. 7 (2), called upon him as owner to make certain alterations so as to render the premises safe in case of fire, among which was a requisition that he should open the very doorways he had bricked up in accordance with his covenant. The plaintiff complied with this notice, made the necessary alterations, opened the doorways and expended £185 12s. in doing so. In order to recover that sum the plaintiff now brings this action against his tenants, the defendants. He claims to be entitled to recover it in this Court without having recourse to the county court. The contention on behalf of the plaintiff is that these expenses were incurred for outgoings, and are therefore recoverable under the terms of the covenant. Mr. Glen, on the other hand, contends for the defendants that these expenses are not or cannot be outgoings, because the outgoings to be paid under the covenant were outgoings in respect of "the said demised premises"; and that these were not the demised premises, because of the alteration in their character by the addition of staircases and the opening of the doorways which the plaintiff had closed in accordance with his covenant. But I do not think the word "premises" is to be read with such precision. In my opinion "premises" in the lease is a somewhat vague and loose term intended to embrace the thing demised, even if some alteration has been made to it under the provisions of the lease. Upon that point, therefore, Mr. Glen's argument fails, and I hold that the expenses were outgoings in respect of the demised premises.

But Mr. Glen's further contention is that the plaintiff cannot bring his action in the High Court, and ought to have gone to the county

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court. This argument is grounded upon the concluding words of subsection (2) of section 7 of the Factory and Workshop Act, 1891, which are as follows:—"If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case." It will be seen, therefore, that the words are "ought to bear," so that the Legislature has not said that "ought to bear if there be no contract between the parties." Moreover, it is provided that the owner "may apply" to the county court. If, therefore, the owner goes to the county court the judge of that court would be able to do what I sitting here could not possibly do in this action, because the jurisdiction given by the subsection applies to the county court alone. The plaintiff's contention here is that he is not bound to go to the county court, but has a right to come to the High Court and sue the defendants upon their covenant because these expenses are outgoings within the terms of the covenant, and that I am bound to give him judgment for £185 12s., although had he gone to the county court the judge there might have held that it was unjust and inequitable that the lessee of these premises should pay these expenses; or he might have apportioned them so that the present defendants need only pay such portion as the county court judge should consider just and equitable. This point, however, as to whether the plaintiff in cases of this kind is bound to go to the county court or not has never been definitely decided. It appears to me that it was purposely left open by Lord Alverstone C.J. in *Monk v. Arnold*, 1902, 1 K. B. 761; 71 L. J. K. B. 441, when at p. 765 of the Law Reports he said, "Mr. Russell contends that this interpretation of the section cannot be right, because the landlord may sue in the High Court on the covenant of the tenant to pay all outgoings, and as the jurisdiction given by this section can only be exercised in the county court, and can only be invoked by the owner, such a construction would work injustice to the tenant. That is no doubt a difficult point. It may be that it is a *casus omissus*; but I think it impossible not to give their natural meaning to the plain words of the section." I agree with the Lord Chief Justice that such a construction as that contended for might work injustice to the tenant. Manifestly it would do so, because the tenant might have a case in which the county court judge might think it just and equitable that the landlord should bear the expenses, or that the expenses should be divided between the landlord and the tenant in certain proportions, yet if I were to hold, and be supported in holding, that the landlord was not bound to go to the

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county court, but might come to the High Court if he pleased, it would be tantamount to holding this—that supposing the landlord were to consider that if he went to the county court the judge might say to him “you yourself must bear nine-tenths of those expenses,” he might stay away from the county court altogether and bring his action in the High Court for the very purpose of getting that which he knew the county court judge would say was unjust and inequitable. Therefore I am of opinion that the proper construction to put on the words in section 7 (2) “he may apply” is that he must go to the county court. The Legislature has appointed that court for the purpose because, according to the provisions of the Act it was the only court which could do full justice in these cases of claims for expenses. I am therefore of opinion that the plaintiff is not entitled to bring this action. I also think that if the plaintiff had gone to the county court under section 7 (2) the judge of that court might have taken into consideration the covenant in the lease.

I do not think that it is only in cases under section 101 (8) of the Factory and Workshop Act, 1901, that regard can be had to the terms of the contract. That is the section relating to underground bake-houses, and the words of the subsection are “regard being had to the terms of any contract between the parties”; but I think that the words of section 7 (2) of the Act of 1891 are sufficiently wide to confer upon the county court judge such an equitable jurisdiction that he may equally under that section regard the terms of the contract between the landlord and the tenant. Indeed, the judgments in *Monk v. Arnold* make it plain that he can do so. In that case, at p. 766 of the “Law Reports,” the judgment of Channell J. contains the following passage: “The Legislature, seeing that it would be difficult to say whether such an obligation as this ought to be imposed on the landlord or the tenant of the factory, and seeing that that question would commonly depend on the circumstances of each particular tenancy, deliberately refrained in this section from imposing the liability finally upon the landlord. They put the liability on the landlord, in the first instance, because it was easiest and best in the public interest to make him primarily responsible, but they gave the county court judge power to say how the liability should ultimately fall, and for that purpose they gave him, as I think, power over the contract which had been entered into between the landlord and the tenant.” Therefore, Channell J. says, and I quite agree with him, that jurisdiction was given to the county court judge, not only over the circumstances of the case, but over the contract between the parties—in effect that the county court judge could not only make an order, but such an order as would be just and equitable between the parties in reference to the contract

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between them. Channell J. then continues: "If the parties had by express terms provided for expenses under this section of the Factory Act, so that by that contract the liability for those expenses fell clearly on either the landlord or the tenant, then I do not think it would be just or equitable for the county court judge to make any other order." In the present case, I think, if it were clear from this lease that the defendants had covenanted that if at any time their landlord, the plaintiff, should be called upon by the London County Council to spend money in making alterations to the premises, in accordance with a notice, they would bear those expenses, then, although the county court judge might be of opinion that the expenses should fall on one party or the other, or be apportioned between them, yet he might hold upon the covenant that such expenses had been in the contemplation of the parties, and provided for by the covenant, and that he would not decide, as he otherwise might have done, that one or other of the parties should bear them. Here, however, the word in the covenant is "outgoings," a wide and vague term, which could not include these particular expenses, because the lease was executed in 1890, and the Factory and Workshop Act, which imposed them, was not passed till 1891. Therefore the outgoings contemplated, at the date of the contract, by the parties could have no reference to these expenses of alterations. Continuing his judgment at p. 767, Channell J. says: "But if that liability would only fall on either of them by reason of some general expression in the covenant, sufficient possibly to include such expenses as these if the statute had absolutely imposed them on the landlord, but not clearly showing that the parties had really contemplated the case, and intended that one or other should bear these expenses, whether incurred at the beginning or end of the term, then I think that would be precisely the case in which the county court judge ought to make such order as might seem to him just and equitable in all the circumstances of the case." All these considerations foreshadowed by Channell J. are entirely applicable to the present case, and are outside my purview sitting here, and required as I am to give judgment for the plaintiff. Had the plaintiff gone to the county court all these matters could have been taken into consideration; but in the High Court none of them can be taken into account by me. I am, therefore, of opinion that the plaintiff ought to go to the county court and obtain the decision of the judge there. It may be that the county court judge would consider him entitled, having regard to the contract in the lease, to the whole amount of his claim; on the other hand, the judge might hold that he was entitled to none, or only entitled to a proportionate part of his claim. I rely upon the words of the statute for holding as I do that the plaintiff must go the county court, and

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cannot at his option bring his action in the High Court. The statute casts the expenses of these alterations upon the owner, and if it gave him no remedy he could not sue his tenant at all. The only remedy the statute gives him is in the county court. It does not say he can go elsewhere, and unless it had said he could go to the county court he could not even have gone there.

I think the county court judge could take the whole of the lease into consideration and apply a meaning to the term "outgoings" upon the principles laid down in *Foulger v. Arding*, 1902, 1 K. B. 700; 71 L. J. K. B. 499. He might come to a variety of conclusions, but in the face of the legislation on the subject it is not my place to consider any of these things to-day. I therefore give judgment for the defendants, and grant a stay of execution in the view of any appeal.

Judgment for the defendants.

Solicitor for the plaintiff—E. Betteley.

Solicitors for the defendants—Syrett and Son.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

DICKENSON v. FORSYTH.

1903.

Dec. 16.

Bye-laws—Buildings—Erection in contravention of bye-laws—Notice of infringement—Sufficiency of notice.

No. 53 of a series of bye-laws as to new streets and buildings contained provisions, in the model form, requiring the provision of an open space of given dimensions and, with certain exceptions, free from erections, in connection with any new domestic building, and prohibiting the diminution of the space or other contravention of the bye-law in the case of a subsequent alteration of or addition to the building.

No. 96 of the same bye-laws contained provisions of the usual character and in model form requiring the giving of notice and deposit of plans by persons intending to erect new buildings.

No. 98 of the same series contained provisions, also in model form, to the effect that where a person who erects a new building, or executes other work to which the bye-laws relating to new streets and buildings may apply, receives from the surveyor to the local authority a notice "specifying any matters in respect of which the erection of such building, or the execution of such work may be in contravention of" any of the bye-laws, and requiring the person to cause any thing done contrary to any such bye-law to be amended, such person shall comply with the requirements of the notice.

Held, that proceedings under bye-law 98 might be founded on a notice stating that a wooden shed had been erected in the back yard of the defendant's property "contrary to Nos. 53 and 96 of the bye-laws relating to new streets and buildings in force in this district," and requiring the removal of the shed, but giving no further particulars as to the nature of the breach of bye-law 53 complained of.

CASE stated by justices who had dismissed an information preferred by the appellant, the clerk to the Chester-le-Street Rural District Council, against the respondent charging that the respondent had unlawfully erected, within the district of the rural district council, a shed above the level of the ground in an open space at the rear of his domestic building, No. 20, Avondale Terrace, in such manner as to cause the distance across such open space from the rear of every part of such building to the boundary of the premises opposite to be less than 15 feet, as required by bye-law No. 53 made by the council and duly confirmed, and contrary to the bye-law, and, the surveyor of the council having on December 2, 1902, given him notice in writing requiring him to cause the shed to be removed within 21 days, he had

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unlawfully neglected to comply with the notice contrary to bye-law 98 made by the council and duly confirmed, contrary to the bye-law and to the statute in such case made and provided.

Bye-law No. 53 was as follows:—

“Every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than 150 square feet, and free from any erection thereon above the level of the ground, except a water-closet, earth-closet, or privy, and an ashpit.

“He shall cause such open space to extend, laterally, throughout the entire width of such building, and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises immediately opposite or adjoining the site of such building to be not less in any case than 10 ft.

“If the height of such building be 15 ft. he shall cause such distance to be 15 ft. at least.

“If the height of such building be 20 ft. he shall cause such distance to be 20 ft. at least.

“If the height of such building be 35 ft. he shall cause such distance to be 35 ft. at least.

“A person who shall make any alteration in or addition to such building shall not, by such alteration or addition, diminish the aggregate extent of open space provided in pursuance of this bye-law in connection with such building, or in any respect fail to comply with any provision of this bye-law.

“For the purposes of this bye-law the height of such building shall be measured upwards from the level of the ground over which such open space shall extend to the level of half the vertical height of the roof or to the top of the parapet, whichever may be the higher.”

Bye-law No. 96 was as follows:—

“Every person who shall intend to erect a building shall give to the council notice in writing of such intention, which shall be delivered or sent to their clerk, at his or their office, or to their surveyor at his or their office, and shall at the same time deliver or send, or cause to be delivered or sent to their clerk, at his or their office, or to their surveyor, at his or their office, complete plans and sections of every floor of such intended building, which shall be drawn to a scale of not less than one inch to every eight feet, and shall show the position, form, and dimensions of the several parts of such building, and of every water-closet, earth-closet, privy, ashpit, cesspool, well, and all other appurtenances, and in which the building shall be so described as to show whether it is intended to be used as a dwelling-house or otherwise.

"Such person shall at the same time deliver or send or cause to be delivered or sent, to the clerk to the council, at his or their office, or to their surveyor, at his or their office, a description in writing of the materials of which it is intended such building shall be constructed, and of the intended mode of drainage and means of water supply."

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Bye-law No. 98 was as follows:—

"Where a person who shall lay out or construct a street, or shall erect a building, or shall execute any other work to which the bye-laws relating to new streets and buildings may apply, shall, at any reasonable time during the progress or after the completion of the laying out or construction of such street, or the erection of such building, or the execution of such work, receive from the surveyor of the council notice in writing specifying any matters in respect of which the laying out or construction of any such street, the erection of such building, or the execution of such work may be in contravention of any bye-law relating to new streets or buildings, and requiring such person within a reasonable time, which shall be specified in such notice, to cause anything done contrary to such bye-law to be amended, or to do anything which by any such bye-law may be required to be done, but which has been omitted to be done —

"Such person shall, within the time specified in such notice, comply with the several requirements thereof so far as such requirements relate to matters in respect of which the laying out or construction of such street, the erection of such building, or the execution of such work may be in contravention of any such bye-law.

"Such person, within a reasonable time after the completion of any work which may have been executed in accordance with any such requirement, shall deliver or send, or cause to be delivered or sent, to the surveyor of the council, at his or their office, notice in writing of the completion of such work, and shall at all reasonable times within a period of seven days after such notice shall have been so delivered or sent, afford such surveyor free access to such work for the purpose of inspection."

On the hearing of the information the above bye-laws were put in evidence, and the following copy of the notice of December 2, 1902, which was admitted by the respondent:—

"Rural District Council, Chester-le-Street,
December 2, 1902.

"Dear Sir,—I am directed by this council to draw your attention to the fact that a wooden erection has been made in the backyard of your property situate at No. 20, Avondale Terrace, Chester-le-Street, contrary to Nos. 53 and 96 of the bye-laws relating to new streets and buildings in force in this district, and you are hereby requested to cause

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the erection above referred to to be removed within twenty-one days from this date. I would further respectfully remind you that you are required by law to let me have a notice in writing if the work above referred to is completed.

I am yours &c.,

JOHN H. MOLE."

It was proved to the satisfaction of the justices that the shed, which was seven feet in height, caused the open space at the rear of the respondent's dwelling-house to the boundary wall opposite to be less than 15 feet. It was admitted that the shed was erected after the building of the dwelling-house had been completed, and that no plan for its erection had been previously submitted to the surveyor for the approval of the district council. It was also admitted that between the service of the notice of December 2, 1902, and the laying of the information, negotiations between the respondent and the district council had taken place with reference to the notice, but no conclusion had been arrived at.

The respondent alleged, though he called no evidence to prove it, that the shed had been built several months prior to the notice of December 2, 1902; and that notwithstanding the erection of the shed there still remained an aggregate open-air space at the rear of his dwelling-house of 259 square feet, being 109 square feet beyond the requirements of bye-law 53.

The respondent took the following objections, namely:—

(a) That the proceedings were not duly authorised by the district council pursuant to section 259 of the Public Health Act, 1875.

(b) That the notice of December 2, 1902, was not given by the surveyor of the council within a reasonable time after the erection of the building as required by bye-law 98.

(c) That the notice was bad in law, and that it did not, as required by bye-law 98, specify the matters in respect of which the erection of the building was in contravention of bye-laws Nos. 53 and 96, such bye-laws being capable of contravention in various ways.

As to objection (a), the appellant stated on oath that the proceedings were authorised by the council at a meeting of the whole council held on February 26, 1903, at which the report of the building committee recommending that proceedings be taken against the respondent, amongst others, for breach of the bye-laws was read and adopted.

As to objection (b), there was no formal evidence as to when the building was erected, and since the justices had decided to dismiss the information upon the point raised by the respondent's objection (c) they expressed no opinion as to whether the notice was given by the surveyor within a reasonable time, as required by bye-law 98.

Upon objection (c) the justices were of opinion that the notice of December 2, 1902, was bad in law, in that it did not, as required by bye-law 98, specify the matters in respect of which the erection of the building contravened the provisions of bye-laws Nos. 53 and 96 referred to in such notice. 1908.
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The question for the opinion of the Court was whether, under the circumstances, the justices were right in dismissing the information.

Simey for the appellant. These are bye-laws relating to new streets and buildings, and the surveyor served notice under bye-law 98 requiring the removal of this shed. The point taken by the respondent amounted to this, that the notice as framed did not draw sufficient attention to the matters complained of; but the notice, by reference to the shed in the backyard and to bye-laws 53 and 96, expressed with sufficient accuracy the matters in respect of which the erection was in contravention of those bye-laws. The justices have found that the notice was insufficient; but the submission is that it was sufficient, and that they should have dealt with the case on that basis. The district council are only asking for penalties in connection with the shed, and the question as to whether the notice was given in reasonable time was not dealt with by the justices.

The respondent did not appear.

LORD ALVERSTONE C.J. We are of opinion that the justices should have entertained this information. Bye-law No. 98 provides that at any reasonable time during the progress or after the completion of the building a notice in writing may be given as to any matters in respect of which the execution of work may be in contravention of a bye-law. The alleged breach here is a contravention of bye-law 53, and the respondent was informed by the notice of December 2, 1902, that a wooden shed had been erected in his backyard contrary to bye-laws 53 and 96. I am of opinion that this notice was sufficient, since it specified the bye-laws which it is alleged the respondent had infringed, and pointed out the particular structure he had erected in contravention of those bye-laws.

LAWRANCE J. I am of the same opinion.

KENNEDY J. I entirely concur.

Case remitted.

Solicitors for the appellants—Dangerfield and Blyth, for J. Turnbull, Durham.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

NUTTER v. MOORHOUSE.

1902.

April 2

Vaccination—Order to vaccinate signed by justice but not sealed—Validity—Subsequent order purporting to cure defect—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31.

An order of justices under section 31 of the Vaccination Act, 1867, requiring a parent to cause his child to be vaccinated within a certain time is a nullity unless sealed as well as signed; and where an order for the vaccination of a child within a certain number of weeks from the date thereof is signed but not sealed, the defect is not cured by the drawing up at a later date of a subsequent order, signed and sealed by two of the justices present when first order was verbally made, dated as of the later date, and requiring the vaccination of the child within a like number of weeks from such later date.

CASE stated by the borough justices of Burnley, before whom the appellant had been convicted in a penalty under section 31 of the Vaccination Act, 1867.

An information was preferred on April 26, 1902, by G. Moorhouse, a vaccination officer appointed by the guardians of the Burnley Union to enforce the provisions of the Vaccination Acts, 1867 to 1898 (hereinafter called the respondent), that he had reason to believe that a certain child, named Florence Nutter, more than six months old and under the age of 14 years, to wit, of the age of two years, then residing at the said borough within the union for which the said respondent usually acts, had not been successfully vaccinated; that he, the said respondent, had given notice to David Nutter (hereinafter called the appellant), the parent and person having the custody of the said child to procure its being vaccinated; and that the notice had been disregarded contrary to the Vaccination Act, 1867, s. 31, which information was heard and determined at a court of summary jurisdiction in and for the said borough on May 7, 1902, the appellant appearing personally and being also represented by a solicitor. The appellant's solicitor consented to an order being made pursuant to the said section, and it was ordered that the appellant should cause the said child to be vaccinated within four weeks, and the appellant was ordered to pay the costs.

On June 13, 1902, the respondent preferred another information against the appellant, that he, the said appellant, being the parent of the said child, Florence Nutter, unlawfully did omit to carry into effect

the order of May 7, 1902, the period having expired, and the child not being so vaccinated nor shown to be insusceptible of vaccination, contrary to section 31 of the said Act. The order referred to was signed by one of the justices for the said borough, but it was not under seal.

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The appellant attended in person, and was also represented by a solicitor at the hearing of the last-mentioned information on June 25, 1902. Service of the summons upon the appellant personally was duly proved, and it was also proved by the respondent that he had not received any certificate of the vaccination of the said child, nor that it was unfit for vaccination or insusceptible of vaccination. The appellant's solicitor asked the court to dismiss the summons, on the ground that the order to have the child vaccinated served on the appellant was a nullity, being only under the hand of a justice and not under the "hand and seal" of a justice as provided by section 31 of the said Act. By a clerical error or oversight a seal was omitted to be put on the said order, and the court, being of opinion that the objection was purely technical, adjourned the summons for five weeks in order that an order under hand and seal of a justice might be served on the appellant; but this summons was afterwards withdrawn on the application of the respondent.

An order under the hand and seal of two of the justices sitting at the said court of summary jurisdiction on the said May 7, 1902, was subsequently drawn up and dated June 25, 1902.

On July 25, 1902, the respondent preferred a fresh information against the appellant that he, being the parent of the child Florence Nutter, under the age of 14 years, unlawfully did omit to carry into effect a certain order of the court of summary jurisdiction, sitting at the said borough, and dated June 25, 1902 (being the last-mentioned order), made pursuant to section 31 of the said Act; and another summons was thereupon issued against the said appellant for omitting to carry into effect a certain order of the court of summary jurisdiction, sitting on May 7, 1902, made pursuant to section 31 of the Vaccination Act, 1867, whereby it was ordered and directed that he, the said David Nutter, should cause the said child to be vaccinated within 28 days from the date thereof, which information and summons were heard and determined by us on July 30, 1902. Upon such hearing the appellant did not appear personally before us, but was represented by a solicitor. We convicted the appellant, and fined him the sum of 10s., and ordered him to pay the sum of 1rs. for costs, subject to this case.

Upon the hearing of the said information the following facts were admitted or proved in evidence before us:—

(a) Service of the summons upon the appellant personally was

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proved, and the respondent proved the original order dated June 25, 1902, being an order under the hands and seals of two justices sitting on May 7, upon which was endorsed the memorandum of personal service of a copy thereof.

(b) That the respondent had not received any certificate of successful vaccination of the said child, nor that it was unfit to be vaccinated or insusceptible of vaccination.

(c) The child was still living.

(d) That two informations had been laid for non-compliance with the order made on May 7, 1902.

(e) That only one order had been pronounced by the justices.

It was contended on behalf of the appellant—

(a) That no evidence was before the justices that the order had been served on the appellant.

(b) That no evidence of the order having been made was adduced.

(c) That the order dated June 25, 1902, under the hands and seals of two justices was not the order pronounced by the court sitting on May 7, 1902, inasmuch as the order then made was to vaccinate the child within 28 days from May 7, 1902, whereas the order drawn up and signed by and under the seals of the justices was to vaccinate the child within 28 days from the date thereof, namely, June 25, 1902.

(d) That the information and summonses were not for the same offence, the information stating that the appellant "unlawfully did omit to carry into effect a certain order of the court of summary jurisdiction sitting in the said borough dated June 25, 1902, whereby it was directed that the appellant should cause the said child to be vaccinated within twenty-eight days from the date thereof"; and the summons stating that the appellant "unlawfully did omit to carry into effect a certain order of the court of summary jurisdiction sitting in the said borough on May 7, 1902, whereby it was ordered and directed that he, the appellant, should cause the said child to be vaccinated within twenty-eight days from the date thereof."

(e) That the order was not properly proved.

(f) That the justices' order of May 7, 1902, when drawn up and sealed by the justice, should bear the date of the day on which it was pronounced, and relate back to that date. And that the order which was drawn up and signed and sealed by the justices was invalid because it bore date June 25, 1902: *Ratt v. Parkinson* (1851) 20 L. J. M. C. 208.

(g) That the order of the justices could not be amended after once delivered: *Rex v. Cheshire Justices* (1833) 5 B. & Ad. 439; 2 N. & M. 827.

It was contended on behalf of the respondent—

(a) That the order under the hands and seals of two justices having been put in, it was not necessary to tender any other evidence as to the making of such order. 1903.
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(b) That it was not necessary to prove service of the order on the appellant, the appellant having been present in court when the order was made, and the solicitor having consented thereto, and also inasmuch as the document signed by the justice dated May 7, 1902, though not amounting to an order under section 31, was a minute of the decision of the justices and had been served upon the appellant.

(c) That the evidence adduced was sufficient proof that the appellant had not complied with the order referred to.

We were of opinion that proof of the order having been made was unnecessary, the order under the hands and seals of two justices being before us, and one of us having been present and constituted one of the court of summary jurisdiction sitting on May 7, 1902, when the order to vaccinate was made; and that proof of the service of the order was unnecessary, inasmuch as the appellant's solicitor had consented to the making of it when the appellant was also present in person, and therefore had notice of it. We were also of opinion that the appellant had had ample opportunity of complying with the order of the court made on May 7, 1902, and dated June 25, 1902; that the words "date thereof" in such order were not material, seeing that more than 28 days had elapsed since both the date when the order was made, namely, May 7, 1902, and the date of the order of June 25, 1902; and having regard to the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1, that the variance between the information and summons was not material, and that the appellant was not deceived or misled thereby. We were also of opinion that the order under hands and seals of two of the justices was good in law.

The question was whether upon the facts as stated the decision and determination of the justices was right in point of law.

Atherley Jones, K.C., for the appellant, read the case and referred to the contentions.

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed, although we have not had the advantage of hearing any argument on the part of the respondent. It seems that under section 31 of the Vaccination Act, 1867, there must be an order signed and sealed by a justice. The words are: The justice "may if he see fit make an order under his hand and seal directing such child to be vaccinated within a certain time." Upon objection having been taken on behalf

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of the appellant that the order had not been sealed, the justices appear to have adjourned the proceedings, and subsequently, on June 25, 1902, to have made an order in the absence of the appellant. This does not appear to be a case in which something has been done to cure a technical defect in the order, but a case in which an order was made as from a date differing from that of the original order and imposing fresh liabilities. In procedure of this kind it is clearly necessary that everything should be done regularly; and in my opinion the proceedings subsequent to the hearing of the information on May 7, 1902, were wrong, and cannot be supported.

WILLS J. I am of the same opinion. It is clear that the second order, that of June 25, was invalid. It was not the drawing up of the order of May 7, 1902. There never was an order of May 7 such as was required by the Act of Parliament. Therefore, there was no order for the disobedience of which the appellant could be proceeded against.

CHANNELL J. I agree.

Appeal allowed.

Solicitor for the appellant—R. H. Bentley, for Roberts and Riley, Burnley.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

REX v. FLEETWOOD URBAN DISTRICT COUNCIL.

1904.

Mar. 4.

Accounts—Audit—Inspection of Accounts—Mandamus—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247.

The Court will not grant a mandamus requiring a district council to permit the inspection of accounts which have already been audited for some considerable time, at the instance of a person who was entitled, under section 247 (4) of the Public Health Act, 1875, as a person interested, to inspect such accounts when deposited for inspection prior to audit, but who was at that time wrongfully refused access to the accounts, where it does not appear that the applicant has any reason for supposing that by investigation of the accounts he would discover any right which he could enforce or any wrong in respect of which he could claim redress.

RULE nisi for a mandamus calling upon the Fleetwood Urban District Council to show cause why the applicant, a Mr. Marginson, should not be at liberty to inspect the accounts and documents of the council for the year ending March 31, 1902.

The applicant was during the earlier part of the financial year 1901-1902 a member of the Fleetwood Urban District Council, and chairman of the finance committee of the council. He became, however, disqualified for membership of the council by being adjudicated bankrupt, and in November, 1901, the council duly declared his seat vacant. While chairman of the finance committee he had signed numerous cheques on behalf of the council.

When the council's accounts for the financial year 1901-1902 were deposited for inspection prior to audit, the applicant applied to Mr. Joseph Tildsley, the clerk of the council, to be allowed to inspect them, claiming the right of inspection under section 247 (4) of the Public Health Act, 1875, as a person interested. The clerk, however, refused to allow the applicant to inspect the accounts.

The applicant then took summary proceedings against the clerk under the subsection in respect of his refusal to permit the applicant to inspect the accounts.

The justices were of opinion that the appellant, as previous chairman of the finance committee, would have been a person interested and entitled to inspect the accounts had he not been a bankrupt, but held that as he had been adjudicated bankrupt he had no *locus standi* at the time he applied to see the accounts, and was therefore not

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entitled to inspect them; and they accordingly dismissed the information, subject to a case stated for the opinion of the High Court.

The Divisional Court, on the case so stated, held in *Marginson v. Tildsley*, 1 L. G. R. 333, which was heard on March 27, 1903, that the justices were wrong, and that the applicant was a person interested and entitled to see the accounts, and remitted the case to the justices with directions to convict Mr. Tildsley. The justices accordingly convicted and imposed a penalty on Mr. Tildsley.

The applicant then at once applied to Mr. Tildsley for inspection of the accounts, but that gentleman, seeing that the seven days before the audit of the accounts had long elapsed, and that it was not clear that there was statutory authority for inspecting the books on any other days, refused to permit Mr. Marginson to inspect the accounts.

The present rule was obtained on November 10, 1903. The affidavit filed on behalf of the district council in opposition to the rule showed that the position taken up by them was that the time had gone by, and that therefore the applicant was not entitled to see the accounts.

Macmorran. K.C., and *Scholefield* showed cause against the rule. The applicant had no right in the year 1903 to inspect the accounts of the district council for the year ending in March, 1902. As a matter of fact, he did attend the audit in 1902, and carried in certain objections, which were dealt with by the auditor. He has seen the books, and there is no reason why he should see them again after the close of the audit, particularly as it is not suggested that he himself has been surcharged. There is no statutory right to see the documents after the audit has been closed.

Coumbe in support. When *Marginson v. Tildsley* (1903) 1 L. G. R. 333, was before this Court on March 27, 1903, no suggestion was then made that Mr. Marginson had already seen the books between May and December, 1902. The suggestion that he has so seen them is made for the first time to-day. As soon as it was held by this Court in *Marginson v. Tildsley* that the appellant was entitled to see the books he applied for immediate inspection. He has not been guilty of laches, and has come to this Court with all reasonable promptitude when he found that the inspection and investigation of these was again denied him. He is entitled to see them to find out if he has been surcharged: *Reg. v. Rochester Corporation* (1857) 27 L. J. Q. B. 45. There may be many grave irregularities in the accounts: *Rex v. Great Farringdon Guardians* (1829) 9 B. & C. 541. It is a matter of public policy that this mandamus should go.

LORD ALVERSTONE C.J. If it were possible for us to consider that

this Mr. Marginson had a real grievance, or that any real remedy or action was open to him upon his investigating these books, we might perhaps stretch a point in his favour and make this rule absolute, because I think he was in a measure wrongfully refused permission to investigate these books, upon the ground of his bankruptcy. But I cannot gather from Mr. Coumbe's argument that he has anything to gain by seeing them. I certainly do not think that we ought in the exercise of our discretion to make this rule for a mandamus absolute, so that the council should be obliged to collect all these books and give inspection of them after the accounts which they contain have been audited for more than a year past, and when there can be no suggestion of the disclosure of any unredressed wrongs which would affect Mr. Marginson or his estate in any material particular. It is not suggested that his investigation would disclose any surcharge upon him personally, and we have no materials before us which can lead us to suppose that he could discover any right which he could enforce or wrong for which he could claim redress upon his inspection of these books and documents. He would, therefore, be none the better off nor would he gain anything by his inspection. He has really put forward no substantial reason for seeing these books. He makes out no personal injury or wrong inflicted beyond the refusal of inspection. He was, in the first instance, refused inspection in May, 1902, and he then and there proceeded against the clerk of the council for a penalty. The justices dismissed the summons upon the mistaken ground that the applicant was precluded from having any right to see the books by his bankruptcy. Upon a case stated for our opinion we held that the justices ought not to have dismissed the information on that ground. The case then went back, and the clerk who had been summoned was fined. That brings us to May, 1903, and Mr. Marginson again applies for inspection of the books, but the clerk takes up the position that after what had taken place the matter was closed, and that the time for inspection had gone by. In November, 1903, Mr. Marginson comes to this Court and moves for the present rule *nisi*, and in my view of the case I think that had there been any real or substantial reason for his seeing the books, or if his investigation of them would answer some really useful purpose, he would have come to the Court before, and would not have delayed till November. I recollect pointing out when the rule *nisi* was moved that it appeared likely Mr. Marginson would have considerable difficulty in getting it made absolute. If it had been made to appear to us that there was any claim which Mr. Marginson could enforce in respect of anything he had suffered, I, speaking for myself, would strain my own view of the case so that he should have an opportunity of enforcing it.

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I think the particular defence raised by the affidavit filed on behalf of the council that the time had gone by was not properly put forward; the affidavit ought to have gone on to indicate the real defence, which was that Mr. Marginson had already had inspection. Mr. Coumbe, however, has been unable to point to any substantial wrong suffered by Mr. Marginson which would be redressed, or any claim on his part which could be enforced upon a mandamus being granted; and I am therefore of opinion that this rule must be discharged, but without costs.

KENNEDY J. I agree.

CHANNELL J. I concur.

Rule discharged.

Solicitors for the District Council—Baker and Lees.

Solicitors for the applicant—Clarke & Co., for Clarke, Fleetwood.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

Mar. 4.

TOUGH v. HOPKINS.

Nuisance—Black smoke—Metropolis—"Chimney"—Funnel of steamer—Prohibition order—Specification of works necessary to prevent recurrence—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 5 (4, 5), 23, 24.

The funnel of a steamer is a "chimney" within section 24 (b) of the Public Health (London) Act, 1891, dealing with nuisances caused by black smoke issuing from chimneys.

Where all that is required to prevent the recurrence of a nuisance in London arising from black smoke is careful stoking, it is unnecessary in a prohibition order under section 5 of the Act prohibiting the recurrence of the nuisance to specify any works to be executed, although the defendant may have required that the order should specify the works to be executed.

CASE stated by one of the aldermen of the City of London before whom, sitting while Lord Mayor, the appellant had been convicted upon an information preferred by the respondent under section 24 of the Public Health (London) Act, 1891, for that on August 24, 1903, between the Custom House and Southwark Bridge on the north side of the River Thames, in the City, and within the Port of London, upon a certain vessel, to wit, the s.s. *Richmond*, of London, 95,485, the following nuisance existed, namely, a chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance, and that the appellant, being owner of the said vessel, had made default in complying with the requisitions of a notice dated April 25, 1903, served upon him under section 24 of the Public Health (London) Act, 1891, requiring him to abate the nuisance, and to execute such works and do such things as might be necessary for that purpose, contrary to the statute.

The Lord Mayor fined the appellant one pound, with one guinea for costs, and made under the provisions of section 5 (4, 5) of the Act a prohibition order against him.

The facts, &c., were set out in paragraphs 5 *et seq.* of the case as follows :—

5. Upon the hearing of the said information the following facts were proved before me or admitted by the said appellant.

(a) That the appellant was the owner of a steam tug known as *The Richmond*.

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(b) That on April 25, 1903, a notice was served upon him at the instance of the Port Sanitary Authority of London, a true copy whereof is marked A and forms part of this case.

(c) That on August 24, 1903, the said steam tug was towing six barges, and was proceeding from below the Custom House to Southwark Bridge and beyond, within the jurisdiction of the said Port Sanitary Authority, and that while the tug was proceeding between the Custom House and Southwark Bridge there was being sent forth from the funnel thereof dense black smoke for the space of about five minutes in such quantity as to be a nuisance.

(d) That the steam tug was then being navigated by a master, engineer, and crew employed by the appellant, who was not on board, and had no personal knowledge of such emission of black smoke.

(e) That the steam tug did not stop or lie up at any point of the voyage of August 24 aforesaid, but was then proceeding to Kingston-on-Thames, where she was in the habit of lying every night, and that the said steam tug was employed throughout the day in plying for hire as a tug between Woolwich and Kingston-on-Thames.

(f) That the engines and boiler on board the steam tug were of modern construction and of the best known type of marine engines and boilers, and were constructed so as to consume, as far as possible, all the smoke caused therein, having regard to the funnel being a short one, and adapted for passing under bridges at high-water level by hinging backwards nearly to deck level.

(g) That the appellant had given strict instructions to his servants to prevent as far as possible the production of black smoke on the said steam tug, that good Welsh steam coal procured by the appellant was burned on board, and that the furnaces had been freshly stoked with such coal at about opposite the Custom House on the said August 24, and that from three to four minutes was not an unreasonable time to allow the fresh fuel to cease emitting black smoke on such a vessel.

(h) That the emission of smoke from the funnel of the tug could have been prevented by the fire being kept bright by frequent and careful stoking or by the use of steam coal.

6. Upon the above facts it was contended before me by the appellant:—

(1) That section 24 of the Public Health (London) Act, 1891, was inapplicable to a steam tug such as *The Richmond* while plying to and fro on the River Thames as described in paragraph 5 of this case.

(2) That *The Richmond* on the said August 24 was not a vessel lying within the district of the Port Sanitary Authority within the meaning of Article III. of an Order of the Local Government Board,

dated March 25, 1892, and made under section 112 of the said Public Health (London) Act, 1891.

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(3) That if by reason of such Order of the Local Government Board section 24 of the Public Health (London) Act, 1891, was applicable to a vessel used as the said steam tug was being used on August 24, 1903, then the proceedings under such section should have been taken against the master of the vessel, and not against the appellant.

(4) That proceedings in respect of smoke from vessels plying on the River Thames can only be taken under the provisions of section 23 of the Public Health (London) Act, 1891.

7. On behalf of the respondent it was contended :—

(1) That the funnel of the said steam tug was a chimney within the meaning of that expression in section 24 (b) of the Public Health (London) Act, 1891.

(2) That the alleged nuisance arose owing to the appellant not having used anthracite coal in the furnaces of the said tug, and from the coal that was used having been carelessly and improperly stoked.

(3) That the appellant was liable for the acts of his servants, and was a person by whose act, default, or sufferance the nuisance arose.

(4) That I had a discretion as to whether or not I specified on the prohibition order any works to be done by the appellant to prevent the recurrence of the nuisance, and that it was for me to determine whether or not it was desirable to do so.

8. My attention was called to the case of *Weekes v. King* (1885) 49 J. P. 709.

9. I found as a fact that the funnel of the said steam tug was a chimney within the meaning of section 24 of the said statute, and that black smoke had been sent forth from it in such quantities as to be a nuisance at the place and time and on the day mentioned in the information. I also found as a fact that no works that could be ordered would cure the alleged nuisance, but that it was a question of stoking with proper fuel, and that if a bright fire were kept up by frequent and careful stoking the nuisance could be prevented. I was of opinion that the information had been properly laid under section 24 (b) of the Public Health (London) Act, 1891, and that the appellant was a person by whose act, default, or sufferance the said nuisance arose, and I overruled the contentions of the appellant, and convicted him of the nuisance alleged in the information, and made an order upon him prohibiting the recurrence of the said nuisance.

10. The appellant, after I had convicted him as above mentioned, required me on making the said prohibition order against him, under section 5, subsections (4) and (5) of the Public Health (London) Act, 1891, to specify therein the works to be executed by him for the purpose

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of preventing the recurrence of the said nuisance, but I refused to specify any works in the said order because it was not, in my opinion, desirable to do so, since there was no question of works here involved, but only a question of careful and skilful stoking with proper fuel.

11. The questions for the opinion of the King's Bench Division of the High Court of Justice are :—

(a) Whether I was right in law in convicting the appellant.

(b) Whether the said prohibition order so made upon him, under the circumstances above set forth, is a good and valid order under the Public Health (London) Act, 1891, s. 5 (4, 5).

The Order of the Local Government Board of March 25, 1892, referred to in the case, is an Order made under section 112 of the Public Health (London) Act, 1891, conferring certain functions of a sanitary authority under that Act on the Corporation of the City of London as Port Sanitary Authority of the Port of London.

The material provisions of the Order are as follows :—

“Art. II. We hereby assign to the said Mayor, Commonalty, and Citizens, as the Port Sanitary Authority aforesaid, on and after the thirty-first day of March, one thousand eight hundred and ninety-two, and until We by Order otherwise direct, all the powers, rights, duties, capacities, liabilities, or obligations of a sanitary authority under the said Public Health (London) Act, 1891, created by or arising out of the following sections of that Act, or of the specified parts of those sections, and exercisable by or attaching to sanitary authorities, so far as those several sections or such parts thereof are applicable to a port sanitary authority, and to ships, vessels, boats, waters, or persons within their jurisdiction ; namely :—

* * * * *

Section 24, relating to nuisances caused by smoke.

* * * * *

“Art. III. For the purposes of the aforesaid sections and parts of sections, any vessel lying within the district of the said Port Sanitary Authority shall be subject to the jurisdiction of the said authority as if it were a house, and the master of any such vessel shall, for such purposes, be deemed to be the occupier of such vessel ; . . .”

The Order is amended by later Orders of the Local Government Board, but not in any respect material to the present case.

J. A. Hamilton, K.C., and *Trevor Bigham* for the appellant. Section 24 of the Public Health (London) Act, 1891, does not apply to the case of black smoke issuing from the funnel of a tug on the River Thames. Subsections (3) and (4) of section 23 may, under

certain circumstances, be applicable in such a case, but the information in this case is not laid under that section. If the Order of the Local Government Board of March 25, 1892, did make section 24 applicable to tugs, then the master, and not the owner (the present appellant) should have been summoned, though under section 23 the owner as well as the master could have been summoned. Section 24 is wholly applicable to chimneys on land, and does not contemplate the so-called chimneys which are really the funnels of steam vessels afloat on the river. The Order of the Local Government Board has not increased, and could not increase, the responsibilities of tug owners in respect of smoke nuisance.

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R. Cunningham Glen for the respondent. The funnel of a steam vessel is nothing but a chimney. Section 24 of the Public Health (London) Act, 1891, is intended to deal with any case of black smoke not covered by section 23, whether on land or on steamers. It is a superadded protection against the issue of black smoke, whether from chimneys ashore or afloat. Although subsections (3) and (4) of section 23 contain special provisions for the construction of furnaces on steamers, yet the two earlier subsections, (1) and (2), equally apply to the construction of furnaces on land. Sections 23 and 24 do not deal with different subject matters, but with the different consequences arising from their user, and it cannot be said that because steamers are specially dealt with under section 23 they must be excluded from the operation of section 24.

Bigham in reply. Section 24 was never intended to apply to steamers at all. It is reasonable to suppose that section 23 exhausts the operation of the legislation so far as steamers are concerned. Section 24 applies strictly to chimneys and furnaces on land, and not to ships nor their furnaces and funnels, which are in no sense chimneys within the contemplation of that section.

LORD ALVERSTONE C.J. Notwithstanding the very ingenious argument of Mr. Hamilton, and the observations Mr. Bigham has made, I think that this decision was right. I quite agree with them that the Order of the Local Government Board of March 25, 1892, has not increased the responsibility of persons who own tugs in respect of nuisance from smoke. It merely provides that the Port Sanitary Authority are to take such proceedings as can be taken under certain sections of the Public Health (London) Act, 1891, including section 24, in respect of "ships, vessels, boats, waters or persons within their jurisdiction . . ." Whatever the opinion of the draughtsman may have been, the mere inclusion of the section in that Order would not increase the responsibility of tug owners if we were of opinion that section 24

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could not apply to the chimney or funnel of a steam tug plying on the Thames.

The point has admitted of argument, and there is some ground for thinking at the first blush that the wording of section 24 would indicate that it was intended to apply to chimneys on land in the ordinary sense of the word; but when we look at the object of the legislation, and at certain expressions in section 24 itself, I think any such construction would be too narrow. It is, as far as this part of the section is concerned, essentially what may be called a black smoke section, that is to say, it is a section which provides in clause (b) that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. Subsections (3) and (4) of section 23 undoubtedly deal specifically with the steam-engines and furnaces used in the working of steam vessels which are worked in the district where this case arose. Subsection (3) provides that they "shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if any such steam-engine or furnace is not so constructed, or being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding five pounds, and on a second conviction to a fine of ten pounds." Then by subsection (4): "Provided that in this section the words 'consume or burn the smoke'" shall not be held in all cases to mean "consume or burn all the smoke," and the Court hearing an information against a person may remit the fine if of opinion that such person has so constructed his furnace as to consume or burn, as far as possible, the smoke arising from such furnace . . ." Those two subsections show that there are special provisions with regard to the construction of furnaces and engines upon steamers and the non negligent user of them; but it is observed, and I think the argument of Mr. Glen is of importance, that there is a corresponding provision with regard to furnaces upon land, because subsection (1) of section 23 also provides that the furnaces employed in the working of engines by steam, and a number of other furnaces, all on land, "shall be constructed so as to consume or burn the smoke arising from such furnace," and then there is a corresponding subsection (2) with regard to negligent user.

Therefore we have, with regard to both furnaces on land and furnaces on ships, provisions for the proper construction of the engines and furnaces and for the non-negligent user. Then comes section 24, which is unquestionably a nuisance section. I think it is not without importance that it immediately follows section 23, and is under the

same heading, "Smoke consumption." If the words to which I am about to refer to can be fairly applied to a chimney on board a steamship, there is no reason why they should not apply. Clause (a) of section 24 is as follows: "any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used therein . . ." shall be a nuisance liable to be dealt with summarily. Then comes the important clause (b), "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. 1904.
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I think that clause, quite apart from negligence, is intended to deal with the case, which has not been covered by the previous section, of a chimney other than that of a dwelling-house sending forth black smoke.

We have had our attention directed to the other legislation of a similar character with regard to railway engines and with regard to traction engines, and there does not appear to be any black smoke nuisance section in any of them. Therefore one would rather assume that this legislation is something which may be said to be additional protection, and to be superadded to the legislation with regard to construction, and unless the words "any chimney (not being the chimney of a private dwelling-house)" are sufficiently strong to show that a steamship would not be included, I think both the purview of this section and the object of the legislation would point to black smoke being emitted within the port from the chimney or funnel of a steamer as constituting an offence.

It is quite obvious there may be cases in which the black smoke would come from a chimney which could not ordinarily be called a funnel. I do not think any argument can be based upon the fact that the word "chimney" is used, because the word "funnel" is a technical and almost secondary meaning for that kind of chimney.

I cannot see any reason why emission of black smoke from steamers constantly plying on the Thames should not be as much prevented as the emitting of black smoke from chimneys on land. I, therefore, come to the conclusion that section 23 does not contain, as Mr. Bigham pressed us that it did, the whole code with regard to nuisances arising from steamships or smoke arising from steamboats. The language of section 24 is not enough to enable us to hold that it does not include the chimney of a steamship. Therefore I think this conviction was right.

Upon the second point Mr. Hamilton mentioned, I ought, perhaps, first to say, that we held the other day in *Central London Ry. Co.*

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v. *Hammersmith Borough Council* (1904) 2 L. G. R. 446, and I think we were right, that the prohibition order was not bad because it did not specify the works to be done though the defendant asked for the specification of them, if there were no works that could be done. I do not think that objection prevails. I think, therefore, that this appeal should be dismissed.

KENNEDY J. I am of the same opinion. To my mind the only point, which certainly is not wholly free from difficulty, I agree, is the question as to whether the words in section 24 (b), "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance," include the funnel of a tug boat or steamer. Usually, no doubt, "chimney" is a phrase applicable to that through which smoke passes from a fire of some sort in a building. It is not the term which is technically the proper term to describe those passages or flues, or whatever they may be called, in a steamboat, which convey the smoke from the furnace to the upper air, but I see nothing to prevent "chimney" from being used in what may be called its natural sense, namely, that of a passage by which smoke from a fire is carried away upwards. Otherwise we should have no "black smoke section," as my Lord has described it shortly, with regard to the description of thing which may send out smoke in quite as great quantities, with quite as great mischief, as what is more usually described by the word "chimney," namely, the smoke passage from the roof of a building. There is, I believe, no definition of "chimney" in the Act, and if it is not defined it seems to me naturally enough intended to cover that which it may cover in a popular, though not in a technical, sense.

I need not add anything on the other point to that which my Lord has said.

CHANNELL J. I agree. I think "chimney" in this section is used simply as meaning that from which smoke issues into the outer air. The cases of funnels of steam vessels, or of funnels of locomotive engines, or other movable smoke-producing apparatus, might have been so dealt with elsewhere in the Act as to lead to the conclusion that they were not intended to be included in the general words in section 24 (b); but, in fact, the operation of section 24 is only to apply particular summary procedure in reference to nuisances to certain cases of smoke nuisance. The other sections deal with the construction and user of apparatus producing smoke, and do not deal, as section 24 does, with the consequences or results. The result seems to me to be that section 24 and section 23 are dealing, not with different subject matters, but with different consequences of the subject matter, and there is no reason, therefore, to hold that because steam vessels are

especially dealt with by section 23, they cannot come under section 24. 1904.

I see no reason for cutting down what seems to me the primary meaning of the word "chimney" in section 24. Tough v.
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Appeal dismissed.

Solicitor for the appellant—John A. Roberts.

Solicitor for the respondent—The City Solicitor.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

CHANCERY DIVISION.

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July 21, 22.

MILWARD v. BARRY URBAN DISTRICT COUNCIL.

Education — Local education authority — Education committee — Scheme — Provision empowering local education authority to determine order of retirement of members — Resolution determining order — Subsequent resolution varying order — Validity — Education Act, 1902 (2 Edw. VII. c. 42), ss. 17 (1), 21 (3).

An urban district council, as the local education authority under section 1 of the Education Act, 1902, made a scheme for the establishment of an education committee under section 17 (1) of the Act, which was duly approved by the Board of Education. The scheme provided (inter alia) that the council should determine the order of retirement of the members of the committee. The council passed a resolution determining the order. They subsequently passed a second resolution by which they purported to vary the order of retirement.

Held, that the council, having by the first resolution determined the order of retirement, were functi officio, and that the subsequent resolution purporting to alter that order was therefore ultra vires and invalid.

MOTION.

The Barry Urban District Council, of which the plaintiff, John Milward, was a member, were the "local education authority" for the district of Barry within the proviso to section 1 of the Education Act, 1902.

On March 16, 1903, the council made a scheme for the establishment of an "education committee" under section 17 (1) of the Act.

The scheme was as follows:—

"1. The education committee (hereinafter called 'the committee') shall when complete consist of nine members, including persons of experience in education and persons acquainted with the needs of the various kinds of schools in the Barry Urban District, appointed by the Barry Urban District Council (hereinafter called 'the council'), five being members of the council, and four other members of whom two at least must be chosen from outside the council, one at least of these being a woman.

"2. After the 30th day of April, 1904, one member at least of the committee shall be one of the four representatives which the council will henceforward appoint on the body of school managers of the Barry County School.

"3. One of the members of the committee shall be one of the

councillors of the Glamorgan County Council representing a portion of the urban district of Barry, or an alderman of the Glamorgan County Council, who has previously been a county councillor representing a portion of the urban district of Barry.

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" 4. One at least of the members of the committee shall be a person well-acquainted with the commercial and industrial conditions of the urban district of Barry.

" 5. After the 30th day of April, 1904, one member of the committee shall be appointed after consultation with the council of the University of Cardiff.

" 6. The five members of the committee who are elected as members of the council shall not hold office after they cease to be members of the council, and the one member of the committee who is elected as a councillor or alderman of the Glamorganshire County Council shall not hold office after he ceases to be a member of the county council. Subject thereto the members of the committee shall hold office for three years, provided nevertheless that one-third shall go out of office on the 1st day of May in the year 1904 and in each succeeding year. The council shall determine the order in which they shall retire.

" 7. Members appointed to fill casual vacancies shall be appointed only for the remainder of the term of office of the outgoing members, and subject to the same provisions as regulated the appointment of such members.

" Any member who is incapacitated from acting, or who is absent from all meetings of the committee during a period of three months (except for some reason approved by the council), shall thereupon cease to be a member of the committee."

On April 16, 1903, the scheme received the approval of the Board of Education, and on April 18, 1903, the Act came into operation in the district.

The proceedings of the council and their committees were regulated by standing orders framed under the authority of Schedule I., r. 1, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), as applied by section 59 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

Order 40 was as follows:—

" 40. It shall be competent for any member of the council for any specific purpose and object to move the suspension of all or any of the standing orders; and if at least two-thirds of the members present vote for such suspension the same shall be suspended until the specific object forming the ground of such motion shall be decided upon and disposed of by the council; otherwise no standing orders shall be suspended."

On April 20, 1903, a meeting of the council was held, at which

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certain persons, including the plaintiff, were appointed members of the education committee, and the following resolution was passed :—"That the two co-opted members of the committee of the Glamorgan County Council representation retire at the end of the first year, and that the other members of the committee retire at the end of the second or third year, according to the number of votes received, as follows : At the end of the second year Messrs. J. A. Hughes, J. H. Jose, and J. Milward, and at the end of the third year Messrs. B. Evans, D. Lloyd, and J. A. Manton."

Under this resolution J. Milward was to retire at the end of the second year.

On April 15, 1904, owing to the redistribution of wards in the urban district of Barry, the whole of the council went out of office, and on the same day an election was held, at which the plaintiff was re-elected a member of the council.

On April 18, 1904, the annual meeting of the council was held, at which a resolution was passed by the necessary two-thirds majority "that the standing orders of the council be suspended in order to discuss the constitution of the education committee." A resolution was then passed that so much of the resolution passed by the council on April 20, 1903, deciding that Miss M. E. Meredith (one of the co-opted members) should retire from the education committee at the end of the first year, and that Mr. J. Milward should retire from such committee at the end of the second year, should be rescinded, and that in lieu thereof Miss M. E. Meredith should retire on May 1, 1905, and Mr. J. Milward retire on May 1, 1904.

On June 21, 1904, the plaintiff issued a writ against the defendant council asking for—first, a declaration that the resolution of April 18, 1904, was *ultra vires*, and that the plaintiff was entitled to act as a member of the education committee until the period of two years from the date of his appointment as a member thereof should have expired; and, secondly, an injunction restraining the defendant council from preventing him or from interfering with his acting as a member of the committee during such period.

This was a motion by the plaintiff asking that the defendant council might be restrained from preventing him from or interfering with his acting as a member of the education committee until the trial of the action or further order.

By consent of both parties the hearing of the motion was treated as the trial of the action.

The material provisions of the Education Act, 1902 (2 Edw. VII. c. 42), are the following :—

Section 1. For the purposes of this Act the council of every county and of every county borough shall be the local education authority :

Provided that the council of a borough with a population of over ten thousand, or of an urban district with a population of over twenty thousand, shall, as respects that borough or district, be the local education authority for the purpose of Part III. of this Act, and for that purpose as respects that borough or district, the expression 'local education authority' means the council of that borough or district. 1904.
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Section 17.—(1) Any council having powers under this Act shall establish an education committee or education committees, constituted in accordance with a scheme made by the council and approved by the Board of Education: Provided that if a council having powers under Part II. only of this Act determine that an education committee is unnecessary in their case, it shall not be obligatory on them to establish such a committee.

(2) All matters relating to the exercise by the council of their powers under this Act, except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers shall, unless in their opinion the matter is urgent, receive and consider the report of the education committee with respect to the matter in question. The council may also delegate to the education committee, with or without any restrictions or conditions as they think fit, any of their powers under this Act, except the power of raising a rate or borrowing money.

(3) Every such scheme shall provide—

- (a) for the appointment by the council of at least a majority of the committee, and the persons so appointed shall be persons who are members of the council, unless, in the case of a county, the council shall otherwise determine;
- (b) for the appointment by the council, on the nomination or recommendation, where it appears desirable, of other bodies (including associations of voluntary schools), of persons of experience in education, and of persons acquainted with the needs of the various kinds of schools in the area for for which the council acts;
- (c) for the inclusion of women as well as men among the members of the committee;
- (d) for the appointment, if desirable, of members of school boards existing at the time of the passing of this Act as members of the first committee.

* * * * *

Section 21.—(3) A scheme under this Act when approved shall have effect as if enacted in this Act, and any such scheme, or any provisional order made for the purposes of such a scheme, may be revoked or altered by a scheme made in like manner and having the same effect as an original scheme.

Buckmaster, K.C., and O. Leigh Clare for the plaintiff. The scheme, having been approved by the Board of Education, has the same effect as if enacted in the Act—section 21 (3). The provision in clause 6 of the scheme that the council should determine the order in which the members of the education committee should retire only empowered the council to determine once and for all the order of retirement. The council, having by their resolution of April 20, 1903, exercised that power, were *functi officio*. The resolution of April 18, 1904, by which the council purported to vary the resolution of April 20, 1903, was therefore *ultra vires* and invalid.

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Astbury, K.C., and *S. G. Lushington*, for the defendant council. A distinction must be drawn between acts of the council done under the Act and the scheme and acts done by virtue of their own discretion. The plaintiff having been duly elected a member of the education committee, it is not suggested that the council can deprive him of his office until his term expires. But the scheme provides that one-third of the members are to retire every year, and gives the council power, in the exercise of their discretion to determine the order of their retirement. Provided, therefore, that the council did nothing contrary to the provisions of the scheme, it was open to them, in the exercise of the discretion thus vested in them, to rescind the resolution of April 20, 1903, and to substitute for it the resolution of April 18, 1904, notwithstanding that the effect of the latter was to shorten the plaintiff's term of office.

Further, the plaintiff is not entitled to maintain the present action. The office of member of the education committee is a purely administrative office, as it is clear from section 17 (2) of the Act that the committee possess no property. There is no decision that a purely administrative office confers a vested interest upon the holder. *Aslatt v. Southampton Corporation* (1880) 16 Ch. D. 143; 50 L. J. Ch. 31, and *Livingstone v. Westminster City Council*, 1904, 2 K. B. 109; 2 L. G. R. 581; 73 L. J. K. B. 434, are therefore distinguishable. The defendant council have, however, no desire to press this objection.

Buckmaster, K.C., was not called on to reply.

BUCKLEY J. By section 17 (1) of the Education Act, 1902, the council had power to "establish an education committee or education committees, constituted in accordance with a scheme made by the council and approved by the Board of Education"; and by section 21 (3), "A scheme under this Act when approved shall have effect as if enacted in this Act, and any such scheme, or any provisional order made for the purposes of such a scheme, may be revoked or altered by a scheme made in like manner and having the same effect as an original scheme."

What took place was this: The Barry Urban District Council made a scheme, which was duly approved under the Act of Parliament, by which it was provided that the education committee should, when complete, consist of nine members, to be determined as therein mentioned, with a provision in clause 6 that, subject to something which I need not read, the members of the committee should hold office for a period of three years, provided nevertheless that one-third should go out of office on May 1 in the year 1904 and in each succeeding year, and that the council should determine the order in

which they should retire. Now it is to be noticed that the Act simply provides that the council are to establish an education committee. The number of the members of the committee, how they are to retire, and all other details, are left, so far as the Act is concerned, to be determined under the term "establish." The council are to establish the committee, determine its constitution, and so on ; and then that which they so establish is to be "the education committee," and the scheme is not to be altered except by a scheme made in like manner as an original scheme. Under the term "establish" they either could, or they could not, determine the method of retirement. If they could not determine the method of retirement, of course they could not resolve that one of the members should be retired at a particular date. I have no doubt myself that they could determine the method of retirement. If they determined the method of retirement, could they reserve to themselves power from time to time to vary the method of retirement which they had once established under the Act of Parliament? I think not. What they did was this : At a meeting of April 20, 1903, they appointed certain persons, of whom Mr. Milward, the plaintiff in this action, was one. They then went on to provide in the same resolution that certain persons, of whom Mr. Milward was not one, should retire at the end of the first year, and that at the end of the second year certain persons, of whom Mr. Milward was one, should retire, and that at the end of the third year certain other persons should retire. Subsequently, on April 18, 1904, they passed a resolution that so much of the resolution passed in 1903 deciding that a certain lady, Miss Meredith, should retire at the end of the first year, and Mr. Milward at the end of the second year, should be rescinded, and that in lieu thereof Miss Meredith should retire in 1905, which would be the second year, and Mr. Milward retire on May 1, 1904, which would be the first year ; that is to say, the council purported to rescind a resolution at which they had previously arrived, that Mr. Milward should retire in the second year, and required him to retire in the first year instead. I think they had no power to do so. When in 1903 the council passed the resolution that he be appointed and that he do retire at the end of the second year they were *functi officio* until they procured a new scheme under section 21 (3) of the Act. The council had appointed Mr. Milward to be a member of the education committee to hold office until May 1, 1905. The argument on the other side really comes to this—that, by introducing into the scheme the words "the council shall determine the order in which they shall retire," they had provided that the council shall from time to time determine the order in which they should retire. I do not think that they had any power to do that. The council's one power was to make a scheme which was

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to be a final scheme, and they could not make a scheme as to which they could say, "This is not to be a final scheme, but is to be revocable and alterable as we from time to time think proper." The Act of Parliament prohibits that by section 21 (3), which says that a scheme may be revoked or altered by a scheme made in like manner, but not otherwise. I do not think the council had any power to reserve to themselves by the scheme any authority to vary from time to time that which they had done under the scheme. I think that the effect of this resolution in 1903 is the same as if there had been written in the scheme, "The members shall consist of nine persons, of whom Mr. Milward shall be one, and Mr. Milward shall hold office until 1905." I do not think that the council had any power to alter that.

A question was suggested, though counsel for the defendant council said he was not in a position to raise it, as to whether Mr. Milward could sue in respect of an office in which he had no property—a mere administrative office. Of course the question would be capable of being raised somehow by the defendants or others interested in being in office, but counsel for the defendant council does not raise the question that the plaintiff is not the proper person to sue, and he asks for a decision, and says there is no defect as regards the power to sue.

I think, therefore, that the plaintiff is entitled to a declaration that the resolution that he should retire in 1904 is *ultra vires*, and that he is entitled to act as a member of the committee until May, 1905, and that an injunction must go to restrain the defendant council from acting contrary to the Act.

Solicitors for the plaintiff—Burton, Yeates, and Hart, for J. A. Hughes, Barry.

Solicitor for the defendant council—Leonard H. West, for T. B. Tordoff, Barry.

High Court of Justice.

CHANCERY DIVISION.

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SHARPINGTON v. FULHAM GUARDIANS.

July 5, 6.

Poor Law—Guardians—Building contract—Breach—Damages—Reference to arbitration—“Neglect or default in the execution of any public duty”—Limitation of time for commencement of proceedings—“Debt claim or demand incurred or become due”—Public Authorities Protection Act (56 & 57 Vict. c. 61), s. 1 (a)—Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), ss. 1 and 4.

The defendant guardians entered into a building contract with the plaintiff for the execution of certain works required by them in the execution of their public duties. The contract contained the usual arbitration clause. The plaintiff completed the contract in May, 1901. In addition to the sum paid to him by the defendants, the plaintiff claimed a further sum for expenses incurred, as he alleged, through the acts negligence or defaults of the defendants, and delivered particulars of this claim in September, 1902. The claim was referred to arbitration, but the defendants took objections to the proceedings on the ground that they had not been commenced within the six months limited by section 1 (a) of the Public Authorities Protection Act, 1893, and also on the ground that inasmuch as the claim had not been paid within the time limited by section 1 of the Poor Law (Payment of Debts) Act, 1859, the defendants could not now pay it.

Held, (1) that a breach of a private contract entered into by guardians in execution of their public duties was not “a neglect or default” in the execution “of any public duty or authority” within section 1 of the Public Authorities Protection Act, 1893, and consequently the limit of six months prescribed by section 1 (a) for the commencement of proceedings did not apply to a reference to arbitration in respect of such breach:

(2) that the demand for a reference to arbitration was not a commencement of proceedings within the meaning of section 4 of the Poor Law (Payment of Debts) Act, 1859.

(3) that the claim for damages for breach of contract would not constitute “a debt claim or demand lawfully incurred or become due” within the meaning of section 1 of the Poor Law (Payment of Debts) Act, 1859 until the amount of the damages had been ascertained either by the award of an arbitrator or in some other manner provided by law.

THIS was an action for the determination of two questions of law raised by the defendant guardians in an arbitration between them and the plaintiff arising out of a building contract in the following circumstances:—

By a building contract, dated January 18, 1900, the plaintiff agreed to execute certain works, consisting of the alteration of a house, No. 9,

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Parsons Green, S.W., into a receiving house for children, required by the defendants in the execution of their statutory powers, for the sum of £4,599, subject to certain general conditions therein incorporated, which were of a character usual in contracts of that nature. The arbitration clause provided as follows:—"If any dispute question difference or controversy shall arise between the parties to the contract other than questions respecting the quality of the materials or labour or as to payments to be made as the work progresses or as to the matters provided for by clauses 3 and 16 (all of which are to be left to the sole decision of the said architect) then and in every or any such case the matter or difference shall be and is hereby referred to some person to be appointed by the President of the Royal Institute of British Architects for the time being, and it shall be and it is hereby agreed that this reference shall be made a rule of Her Majesty's High Court of Justice and that the arbitration shall be conducted in all respects according to the provisions as to arbitration contained in the Arbitration Act, 1889, and shall have all the incidents and consequences of an arbitration under that Act."

The plaintiff duly proceeded with and completed the work to the satisfaction of the defendants' architect. The contract was completed on May 3, 1901. The sum of £5,751 15s., in respect of the original sum named in the contract and additions, was duly paid by the defendants to the plaintiff, but he claimed to be paid a further sum of £1,357 19s. for extra cost incurred, as he alleged, through the acts, negligence, or defaults of the defendants, and their extensive alterations and changes. Particulars of this claim were delivered in September, 1902, and on November 21 and 23, 1902, a joint request for arbitration was signed. The claim came before the arbitrator in March, 1903. The defendants raised two preliminary objections before the arbitrator. First, they said that as the plaintiff did not commence proceedings within six months after the acts, negligence, or default now complained of, nor within six months next after the ceasing thereof, the present action would not lie by reason of section 1 (a) of the Public Authorities Act, 1893.

Further, the defendants said that the debt, claim, or demand could not now be paid by the defendants, by reason of sections 1 and 4 of the Poor Law (Payment of Debts) Act, 1859, as the same was incurred or became due on or before May 3, 1901, the date of the completion of the contract, and was not paid within the half-year in which the same was incurred or became due, nor within three months after the expiration of such half-year, the commencement thereof being reckoned from March 30, 1901, the time when the last half-year's account was or ought to have been closed according to the Poor Law Board's Order of January 14, 1867.

The arbitration proceedings were accordingly adjourned, in order that the questions of law raised might be determined by the Court.

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Section 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), provides that :—

Section 1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Sections 1 and 4 of the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), provide as follows :—

Section 1. With respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the Order of the Poor Law Commissioners or Poor Law Board : provided that the Poor Law Board by their Order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand.

Section 4. If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officers the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by mandamus or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section.

Upjohn, K.C., and *Beddall* for the plaintiff. Section 1 of the Public Authorities Protection Act, 1893, deals only with neglects or defaults in the execution of public duties ; it has no application to a breach of a private contract such as is the subject-matter of this action. Statutory provisions of this character do not apply to contracts of a private nature : per Brett M.R. in *Midland Railway Co. v. Withington Local Board* (1883) 11 Q. B. D. 788 ; 52 L. J. Q. B. 689, which was a case under section 264 (now repealed) of the Public Health Act, 1875, and

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per Lord Ellenborough in *Wallace v. Smith*, (1804) 5 East. 115; and in *Davies v. Swansea Corporation* (1853) 8 Ex. 808; 22 L. J. Ex. 297, it was admitted on behalf of the defendants, in argument, that a similar statutory enactment had no application to such contracts. The reference to arbitration is not "a proceeding" within the meaning of the section.

Butcher, K.C., and *A. A. Hudson* for the defendants. The act of the defendants in entering into this contract was an "act done in pursuance or execution of a public duty or authority" within the section. In *Fielden v. Morley Corporation*, 1899, 1 Ch. 1; 67 L. J. Ch. 611, affirmed in the House of Lords, 1900, A. C. 133; 69 L. J. Ch. 314; *The Ydun*, 1899, P. 235; 68 L. J. P. 101; *Toms v. Clacton Urban District Council* (1898) 14 Times L. R. 474; *Grand Junction Waterworks Co. v. Hampton Urban District Council* (1899) 15 Times L. R. 412; *Parker v. London County Council* (1904) 2 L. G. R. 662; 73 L. J. K. B. 561; *Ambler and Sons v. Bradford Corporation*, 1902, 2 Ch. 585; 71 L. J. Ch. 744; and *Chamberlain and Hookham, Ltd. v. Bradford Corporation* (1900) 83 L. T. R. 518, the defendants were all sued in respect of neglect or default in the execution of public duties, and the Act was held to apply. Similarly the breach of contract in respect of which this action is brought is a neglect or default in the execution of a public duty within the meaning of section 1 (a), and the action ought to have been brought within six months of such neglect or default. [They also referred to *Attorney-General v. Margate Pier and Harbour Proprietors*, 1900, 1 Ch. 749; 69 L. J. Ch. 331.]

Upjohn, K.C. replied.

FARWELL J. The plaintiff is a contractor who entered into a contract with the defendants, the Guardians of the Poor of the Parish of Fulham, for the alteration of certain buildings into a house to be used as a receiving house for children. The supply of such a house is one of the statutory duties cast on the defendants, and they accordingly have power to enter into a contract for supplying the same. The contractor complains that he has not been paid the full amount due to him, and there are the usual claims for extras and omissions and other charges. In effect, the action is for breach of contract to pay him for the work he has done. He has commenced proceedings before an arbitrator under the clause usual in contracts of this nature. The defendants took two preliminary objections to those proceedings, and this action has been brought for the determination of the points of law so raised.

The first point that has been argued is that taken under the Public Authorities Protection Act, 1893, s. 1 (a). [His Lordship read

section 1 (a), and continued :—] It is said that this breach of contract with the contractor, now sued upon, is within that first section, and is a “neglect or default in the execution of a public duty.” It is curious that there is no decision on the point to be found.* In my opinion this is an attempt to carry the protection of the Act very much further than has been done in other cases or than the Court would do unless it were unavoidable. Public authorities perform many functions now in the place of private contractors, and they employ workmen, and deal with tradesmen, and enter into all sorts of contracts, and this is the first time that it is sought to apply this section to such a contract as this. In fact, counsel for the defendants, in his argument, did not have the courage to say that it did apply to every contract of this nature. If I were to decide in favour of the defendants, I think it would necessarily follow that every contract entered into by a public authority was an act done in pursuance of a public duty or authority, and, therefore, was one to which the Act applied. I do not see how to draw the line.

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A number of cases have been cited. The first case, *Fielden v. Morley Corporation*, 1899, 1 Ch. 1 ; 67 L. J. Ch. 611, does not touch the question at all. It was an action for an injunction to restrain the commission of a tort in connection with a water supply for which the corporation claimed a statutory power. That seems to me not to touch the present case. The next case cited was that of *The Ydun*, 1899, P. 236 ; 68 L. J. P. 101, in which an action of tort was brought against the Preston Corporation who were acting in pursuance of their public duties. The action failed, and it was held that the case fell within the Act for the purposes of costs. The President says : “I cannot doubt that the corporation of Preston, in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality.” *Parker v. London County Council* (1904) 2 L. G. R. 662 ; 73 L. J. K. B. 561, was also a case where the defendants were acting in pursuance of their public duties, and can be explained in the same way. Then there is the case of *Ambler and Sons, Ltd. v. Bradford Corporation*, 1902, 2 Ch. 585 ; 71 L. J. Ch. 744. The actual decision in that case in no way affects the question before me, but Romer L. J. makes a suggestion which shows that he had the present point before his mind. The last case was *Chamberlain and Hookham, Ltd. v. Bradford Corporation* (1900) 83 L. T. 518, before Kekewich J., in which the patentees sued

* His Lordship was not referred to Buckley J.’s decision in *National Telephone Co., Ltd. v. Kingston-upon-Hull Corporation* (1903) 1 L. G. R. 777, 786, until after he had delivered judgment.

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the corporation for infringement of their patent, and the action having failed, the learned judge held that the corporation were attacked in respect of something done in the performance of their public duty, and gave them solicitor and client costs. That case differs entirely from this. The public duty which is here cast upon the defendant guardians is a duty to supply a receiving house for poor children. A breach of that duty would be an injury to the class of poor children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out that public duty the defendants have power to build a new house or alter an old house, and they accordingly have entered into a private contract, and it is a breach of that contract that is the subject-matter of this action. This is not an action by one of the class of poor children or by the public in respect of that duty, but it is a complaint by a private individual in respect of an injury done to him, and the only way in which the public duty comes in at all is that if it were not for the statutory power incidental to such public duty a contract of this nature would be *ultra vires* of the defendants. I cannot, therefore, find any ground for saying that this particular contract is within the Act. Take this case—suppose the contract related to bricks or fire-clay, and the public body had chosen to make its own bargain for those particular materials, counsel for the defendants would not go so far as to say that such a contract would be within the Act; but I do not see why, logically, it would not, if his contention be correct.

The result is that, so far as this objection goes, the action will lie.

The Court considered the second objection by the defendants on the following day.

Upjohn, K.C., and *Beddall* for the plaintiff. The amount of this claim not having been yet ascertained, it is not a "debt claim or demand" within the meaning of section 1 of the Poor Law (Payment of Debts) Act, 1859, and time will run under that section from the date of the award, and not from the time of payment on completion or when the claim was sent in: *Midland Railway Co. v. Edmonton Union*, 1895, A. C. 485; 64 L. J. Q. B. 710; *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, 1896, A. C. 477; 65 L. J. M. C. 201; and *Manchester, Sheffield, and Lincolnshire Railway v. Doncaster Union*, 1897, 1 Q. B. 117; 66 L. J. Q. B. 75.

Butcher, K.C., and *A. A. Hudson* for the defendants. The plaintiff in this case is going to an arbitrator instead of going to a court of law, and, therefore, these are proceedings before a competent authority, and the application to the arbitrator or the sending in of the claim was a commencement of proceedings within the Act, and such proceedings

ought to have been brought within the statutory period: *Baker v. Billericay Guardians* (1863) 2 H. & C. 642; 33 L. J. M. C. 40; *Reg. Sharpington v. Stepney Union* (1874) L. R. 9 Q. B. 383; 43 L. J. M. C. 145. The cases cited on behalf of the plaintiff are all distinguishable on the ground that they were all cases dealing with costs. This claim was a debt, claim, or demand within the meaning of the section. Where there is a claim for a breach of contract, whether for a definite sum or for unliquidated damages, the claim must be made within the time specified in the Act or else the claimant will be barred. There must be a specific claim with which the guardians can deal, and that was what Lord Herschell meant when he said in *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, 1896, A. C. 477; 65 L. J. M. C. 201, that a sum must be ascertained. The guardians in this case were under a legal liability to pay, and that fact distinguishes it from the cases in the House of Lords. In *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, the ascertainment of the amount of costs was necessarily a condition precedent, as the question was one of costs, and costs cannot be sued for until they are taxed, the amount having previously to be ascertained, as Lord Herschell says, "in manner provided by law." That, however, does not apply to this case, where no condition precedent existed, for under this contract arbitration was not a condition precedent to bringing an action: *Scott v. Avery* (1856) 5 H. L. C. 811; 25 L. J. Ex. 308. Moreover, the true ground of the decision in *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, turned on the practice of the House with regard to costs, and the Court of Appeal in *Manchester, Sheffield, and Lincolnshire Railway Co. v. Doncaster Union*, 1897, 1 Q. B. 117; 66 L. J. Q. B. 75, merely followed upon a question of costs the earlier decision in the House of Lords.

FARWELL J. This is an action on a contract for the execution of works. That contract contains the usual arbitration clause, not one making reference to arbitration necessarily a condition precedent to an action, but one providing "that if any dispute question difference or controversy shall arise between the parties to the contract"—other than certain specially excepted questions—"then and in every or any such case the matter or difference shall be and is hereby referred" to an arbitrator to be appointed as therein mentioned. The fourth and fifth paragraphs of the statement of claim which are admitted by the defendants contain the following allegations:—"Full particulars of the plaintiff's claim under this paragraph, amounting to the sum of £1,357 19s., and of all matters referred to in this paragraph were delivered prior to the commencement of the arbitration hereafter mentioned in a document dated September, 1902. In the month of March, 1903, the said claim came before an arbitrator duly appointed

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under the terms of the said contract, when the preliminary question was raised by the defendants that no portion of the said claim of the plaintiff could as a matter of law be recovered by him. Inasmuch as the ascertaining of the true amount which the plaintiff was entitled to be paid (if his claim was in fact a valid one at all) will involve a very lengthy and costly investigation the said arbitration was adjourned in order that the parties might if possible agree upon some method by which the question of law might first be determined, and by agreement between the parties this action has accordingly been brought." I disposed yesterday of one of the points raised. The one which has been argued to-day is under the Poor Law (Payments of Debts) Act, 1859. [His Lordship read sections 1 and 4, and continued:—] That Act has received judicial interpretation in the House of Lords and the Court of Appeal, and I can only follow those decisions. It has been said, first, that the application to the arbitrator or the claim sent in for the sum mentioned is a commencement of proceedings within the Act. That seems to be concluded by the case in the House of Lords of *Midland Railway Co. v. Edmonton Union*, 1895, A. C. 485; 64 L. J. Q. B. 710. That was a case where there was an order for payment of costs, and the application to tax was made within the three months limited by section 1, but the actual taxation of the costs took place after the expiration of the three months, and no proceedings to enforce payment were commenced within the three months after the expiration of the half-year in which the costs were taxed, and it was held that that application to tax was not a commencement of proceedings within the meaning of the fourth section. Lord Herschell states the ground of that decision, as follows:—"It is to be observed that the enactment in question is not in the nature of a Statute of Limitation. It is a fetter on the action of the guardians—a prohibition against payment after a certain date. I cannot but doubt whether it was intended to prohibit them from paying after the lapse of three months from the termination of any half-year a debt which they were not at any time during that period liable to pay. It strikes me that the prohibition must refer to something which they might have paid, and did not, and that it can scarcely have been contemplated that they were either to pay a debt before it became payable or to be unable to pay it at all." Now if it be the conclusion that the application to tax is not a proceeding within the meaning of the Act, the ground being that they were not bound to pay until the amount had been ascertained by taxation, it appears to me that a mere claim like the present for a sum which is referred to in the way which I have read in a passage in the statement of claim which is admitted by the defendants, cannot possibly be a proceeding within the meaning of the Act. Certainly the reason

given by Lord Herschell applies—"that it can scarcely have been contemplated that they were either to pay a debt before it became payable or to be unable to pay it at all." The Edmonton Guardians could, of course, in that case have paid the costs without taxation if they had thought fit. The defendants could, of course, in this case have paid the claim without arbitration if they had thought fit. Inasmuch as they thought fit to go to arbitration in this present case, they have shown that they did not consider themselves bound to pay, and they were not in fact bound to pay. It is perfectly obvious from the pleadings that the defendants would not pay a claim like this without the amount being ascertained by arbitration. Therefore, the first decision in the House of Lords settles the point that the mere claim or demand for arbitration is not a proceeding within the meaning of the Act.

Then the defendants' second point is that the second case cited has no application to this present case. That was the case of *West Ham Union v. St. Matthew, Bethnal Green, Overseers*, 1896, A. C. 477; 65 L. J. M. C. 201, in which it was held that an order of the House for the payment of costs of an appeal without specifying the amount does not constitute a debt, claim, or demand within the meaning of the Act. The grounds for that decision are stated by Lord Herschell, and in my opinion the House has now conclusively determined the construction of the Act. Lord Herschell says, "The first section was not designed, as Statutes of Limitation are, to prevent stale demands, though it may incidentally bar the remedy of creditors who delay asserting their rights. Both in form and purpose it is an injunction on the guardians to discharge their obligations promptly. It provides that the debt, claim, or demand "shall be paid" within the time limited. I think it must refer to debts which the guardians could and ought to have paid within the time limited, and not to such as could not properly be paid within that time, inasmuch as the amount had not been ascertained in the manner provided by law." "The manner provided by law" there, in my opinion, does not mean a condition precedent, as counsel for the defendants argued, but in a manner provided by law, as it is in a case of taxation or of reference to arbitration, which either party can insist upon, and Lord Herschell says, "In my opinion it was not until the certificate of the Clerk of the Parliaments was given that the statutory provision became applicable." Then it was said that Lord Macnaghten's judgment shows that the decision in that case turned on the special circumstances of costs given by the House of Lords, and on the practice of the House. That is disposed of by the Court of Appeal in *Manchester, Sheffield, and Lincolnshire Railway v. Doncaster Union*,

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1897, 1 Q. B. 117; 66 L. J. Q. B. 75. There it was held that a judgment of the Court of Appeal for payment by guardians of the poor of the costs of an appeal does not constitute "a debt, claim, or demand lawfully incurred or become due" within the Poor Law (Payment of Debts) Act, 1859, s. 1, until the amount has been determined on taxation, and the time for payment limited by that Act runs from the date of the allocatur, and not from the date of the judgment. Now Lord Esher there says, "It is true to say that outside this Act of Parliament a judgment for costs enables the party in whose favour it is given to say that they are due, and to maintain an action for them, so that the right to costs arises on the judgment of the Court, though at that time they are not taxed; but within the meaning of this Act, where those who are ordered to pay costs are a board of guardians, they are not bound to pay till the costs are taxed; and that being so, the period from which the time limited is to run is not that at which judgment was given, but that at which they are bound to pay—that is, the time when the costs are ascertained by taxation. I think we are bound by that decision, and must say that in this case the time limited by the statute ran from the completion of the taxation." I read that because of the argument that that is not so, and that an action for costs cannot be brought before they are taxed within the meaning of the Act, and that the period from which the time limit is to run is that at which the guardians are bound to pay, that is, of course, the time when the costs are ascertained by taxation. In the same case Rigby L.J. says: "The question that arises on such a case as the present is, to my mind, not whether an action could be brought to recover untaxed costs, or whether an order for such costs has been made, but whether the circumstances are such that the guardians are under an obligation to pay." No one can read the admitted facts in the statement of claim in this case and say that the guardians are obviously under an obligation to pay. There was only one other case cited, to which I need refer, namely, *Baker v. Billericay Union* (1863) 2 H. & C. 642; 33 L. J. M. C. 40. That case really was determined on the pleading. It was previous to the cases with which I have dealt, and I am not sure that it is consistent with the decisions in the House of Lords. The result is that in my opinion the second objection also fails.

Solicitors for the plaintiff—Booth and Smee.

Solicitor for the defendants—T. Blanco White.

High Court of Justice.

KING'S BENCH DIVISION.

McNAIR v. HORAN.

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July 11.

Adulteration—Margarine—Marking cases—"Package"—Margarine retailed from open tubs—Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6.

An open tub in the shop of a dealer in margarine, out of which he scoops margarine which he retails to his customers, is a "package" containing margarine within section 6 of the Margarine Act, 1887, and must be marked "Margarine," pursuant to that section accordingly.

CASE stated by a metropolitan police magistrate, who had dismissed a complaint preferred by Alexander McNair (the appellant) under the Margarine Act, 1887 (50 & 51 Vict. c. 29), against Patrick Horan (the respondent) for that he, on Tuesday, December 8, 1903, at 41, York Street, in the city of Westminster, being a person dealing in margarine, did unlawfully expose for sale certain margarine contained in an open package which was not branded or durably marked "Margarine" in printed capital letters, contrary to the Margarine Act, 1887.

The facts, &c., were stated in paragraphs 5 *et seq.* of the case, as follows:—

"5. (a) The appellant is a sanitary inspector appointed by the Mayor, Aldermen, and Councillors of the city of Westminster.

(b) The respondent keeps a shop at 41, York Street, and is a dealer in margarine by retail at such shop.

(c) The respondent on December 8, 1903, had in his said shop, at the back of his counter, in full view of anyone entering the said shop, several tubs, open at the top, containing margarine. As the respondent sold the margarine he scooped it from the said tubs for the purpose of delivering the same to his customers.

(d) The said tubs containing the margarine were not branded or marked "Margarine," in accordance with section 6 of the Margarine Act, 1887, or in any way.

(e) The appellant, on the said December 8, 1903, obtained a sample from one of the said tubs of margarine, and duly fulfilled his obligations in dealing with such sample in compliance with the provisions of the said Margarine Act, 1887.

6. On the part of the appellant it was contended that the tub from which the said margarine was taken was a package containing margarine, and that the same not being branded or marked in accord-

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ance with section 6 of the Margarine Act, 1887, the respondent was guilty of the offence with which he was charged.

7. The magistrate was of opinion that the said tub contained margarine, but, having regard to the mode in which it was used, it being only used as a store for the margarine, it was not a package within the meaning of section 6 of the Margarine Act, 1887, and therefore dismissed the summons.

8. The question upon which the opinion of the Court is desired is whether, upon the above statement of facts, the magistrate came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Section 6 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), provides as follows :—

Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations :

Every package, whether open or closed, and containing margarine, shall be branded or durably marked "Margarine" on the top, bottom, and sides, in printed capital letters, not less than three quarters of an inch square ; and if such margarine be exposed for sale, by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, "Margarine" ; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square "Margarine."

D. C. Bartley, for the appellant, submitted that the learned magistrate had arrived at a wrong conclusion, and that respondent should have been convicted.

The respondent did not appear.

LORD ALVERSTONE C.J. Knowing the object of the Margarine Act, 1887, as we do, it is quite plain to us that this case ought to go back to the magistrate to convict the respondent of an offence against section 6.

KENNEDY J. I am of the same opinion.

PHILLIMORE J. I agree.

Appeal allowed. Case remitted.

Solicitors for the appellant—Allen and Son.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

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FITCH v. BERMONDSEY GUARDIANS.

July 13.

Poor Law—Lunatics—County Asylum—Weekly charge—Maximum charge—Out-county patients—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283.

Section 283 (3) of the Lunacy Act, 1890, does not enable the visiting committee of a pauper lunatic asylum to fix a charge in respect of pauper lunatics sent from or settled in parishes and places outside the county or borough to which the asylum belongs exceeding fourteen shillings in all. The special powers of the subsection are consequently available only where the charge fixed under subsection (1) of the section is less than fourteen shillings a week.

APPEAL by the plaintiff from a judgment of the judge of the City of London Court in favour of the defendant guardians in an action in which the plaintiff, clerk to and suing on behalf of the visiting committee of the City of London Lunatic Asylum, claimed payment for the expenses of the maintenance of a pauper lunatic chargeable to the defendants who had been confined in the asylum, at the rate of 21s. a week from February 15, 1904.

The defence was that the visiting committee were debarred by section 283 (3) of the Lunacy Act, 1890, from charging more than 14s. a week in respect of a pauper lunatic chargeable to a union not in the City.

Up to February 4, 1904, the visiting committee's scale of charges under section 283 of the Act of 1890 had been 12s. 3d. a week in respect of pauper lunatics chargeable to the City and 14s. a week in respect of lunatics sent from or settled in parishes and places not in the City.

On February 4, 1904, the visiting committee passed a resolution that "the charge for out-county patients be increased on and from the 15th instant from 14s. to 21s. per week each, such charge being the 12s. 3d. fixed by the committee under the provisions of section 283 (1) of the Lunacy Act, 1890, and a further sum of 8s. 9d. per week hereby fixed in respect of each of such patients under the provisions of section 283 (3) of the said Act, any excess created by the payment of such further sum being paid over to the building and repair fund of the asylum."

At the trial in the City of London Court it was arranged that the corporation be added as plaintiffs.

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Section 283 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), is as follows :—

(1) Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum, and of such amount that the total of such weekly sums shall be sufficient to defray such expenses and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered.

(2) If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs, may by order direct such addition to be made to the weekly sum as to the local authority seems necessary, and every such order shall be signed by the clerk of the local authority, and forthwith published in a local newspaper.

(3) A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs.

(4) Any excess created by the payment of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund, to be applied by the committee to the altering, repairing, or improving the asylum, and the committee shall annually submit to the local authority a detailed statement of the manner in which such fund has been expended.

Danckwerts, K.C., and *Neilson* for the plaintiffs. The question is whether a county possessed of a lunatic asylum can under section 283 of the Lunacy Act, 1890, charge more than 14s. a week for an out-county patient. Subsection (1) of that section limits the amount that can be charged for an in-county patient, *i.e.*, a pauper lunatic chargeable to or sent from a place in the county, to 14s. a week normally. Subsection (2) enables the charge for an in-county patient to be raised beyond 14s. a week if it is found necessary. Subsection (3), on which the present question more directly turns, provides that the visiting committee may fix a "greater weekly sum, not exceeding fourteen shillings," to be charged in respect of out-county patients; and subsection (4) that any excess created by such greater weekly sum may be carried to a building and repair fund. It is submitted that the effect of subsection (3) is, not to limit the total charge for an out-county patient to 14s., but to limit the excess charged for out-county patients over the charge for in-county patients to 14s. Thus, if in-county patients are charged for at 12s. a week, it is submitted that a charge of 26s. a week may be made for out-county patients.

The Act of 1890 is a consolidation Act, and section 283 should be construed in the light of the enactment it replaces, namely, section 54 of the Lunatic Asylums Act, 1853. That section, so far as is material, was as follows: "Every committee of visitors shall fix a weekly sum to be charged for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic confined in such asylum . . . provided

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always that any such committee may, if they think fit, fix a greater weekly sum to be charged as aforesaid in respect of pauper lunatics other than those sent to such asylum from or settled in some parish or place situate in any county or borough to which such asylum belongs; provided also that such sum shall in no case exceed the rate of fourteen shillings per week; but if the aforesaid rate of fourteen shillings be found insufficient . . . it shall be lawful for the . . . justices of the county or borough . . . to which such asylum may belong . . . to make such addition to such rate as to them respectively shall seem fit and necessary, and to make an order or orders accordingly. . . .” Under the Act of 1853, it is submitted, the charge for in-county patients was not limited, and there was power to charge 14s. a week extra for out-county patients, with power to make a still further charge in special cases if necessary. Section 283 of the Act of 1890 now, no doubt, limits the charge for in-county patients to 14s. a week, but, it is submitted, preserves the right to charge an additional 14s. a week for out-county patients.

If the Court do not accept this construction of section 54 of the Act of 1853, the appellants still rely on the words of section 283 of the Act of 1890 itself.

Section 54 of the Act of 1853 referred to a charge for the “lodging” of the lunatic as well as for other matters. The word lodging is left out of section 283 of the Act of 1890, because as appears from other sections in Part X. of the Act it is intended that the cost of providing the necessary housing is to be defrayed otherwise in the case of in-county patients. The scheme of the Legislature is, however, that the out-county patients should contribute to the costs of providing the housing. This appears from the provisions for carrying the excess produced by the extra charge to a building fund. This scheme will be defeated if the total charge for out-county patients is limited to 14s. a week, for that may be no more than is charged in respect of other patients, and may produce no surplus that can go towards the expense of building.

R. C. Glen, for the defendants, was not called upon to argue.

LORD ALVERSTONE C.J. The point Mr. Danckwerts has raised in this case upon the construction of section 283 of the Lunacy Act, 1890, is certainly one of considerable ingenuity; but, in my opinion, the section does not admit of the construction he seeks to place upon it. I confess I am struck with the suggestion that the Lunacy Act, 1890, is a consolidation Act, and agree in thinking that it is, and that section 54 of the Act of 1853 did in fact allow the committee of visitors to fix an extra payment. Had it been possible for us to place the

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construction contended for by Mr. Danckwerts upon the present Act, I think we should have stretched a point to do so. But the words of section 54 of the Act of 1853 are these: "Every committee of visitors shall fix a weekly sum to be charged for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic confined in such asylum of such an amount that the same may be sufficient to defray the whole expense . . . provided always that any such committee may, if they think fit, fix a greater weekly sum to be charged as aforesaid in respect of pauper lunatics other than those sent to such asylum from or settled in some parish or place situate in any county or borough to which such asylum belongs. . . ." We there find the words "greater weekly sum," which now occur in section 283 (3) of the Act of 1890, and I feel satisfied that the greater weekly sum mentioned in section 54 of the earlier Act was the total amount to be charged, and not an additional sum, that is to say, the charge was to be, not an additional, but an inclusive charge. But even taking it so, it is not altogether conclusive, because Mr. Danckwerts contended, when it was so put to him, that even if he was unable to rely on section 54 of the Act of 1853, yet the Act of 1890 may in itself have altered the law as to this. I am, however, of opinion that the language of section 283 is too strong to admit of such a contention. Subsection (1) is as follows: "Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum. . . ." Mr. Danckwerts says that the framers of that section have dropped out the word "lodging" because the Act contains expressions in other sections which point to the provision of houses or asylums being defrayed in a different way. Possibly there may be some ground for supposing that that is the reason for the change in the language; but for my part I do not think any such change was intentional. In my opinion the intention was to introduce the words "maintenance and other expenses" in subsection (1) as a compendious form for embracing the words in section 54 of the Act of 1854, "lodging, maintenance, medicine, clothing, and care of each pauper confined in such asylum." We now come to subsection (2), which says, "If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs may by order direct such addition . . ."; and this addition or increase may be raised to any weekly sum they may think proper. Then follows subsection (3): "A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs." My view of this clause is that it empowers the committee, not to increase

upon the 14s., but in certain cases to fix a larger weekly sum not exceeding 14s. in all. The question is whether subsection (3) refers to the expense of the maintenance and other expenses of the pauper lunatic, or does it refer to an additional charge to be made in respect of out-county patients because of their admission to the asylum of another county? It was clearly competent to the Legislature to provide that the committee might fix charges in regard to out-county lunatics not exceeding in amount what in their discretion they might think right. Still, it appears to me that the words of subsection (3), "A committee may fix a greater weekly sum," refer to the same weekly sum mentioned in subsection (1), *i.e.*, a weekly sum not exceeding 14s. Therefore, in my view, it would not be in accordance with the fair construction of the language to treat it as an additional sum, for then the maximum would be 28s., and not 14s. In my opinion the section was intended to meet the case dealt with in the section of the earlier Act, which was this: that although the committee do not fix charges up to the maximum in the case of their own in-county patients, yet they may fix greater charges for out-county patients than for their own patients in respect of their maintenance and other expenses so long as they do not in fixing an additional charge exceed the weekly sum of 14s., which is the maximum. The language of the section is, therefore, too strong to admit of the argument Mr. Danckwerts has so properly pressed upon us. As to his argument based upon the words of subsection (4), "any excess created by the payment of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund . . .," in my view these words neither advance the argument one way or the other, for if the committee do not fix a greater charge for an out-county lunatic than for an in-county lunatic within the limit of 14s. a week no such excess can possibly arise; and if, on the other hand, they do fix a greater charge, and an excess arises caused by the difference between the sum charged for in-county lunatics and out-county lunatics up to the maximum of 14s., then the section empowers the committee to apply any such excess for the purposes named. Therefore, in my view, the language of subsection (4) does not warrant us in placing a construction upon subsection (3) different from the one I have indicated. Accordingly I have come to the conclusion that the object of subsection (3) of section 283 was merely to enable the committee to draw a distinction between an out-county pauper lunatic in comparison with one of their own in-county pauper lunatics within the maximum of 14s. a week, and that it was never intended to enable the committee to fix a new, separate, and altogether different charge in respect of an out-county lunatic received into their asylum in regard to the fact that the pauper in question came to their

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asylum from another county. I am, therefore, of opinion that, apart from an order made under subsection (2), no higher weekly charge than 14s. can be made, and that the appeal must be dismissed.

KENNEDY J. I am of the same opinion. After the able and interesting argument we have listened to, the matter certainly does not appear free from difficulty; but I confess the view I take of it is that if the language of the enactment be read simply and naturally any suggested difficulty disappears. Subsection (1) of section 283 provides that "every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum. . . ." Then the subsection goes on to provide that the sum for maintenance and other expenses when fixed is not fixed unalterably. It is a weekly sum which may from time to time be altered.

The maximum weekly payment being laid down by subsection (1) as 14s., it was no doubt considered by the framers of the enactment that a case might occur in which that maximum, *i.e.*, the 14s. a week, would be insufficient, in spite, as I imagine, of the exercise of due economy. Therefore the local authority who own the asylum are permitted to increase the 14s. a week when found insufficient for "the expenses of maintenance and other expenses of each pauper lunatic in the asylum," which are the purposes described in subsection (1). We then come to subsection (3), which refers to the greater weekly sum which the committee may fix in the case of pauper lunatics not "sent from or settled in a parish or place within the county or borough to which the asylum belongs." The committee can only fix a sum within the maximum of 14s.; but where, for instance, they have fixed the weekly charge for in-county patients at 12s., they may raise it in the case of out-county patients to a sum not exceeding 14s. To put the point in another way, they may draw a distinction between the pauper lunatic of whom they have a natural charge or care because of his belonging to their particular district, and the case of pauper lunatics who are sent to them from outside their district. Then perhaps it might be asked whether, assuming the committee have adopted this differential treatment of the two classes of pauper lunatics, the money arising from this differentiation of charge is to be applied to the ordinary purposes of every-day life, or whether it is to be applied to purposes of building and repair. This is met by subsection (4), which enacts that "any excess created by the payment of such greater weekly sum may"—not must—"if the visiting committee think fit, be paid over to a building and repair fund, to be applied by the committee to the altering, repairing, or improving the asylum. . . ." It may well be that, under the scheme of this consolidation Act, it might be said

that this differential charge being found unnecessary for the mere purpose of maintenance was a charge which ought not to be made for that purpose, and that subsection (4) justified the application of that difference to some reasonable and necessary purpose, such as altering or improving the structure of the asylum, which it might be supposed should to some extent be provided for by the extra payment received in respect of out-county pauper lunatics. In my opinion the whole four subsections of section 283 are to be taken as one, and must be read accordingly.

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PHILLIMORE J. I am of the same opinion. The Lunacy Act, 1890, is a consolidation Act, the sections of which have been gathered from earlier Acts. For instance, subsection (4) of section 283 reproduces section 6 of the Lunacy Acts Amendment Act, 1862 (25 & 26 Vict. c. 111), the sidenote to which is "excess of payment may be paid to a building and repair fund." The whole scheme of section 283 is apparently this. It has been assumed by the Legislature that pauper lunatics can, as a rule, be maintained, in the general sense of the word, for something not exceeding 14s. a week. The Legislature then, if by economy or good management, or from the fact that both the cost of provisions and wages are low in the district in which the asylum is situate, the visiting committee find that they can maintain their home pauper lunatics for less—say 12s. a week—allows them to charge for out-county pauper lunatics up to 14s. a week, and to pay if they desire it the difference between the 12s. and 14s. a week to a fund for repairing and improving the fabric of their building; but, if for any reason whatever, the managers cannot keep their expenditure down under 14s. a week for each patient, they shall not make a greater charge in respect of the out-county patients than they do in respect of their home patients. That I take to be the scheme of the section read as a whole; but then there is subsection (2), which is intended to apply to an extreme case, where the 14s. a week will not suffice. Under that subsection the local authority are empowered to raise the standard both for out-county and in-county pauper lunatic patients to any sum they find necessary; and, when such is the case, the Legislature does not consider it right, since 14s. is the maximum for both classes, that more should be charged for the maintenance of out-county patients than the actual charge the committee have fixed in respect of their in-county or home patients. For these reasons I am of opinion the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants—The City Solicitor.

Solicitors for the respondents—Arkcoll, Cockell, and Chadwick.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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MILLARD v. BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL.

Streets—Private street works—Recovery of expenses—Change of ownership between completion of works and apportionment—Continuing liability of former owner—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

Expenses of private street works executed under section 150 of the Public Health Act, 1875, are recoverable from the person who was owner of the premises abutting on the street when the notice requiring the frontagers to execute the works was served and when the work was completed; although he has ceased to be owner of the premises before the expenses are apportioned or demanded.

Decision of Divisional Court, reported 2 L. G. R. 539, reversed.

Dicta of Cockburn C.J. in Reg. v. Swindon New Town Local Board (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, disapproved.

APPEAL from a decision of the Divisional Court on a case stated by justices in proceedings taken by the appellant council against the respondent for the recovery of £45 11s. 7d., and interest, in respect of expenses incurred by the council in executing private street works to a street called Carr Hill under section 150 of the Public Health Act, 1875.

The facts as stated by the justices are fully set out in the report of the case in the Court below, 2 L. G. R. 539. For the purpose of the present report the following short statement will suffice.

Notice to execute the works was served on the frontagers, including the respondent, who was at that time owner of certain premises abutting on the street, on June 8, 1899. The notice was not complied with, and the council executed the works themselves. The works were completed on December 4, 1901. On March 20, 1902, the respondent entered into a contract for the sale of his premises abutting on the street to Smith's Tadcastle Brewery, and on April 25, 1902, the premises were duly conveyed to the brewery. Notice of apportionment was served on the respondent on November 22, 1902, and the apportionment was not disputed by him. The amount apportioned on the respondent, £45 11s. 7d., with interest, was demanded of him on May 20, 1903. The respondent did not pay the sum demanded or any part thereof.

The justices made an order for the payment by the respondent of the sum demanded, with interest and costs; but stated a case for the High Court, raising the question whether the fact that the respondent had

ceased to be the owner of the premises before the date of demand prevented his being liable.

The King's Bench Division (Lord Alverstone C.J., Wills and Kennedy JJ.) set aside the order of the justices, conceiving themselves bound by *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, to hold that summary proceedings for the recovery of expenses of private streets works under section 150 of the Public Health Act, 1875, are available only against persons who were owners of premises abutting on the street both at the time of the completion of the works and at the time of the demand. The Court, however, intimated that they would have decided otherwise had the matter not, in their opinion, been concluded by authority. The case in the Divisional Court is reported 2 L. G. R. 539.

The Council appealed.

Macmorran, K.C. (with him *Scholefield*), for the appellants. Section 257 of the Public Health Act, 1875, expressly makes the expenses recoverable summarily from the person who is the owner of the premises when the works are completed. That liability continues although before the demand is made the premises are sold. The case of *In re Bettesworth and Richer* (1888) 37 Ch. D. 535; 57 L. J. Ch. 749, is an authority in the appellants' favour, although it did not deal with the recovery of such expenses in a summary manner, for it decided that the apportioned expenses become a charge on the property when the works are completed. There are many other cases to the same effect, e.g., *Hornsey Local Board v. Monarch Investment Building Society* (1889) 24 Q. B. D. 1; 59 L. J. Q. B. 105.

The Court below followed a dictum of Cockburn C.J. in *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119. The decision in that case was, however, that the expenses are not recoverable from a person who ceases to be owner of the premises before the works are completed, which is quite in accord with the other cases, and the expression of opinion by Cockburn C.J. that the expenses are not recoverable from a person who is owner at that date but ceases to be owner before demand is a mere dictum, and the learned Chief Justice does not seem to have perceived the difficulties that would arise if that were really the law.

Israel Davis for the respondent. Nothing has been said to shake the authority of *Reg. v. Swindon New Town Local Board*, and to disregard that decision would be to work injustice in many cases, as that case has always been regarded as an authority, and sales of property have taken place on the faith of it. Since that case was decided in 1879 it has never been questioned, and your Lordships should hesitate

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to overrule a practice which, based on that authority, has come to be regarded as settled law. The whole scheme of the Act is to throw the burden of such payments upon the property. It is only reasonable that the person who, as owner of the premises after the work is done, reaps the benefit of that work should be held liable. It is true that on this view of the statute the summary remedy is lost altogether in the case of a sale of the property after the completion of the works and before apportionment; but that circumstance leads to no real difficulty, as the charge on the premises remains. No doubt the words of section 257 taken alone are in favour of the appellants' contention; but that section must be read with section 150, which imposes the liability upon the owner "in default." There can be no default within the meaning of that section until the money is demanded and not paid.

COLLINS M.R. This is an appeal by the Balby-with-Hexthorpe Urban District Council from a decision of the King's Bench Division, holding that the respondent was not liable for paving expenses demanded by the council. The material facts are that the respondent, Mr. Millard, both at the time of the notice to pave and at the time of the completion of the works by the council, was the owner of the premises; but before the date of the notice of apportionment and of the demand upon him to pay the amount apportioned on his premises he had ceased to be owner. The point we have to decide is whether under those circumstances he was liable. He was owner at the inception of the whole matter, when the order was made by the local authority upon the frontagers, and being owner then, he did not carry out the work himself, and thereupon the ordinary proceedings ensued involving the execution of the works, the apportionment of the expenses, and finally a demand for payment. He continued to be from start to finish, that is, until the works were executed, the owner of the premises, but he ceased to be the owner of the premises before the demand in respect of the apportioned amount was made.

Now on those facts the Court below followed—perhaps I ought not to say the decision—but the observations of the Court in the case of *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, and in deference to those observations, and against their own view, held that under those circumstances the respondent was not liable to pay the apportioned sum. That obliges us to look at the statute under which this obligation is imposed, and we have had the most material sections before us. The first is section 150 of the Public Health Act, 1875. I need not deal with the earlier part of the machinery of the section, but I will read the second paragraph: "If such notice"—that is the notice to perform the work in the street—

"is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority." That section contemplates a default on the part of the frontagers, and that default, in the context, clearly must mean failure to perform the works they have been called upon to perform. So much for the 150th section.

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Then we come to section 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of the service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." Now that section in absolutely unambiguous language defines the person who is liable to pay this sum. It may be recovered "from any person who is the owner of such premises when the works are completed." In this case the respondent unquestionably was the owner when the works were completed, though, as I have said, he ceased to be the owner before the actual demand for the apportioned sum was made. It seems to me that on the language of section 257 itself there can be no doubt whatever that he does fulfil the condition of liability. He was the owner of the premises at the time when the works were completed. The only suggestion of any argument that I can follow against that is that the 150th section does unquestionably contemplate a default, and that, in the context, it looks as if that default was regarded as being with reference to the payment of money. But the default in the context, as I have already pointed out, is the failure to perform the work, and it is apparently contemplated, on the terms of that section standing alone, that, as soon as the owner has committed the default by not doing that which he has been ordered to do, a liability is laid on him to be made to pay in a summary manner those expenses. Whether that makes that person liable or not, apparently it is not necessary for us to say, because section 257, the language of which is perfectly clear and unambiguous, has made the person who is the owner when the works are completed liable to pay the apportioned sum. Whether or not any other person is liable under the other section does not arise for discussion, and it is not necessary for us to decide it.

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The Court below, though they said that had the matter been *res integra* they would not have arrived at the same conclusion, thought themselves bound to decide as they have done by *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119. They were not bound by the decision in that case, but they thought themselves bound by dicta in it, with which they did not agree, but which they thought formed the *ratio decidendi* of the case. The cardinal distinction between that case and this is that the person who was there sought to be made liable had ceased to be the owner before the works were completed, and therefore it is absolutely clear that he did not come within the provision of section 257 to which I have referred. But Cockburn C.J. said this: "I cannot think it was ever intended by the Legislature that when the owner has parted with his property, and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought therefore to pay the expenses incurred; it should be competent for the local authority to follow him up wherever he may have gone, and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose that it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this: if the owner who is called upon to do the work, and who makes default in doing it, continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under the 150th section; but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded, and when another has stepped into his shoes and become the owner." That is a dictum properly so called, inasmuch as it was not essential to the decision of that case, and was giving an opinion which would cover immunity unless the person continued to be owner, not only up to the time of the execution of the works as is expressly enacted in the statute, but up to the demand of the expenses, as to which there is no provision at all in the Act. Therefore it certainly was a dictum in my view and not a decision. Therefore it seems to me that we are not bound to give effect to that opinion. In this particular case, undoubtedly the respondent had not ceased to be owner until after the crucial date, the execution of the work, and therefore on the express terms of the statute he is liable. We cannot exclude him from liability by virtue of a

dictum that was not necessary to the actual decision in a case in which the person sought to be charged had ceased to be owner before the crucial date. In my judgment, therefore, we must give effect to what was really the view and intention of the Court below, and, for the reasons I have stated, reverse their decision.

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STIRLING L.J. I am of the same opinion.

In this case the respondent was owner of the property at the time when the works in respect of which he is sought to be charged were completed. Consequently, looking at section 257 of the Act alone, it is quite clear that he is liable. It is said, however, that section 257 must be read along with section 150, which provides that the expenses may be recovered in a summary manner from the owners in default; and it is said that in order to make the respondent liable he must not only have been owner at the time the works were completed, but must also be an owner in default. Now what is the default which is spoken of in section 150? It appears to me that it is a default in executing the works which the urban authority have required to be done. The section provides for giving notice to owners of land adjoining a street, and proceeds: "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default"—that is, those owners who had not complied with the notices served upon them. If that be the meaning, the respondent remains liable if he was the owner of the property in question at the time when the notices were issued by the urban authority, and on whom the notice was served with which he failed to comply. Therefore, if we look at the words of the Act alone, it seems to me that the liability of the respondent is made out, and I have the less difficulty in coming to that conclusion as it appears to me that it was arrived at by every member of the Court from which the appeal comes.

The learned judges of that Court, however, thought that they were constrained to give effect to what is laid down by Cockburn C.J. in the case of *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 395; 48 L. J. M. C. 119, where the question which arose and was decided was a different one from that we are now considering. In that case the person who was sought to be charged was owner of the property at the time when notice for the work was served, but had ceased to be the owner when the works were completed. He, therefore, did not come within section 257 at all, and the decision does not form a precedent for the decision in the present case. But it is said that one of the grounds of decision was that which was laid down by Cockburn C.J., according to the report in the *Law Reports*, that the person

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who is to be liable under section 257 is a person who is the owner on whom notice was originally served, and who is owner at the time the works are completed and the expenses demanded. Unquestionably the respondent was not the owner at the time the expenses were demanded, though he was owner at the time when the work was completed. Upon that I observe, as has been already observed by the Master of the Rolls, that no question arose in that case whether the person who was liable was to be the owner at the time when the expenses were demanded. That is not found in section 257, and, speaking for myself, I am unable to see how that limitation can be arrived at. Section 257 appears to me to be perfectly clear. Now we are asked not merely to apply the decision in the *Swindon* case, but to extend it to a new case, as to which there was no decision. If we were satisfied that the reasoning was right, it might be right to do so; but not being satisfied, and the Court below not being satisfied, that the reasoning was right, I do not think that we are bound to give effect to the observations of Cockburn C.J.

I think, therefore, that this appeal ought to be allowed.

MATHEW L.J. I am of the same opinion. I concur in what has been said by my Lord and my brother Stirling.

Appeal allowed.

Solicitors for the appellants—Speechly, Mumford, and Craig, for Frank Allen, Doncaster.

Solicitors for the respondent—Halse, Trustram, & Co., for A. Muir Wilson, Sheffield.

Reported by Erskine Reid, Esq., Barrister-at-Law.

HOUSE OF LORDS.

BRIGHTON INTERCEPTING AND OUTFALL SEWERS BOARD *v.*
HOVE CORPORATION.

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May 4.

Aug. 5.

Boundaries—Intercepting sewer constructed under local Acts to serve certain districts—Extension of one of such districts—Drainage of added area into intercepting sewer—Brighton Intercepting and Outfall Sewers Act, 1870 (33 & 34 Vict. c. c.), ss. 4, 35, 36, 37, 91—Hove Commissioners Act, 1873 (36 & 37 Vict. c. xciv.), ss. 3, 5, 6, 15, 61—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 58, 125—Local Government Act, 1894 (56 & 57 Vict. c. 78), s. 42.

An intercepting sewer was made under the Brighton Intercepting and Outfall Sewers Act, 1870, which provided for the making of intercepting and outfall sewers for Brighton, and two adjoining Improvement Act districts in the parish of Hove, and for the vesting of the sewers in the appellant Sewers Board. Section 91 of the Act provided that if, after the passing of the Act, any local board or body of commissioners should be constituted for any district in which any part of the sewers authorised would be situate, having powers with respect to sewerage, and to levy rates within such district, such local board or commissioners should be at liberty, by notice to the Sewers Board, to participate in the benefits and liabilities of the Act, and should thenceforth be a local authority within the Act. By the Hove Commissioners Act, 1873, a body of Improvement Commissioners was constituted for the whole parish of Hove, and those Commissioners were given the benefits and liabilities of the former Commissioners for the two parts of Hove under the Act of 1870. By an Order made by the county councils of East and West Sussex in 1893, under the Local Government Act, 1888, it was provided that the area of the parish of Aldrington should be transferred to and form part of the urban sanitary district of Hove, and that the "district" in the Act of 1873 should mean the parishes of Hove and Aldrington instead of the parish of Hove. The district of Hove thus extended was subsequently formed into a borough, and the respondent Corporation became the successors of the Hove Commissioners. The respondents claimed to be entitled under these circumstances to send the sewage of Aldrington as well as of the rest of the borough into the intercepting sewer.

Held, affirming the decision of the Court of Appeal, 1 L. G. R. 355, that they were so entitled.

APPEAL from a decision of the Court of Appeal reversing the decision of Kekewich J.

The action was brought for (1) a declaration that under or by virtue of the Brighton Intercepting and Outfall Sewers Act, 1870, the Hove Commissioners Act, 1873, and the East Sussex and West Sussex (Hove

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and Aldrington) Confirmation Order, 1893, and in the events which had happened, the respondents were entitled to discharge and the appellants were bound to admit into the sewers of the appellants constructed under the above mentioned Act of 1870, all the sewage of the borough of Hove, including as well the sewage from that part of the said borough which was within the parish of Hove, as also the sewage of that part of the said borough which was within the parish of Aldrington, and that the respondents were entitled, at their own expense, to have made all such connection with or openings in the said sewers and all such other works as might be necessary or proper to enable them to exercise fully their rights with respect to the discharge of sewage into the said sewers ; (2) alternatively, a declaration that the respondents were entitled to discharge and the appellants bound to admit into the said sewers all such sewage as aforesaid, and that the respondents were entitled, at their own expense, to have made and executed all such works as aforesaid, subject only to the payment by the respondents to the appellants of compensation to be settled under the provisions of section 36 of the Act of 1870 ; and (3) an injunction to restrain the appellants from excluding the respondents from exercising or interfering with the respondents in the exercise of their aforesaid rights.

The substantial question at issue in the action was whether the plaintiffs, the Hove Corporation, were entitled to use an intercepting sewer, constructed under the Act of 1870, for the purposes of a part of their borough, consisting of the parish of Aldrington, which was added to the urban district of Hove, before that district was formed into the borough of Hove, by the Order of 1893 above mentioned.

The question depended upon the consideration of a large number of the sections of the Acts above mentioned, and certain other legislation, and of the provisions of the above mentioned Order. These sections and provisions are set out very fully in the report of the case in the Court of Appeal, 1 L. G. R., 355, and having regard to the very special character of the legislation, it has been thought unnecessary to repeat them here. The head note explains the outline of the legislation.

Kekewich J. gave judgment for the defendants.

The Court of Appeal reversed the decision of Kekewich J., making a declaration that under and by virtue of the Acts of 1870 and 1873, and the Order of 1893, the plaintiffs were a local authority within the meaning of the Act of 1870, and as such entitled to discharge, and the defendants were bound to admit, into the intercepting sewer all the sewage of the borough of Hove, including the sewage of that part of the borough which was within the parish of Aldrington. No injunction was granted, but liberty to apply generally was given.

The defendants appealed to this House.

Cripps, K.C., Boxall, K.C., and Manby for the appellants.

Macmorran, K.C., and R. J. Parker for the respondents.

The House took time to consider.

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THE EARL OF HALSBURY L.C. My Lords: after very long consideration, and contrary to the impression I had originally formed, I have come to the conclusion that the judgment of the Court of Appeal is right, and ought to be affirmed. The very awkward collection of statutes and parts of statutes, together with the operation of the powers of local bodies and what is within the powers of local bodies to effect, certainly produced an impression of confusion, and even conflict of authorities, which it has been extremely difficult to disentangle. I certainly was under the impression at first that the rights—what I will call the rights—of the intercepting sewer were protected against any invasion by any of the adjoining authorities. But I cannot resist the reasoning of the Court of Appeal, which points out that the intercepting sewer originally contemplated bringing within its user other and outlying districts which at the commencement were assumed to be within communication with it, and when I see the effect which not only is an effect under an Act of Parliament, but which, I think, was an anticipated effect from the increase, enlargement, or alteration of sanitary districts, I cannot resist the reasoning of the Court of Appeal, which points out that what has been done brings the right of the sewer intended to serve the united parishes of Hove and Aldrington within the express language of the statute.

Under these circumstances, I move your Lordships that the appeal be dismissed, with costs.

LORD MACNAGHTEN. I am entirely of the same opinion.

LORD LINDLEY. My Lords: This is an appeal from an order of the Court of Appeal, declaring that the borough of Hove are entitled to discharge the sewage of the borough into the main sewer of Brighton, called the intercepting sewer. Nothing is said in the order respecting the terms or conditions to be complied with by the borough of Hove; they are left to be gathered from the various statutes applicable to the case. It is admitted by both parties that if the borough of Hove are entitled to use the sewer they must bring the sewage of the borough which they want to be carried away down to the Brighton sewer, and must pay whatever is required by the statutes in the event of the borough sewage being carried off by the Brighton sewer. The question in controversy at the present time, and the only question for decision now, is whether the Brighton Sewers Board are bound to allow the sewage of the borough of Hove to be poured into the Brighton sewer. The Brighton Board maintain that the Brighton sewer was not con-

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structed for and is not large enough to carry off the quantity of sewage which the borough of Hove will send into it in addition to that coming into it already, and that if the borough of Hove are right in their contention Brighton will be put to very great expense in enlarging their sewer, or making another for the benefit of Hove alone.

The Brighton sewer was made under the provisions of a local Act of 1870, and the western portion of the sewer is in the old parish of Hove. The sewage of some of that parish has always passed into the sewer. In 1873 a local Act was passed for the better government and improvement of the parish of Hove. This Act contained two important sections (sections 61 and 84) relating to the Brighton sewer, but did not enlarge the parish. In 1893 Hove parish was greatly enlarged for sanitary purposes by the addition to it of the adjoining parish of Aldrington. This was done by an order made under the provisions of the Local Government Act, 1888. The borough of Hove is co-extensive with these two united parishes. The Brighton Sewers Board do not dispute their obligation to carry off the sewage of the old parish of Hove if brought to the Brighton sewer, but they object to receive the additional sewage from Aldrington.

Such being shortly the circumstances which have given rise to the controversy, it is necessary to refer more particularly to the Acts and Order above mentioned.

It will be convenient, in the first place, to deal with the Order of 1893. This Order transferred the parish of Aldrington from the rural sanitary district of Steyning Union to the urban sanitary district of Hove (Article 2). The Order then amended the Hove Act of 1873, and made it applicable as amended to the urban sanitary district of Hove as enlarged by the Order (Article 3). The amendment made was that section 3 of the Act of 1873 should be read as if the parishes of Hove and Aldrington were inserted instead of the parish of Hove. This Order was confirmed by the Local Government Board, and was laid before Parliament in the usual way, and its validity is not disputed. I do not myself see how its validity can be disputed, having regard to the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 42). The effect of the Order is quite another matter, and is the main point in controversy. It does not mention the Brighton sewer, and to ascertain the effect of the Order on that sewer it is necessary to turn to the local Acts of 1870 and 1873. The Local Government Act, 1888 (51 & 52 Vict. c. 41), which (by sections 57 and 59) authorised the Order, contains a provision which must not be overlooked. I refer to section 125, which protects the Brighton Sewers Board from being prejudiced by anything done under the authority of the Act "save so far as may be necessary to give effect to this Act, or any scheme or

order or other thing made or done thereunder." This saving destroys the protection in this particular case. The effect of the Order was fully examined by the Court of Appeal, and having regard to the Acts of 1870 and 1873 the Order would be nullified if it had no application to the Brighton sewer or the Brighton Sewers Board.

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My Lords, I do not propose on the present occasion to examine in detail the sections of the two Acts of 1870 and 1873. The really important sections are section 91 of the Act of 1870 and sections 61 and 74 of the Act of 1873. Section 91 of the Act of 1870 renders it necessary to turn to section 4 of the same Act, which defines the expression local authority, and makes it include, not only the three authorities therein named, but "any local board or body of commissioners who may hereafter under the provisions of this Act be admitted to participate in the benefits and liabilities thereof as the case may be." These words point to development and to new authorities. Bearing this in mind, the first part of section 91 of the Act of 1870 seems to me unquestionably to apply to the united parishes of Hove and Aldrington, and to confer upon them the right to use the Brighton sewer upon the terms mentioned in the last part of the same section. I agree with the Court of Appeal in seeing no escape from this conclusion.

Turning next to section 61 of the Act of 1873, and substituting Aldrington and Hove for Hove, as the district referred to, section 61 of the Act of 1873 fits on to and works with section 91 of the Act of 1870. But then comes section 74 of the Act of 1873, which says "nothing in this Act shall prejudice or affect the powers and provisions" of the Brighton Sewers Board. This saving does not, however, apply if I am right in thinking that the Act of 1870, ss. 4 and 9, and the Order of 1893 have the effect which I have above mentioned. It is not the Act of 1873, but the amendment of it in 1893, which prejudices the Brighton Sewers Board.

As regards the case of *Huddersfield Corporation v. Ravensthorpe Urban District Council*, 1897, 2 Ch. 121; 66 L. J. Ch. 581, on which the appellants relied, I will only add that the legislative enactments, on which the present case turns, are, in my opinion, too explicit to render that case applicable to this.

In my opinion the decision of the Court of Appeal was correct and ought to be affirmed.

Appeal dismissed.

Solicitors for the appellants—Boxall and Boxall.

Solicitors for the respondents—Bircham & Co., for FitzHugh, Woolley, Baines, and Woolley, Brighton.

Reported by Erskine Reid, Esq., Barrister-at-Law.

High Court of Justice.

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Apr. 22.

KING'S BENCH DIVISION.

HITCHCOCK *v.* WANDSWORTH AND CLAPHAM UNION. CHESHIRE *v.* SAME.

Vaccination—Proceedings under Vaccination Acts—Expenses—Legal assistance obtained by vaccination officer—Vaccination Order, 1898, Article 29.

Article 29 of the Vaccination Order, 1898, which provides that the guardians shall pay the reasonable costs and expenses incurred by the vaccination officer in proceedings taken by him for enforcing the provisions of the Vaccination Acts, including "the reasonable costs of obtaining any necessary legal assistance" in connection with such proceedings, does not make the judgment of the vaccination officer as to whether legal assistance is necessary in any particular case conclusive as against the guardians. In case of dispute, accordingly, the question whether the legal assistance was necessary has to be determined as a question of fact in the ordinary way in legal proceedings. But the tribunal before which the question comes, if satisfied that the officer entertained an honest belief that the legal assistance obtained by him was necessary, ought, in all ordinary circumstances, to be guided by the decision to which the officer came.

THIRD party procedure arising out of two actions.

Mr. W. R. Hitchcock and Mr. G. Cheshire were vaccination officers of the Wandsworth and Clapham Union, and had employed a solicitor named May to conduct certain proceedings taken by them under the Vaccination Acts. In due course May sent in his bills of costs in respect of these proceedings to the two officers. They were taxed at £45 13s. 2d. and £43 1s. 1d., respectively. May assigned the bills to one Madgett, who brought two actions on the bills against Hitchcock and Cheshire respectively, and recovered judgment. In each of these actions the defendant brought in the guardians of the union as third parties, claiming to be entitled to be indemnified by them in respect of the bill of costs in question. The claims of the defendants Hitchcock and Cheshire against the guardians now came on for trial before Channell J. sitting without a jury. The two cases were tried together.

The claim to indemnity was under Article 29 of the Vaccination Order, 1898, which provides as follows:—"The guardians shall pay the reasonable costs and expenses incurred by the vaccination officer in any proceedings taken by him for enforcing the provisions of the Vaccination Acts, 1867 to 1898, including the reasonable costs of obtaining any necessary legal assistance in connexion with the institution and conduct of any such proceedings . . .

A majority of the guardians upon the Wandsworth and Clapham Board were opposed to compulsory vaccination, and the Board had, for a considerable time prior to the time when Mr. Hitchcock and Mr. Cheshire began to employ Mr. May, refused to pay any solicitor's bill incurred by the vaccination officers of the union in taking proceedings under the Acts.

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Mr. Hitchcock had accordingly ceased to prosecute offenders under the Act, but the Local Government Board subsequently exacted a written undertaking from him to prosecute offenders. He then informed the guardians of the instructions he had received, and requested them to appoint a solicitor to act for him in prosecuting offenders. The reply to this application was that the Board made no order upon his letter. He thereupon appointed Mr. May to act as his solicitor in proceedings under the Acts, and gave the guardians notice that he had done so. Upon this, posters were issued by one of the guardians informing the public that they need have no fear of any notices circulated by the vaccination officer, nor of his threats of prosecution, and another of the guardians sent for Mr. Hitchcock and told him that if he dared to prosecute, the anti-vaccination party would employ a particular counsel and "fight him to the death." Mr. May conducted 23 cases for Mr. Hitchcock, in all of which the counsel in question appeared for the defence. Mr. Hitchcock conducted some 30 or 40 cases himself in which the defendant had no professional assistance. In the cases conducted by Mr. May, he (Mr. May) drew the summonses and made charges for so doing.

The facts in Mr. Cheshire's case were substantially the same, except that the cases conducted for him by Mr. May were ultimately undefended.

In giving evidence both Mr. Hitchcock and Mr. Cheshire stated that they considered the employment of a solicitor necessary.

Shearman, K.C., and *Condy* for the vaccination officers. Upon the true construction of Article 29 of the Order of 1898 it is for the vaccination officer alone to decide whether in particular cases legal assistance is reasonable and necessary; that is to say, "reasonably necessary." He is the judge of this, and the Court will not interfere with his decision. In *Rex v. Wellingborough Union* (1903) 68 J. P. 179, where Article 29 was before the Court, Kennedy J. remarked, in the course of the argument, that "some one has to decide what is reasonable and necessary. *Primâ facie* it ought to rest with the vaccination officer, whose position is at stake, and who has a public duty to perform, and if he wantonly or vexatiously or negligently incurs expenses which he ought not to do, then in that case the guardians can make representations to

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the Local Government Board, and if it is considered sufficient for Local Government Board to warn him they can do so ; and if not they can dismiss him." *Stroud v. Wandsworth Board of Works*, 1894, 2 Q. B. 1 ; 63 L. J. M. C. 88, also supports the view that the vaccination officer is the judge of the necessity of employing legal assistance. Further, in the present case, on the evidence, the employment of the solicitor was, in fact, necessary.

Boxall, K.C., and *S. Mayer* for the guardians. It does not follow that these costs are either reasonable and necessary or reasonably necessary, since the solicitor's bills are only taxed as between solicitor and client. A charge which might be reasonable for a solicitor to send in to his client may well be unreasonable for an officer to charge against the guardians. A vaccination officer ought not to employ a solicitor in every prosecution, for there are many simple cases he is quite capable of conducting himself. In all these prosecutions the employment of a solicitor was unnecessary ; but the vaccination officers have gone further, and actually have employed a solicitor to attend to issue summonses, which is a mere matter of form.

CHANNELL J. There are, no doubt, a number of cases in which the Legislature has deputed to particular bodies, and occasionally to particular individuals who fill official positions, a power of judging as to the necessity or the sufficiency of particular things within their jurisdiction. But in cases of this kind it is necessary in every instance to find something in the language employed that gives the body or the individual official the power of so deciding. So far as I know, there is nothing in any section of the Vaccination Acts, or in any part of the Orders made under them, apart from Article 29 of the Vaccination Order, 1898, which touches this point. And, in my view, Article 29 does not contain enough to show that "necessary legal assistance" means legal assistance necessary in the opinion of the person who seeks to employ it. No doubt the officer is put in the difficult position of having to judge whether legal assistance is or is not necessary at the risk of having the expense ultimately disallowed. But it is only one instance among many where an official is obliged to act on his own judgment at his own peril. The vaccination officer must exercise his discretion, but that discretion is subject to review. In this there is no hardship, because his decision will not be reviewed by those who might act upon arbitrary principles. There is not a word to suggest that the guardians are the judges of what constitutes necessity. As between them and the officer, it is clearly the latter who has to form a judgment in the first instance. But I cannot hold that Article 29 contains enough to make the vaccination officer's judgment

conclusive, or that, if his judgment is questioned, it is not open to the ordinary tribunals to decide whether he is right or wrong. If the guardians refuse to pay for legal assistance obtained by the vaccination officer, on the ground that it was unnecessary, there must be an appeal to law, either by *mandamus*, if that is thought to be the fitting remedy—and in the *Wellingborough* case a *mandamus* was granted without objection from the Court—or, as in the present case, by an action to recover the amount. The tribunal before which either proceeding comes must, I think, decide whether or not the legal assistance engaged was necessary; but in deciding that question the tribunal ought, not as a matter of law, but as a matter of practice or judicial discretion, if it finds that the vaccination officer has in the honest exercise of his discretion considered the legal assistance necessary, and has made himself personally liable for the expenses incurred, to decline, except in very strong cases indeed, to override his decision. The tribunal must remember that the officer had all the material matters before him at the time; that he knew what the prospects of opposition were, and so on; and that he formed his judgment on the question. If I were the judge I should always in such a case feel that I was not in a position to override the officer's decision. But unfortunately people do not always perform the public duties which they undertake when appointed or elected to official positions. And if a vaccination officer were one day to behave as some of the guardians have 'unfortunately behaved in the present case, the Court might be compelled to decline to follow his decision. In the present case, so far as I can see, there is no reason to suppose that that is what has happened. Both the officers have told me that in their opinion legal assistance was necessary because they were told that the proceedings they were about to institute were to be opposed at every step. I think it was perfectly right for them to get legal assistance, and having got legal assistance to put the matter entirely in the hands of the solicitor whom they employed and in whom they had confidence. They could not, having done that, have insisted on taking particular steps in the proceedings themselves. If they had they would have intertered with their own legal adviser, and left it open to him, if things had gone wrong, to say that if he had not been interfered with the proceedings would have succeeded. I am accordingly of opinion that the charges here incurred for legal assistance were not unreasonably incurred, and that there must be judgment for the defendants, Mr. Hitchcock and Mr. Cheshire, against the third parties—the guardians—for the amounts claimed with costs on the High Court scale.

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Judgment accordingly.

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Solicitor for the vaccination officers—H. E. A. Johnson.

Solicitors for the guardians—W. W. Young, Son, and Ward.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

In the above cases no technical objection to the raising of the question between the vaccination officers and the guardians by means of third party procedure was taken. There seems, however, to be very serious doubt whether the provisions in Article 29 of the Vaccination Order, 1898, constitute an "indemnity" to the officer within R. S. C. Order XVI., r. 48, so as to render it possible for the officer to bring the guardians in as third parties in an action against him by his solicitor if objection were taken: see *Johnston v. Salvage Association* (1887) 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56.

It would rather seem, moreover, that, unless and until the vaccination officer has actually paid his solicitor's bill, he has no cause of action against the guardians, his only remedy, at that stage, being by *mandamus*: see *Jones v. Carmarthen Corporation* (1841) 8 M. & W. 605; 10 L. J. Ex. 401; *Bogg v. Pearse* (1851) 10 C. B. 534; 2 L. M. & P. 21; 20 L. J. C. P. 99; *Addison v. Preston Corporation* (1852) 12 C. B. 108; 21 L. J. C. P. 146; 16 Jur. 643; *Salford Corporation v. Lancashire County Council* (1890) 25 Q. B. D. 384; 59 L. J. Q. B. 576; 63 L. T. 409. And in this connection it may be pointed out that in *Rex v. Wellingborough Union* (1903) 68 J. P. 179, though it was argued on behalf of the guardians that the vaccination officer ought not to have applied for a prerogative writ of *mandamus*, but to have brought an action for a statutory *mandamus*—an argument which did not prevail—it was not suggested that he had a remedy by an ordinary action to recover the amount of the bill of costs.

High Court of Justice.

KING'S BENCH DIVISION.

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In re LONDON BUILDING ACT, 1894, and *in re* LONDON COUNTY COUNCIL.

June 23, 24.

Buildings—Building line—Metropolis—Length of street to be considered in defining general line of buildings—Tribunal of Appeal—Costs—London Building Act, 1894 (57 & 58 Vict. c. cxxiii), ss. 24–27, 183.

It is competent to the Tribunal of Appeal under the London Building Act, 1894, on appeal to them from a certificate of the superintending architect defining the general line of buildings to take into consideration a greater or less length of street than that taken into consideration by the superintending architect in defining such line.

The Tribunal of Appeal have power on an appeal to them to award a party to the appeal a lump sum for costs.

CASE stated by the Tribunal of Appeal under the London Building Act, 1894, at the request of the London County Council.

1. On September 15, 1903, Charles Botterill, as agent for Robert Roy, the owner of houses, Nos. 889 to 897, Fulham Road, inclusive, being desirous of building upon a building site partly occupied by these houses, by notice in writing of that date, applied to the superintending architect of metropolitan buildings under section 22 of the London Building Act, 1894, to define the general line of buildings in respect of the land occupied by the said houses.

[It appeared from the plans hereinafter referred to that Mr. Roy's premises were on the south side of the portion of Fulham Road lying between Munster Road on the east and Landridge Road on the west, and that they occupied a comparatively small part of this length of Fulham Road at the Landridge Road end.]

2. The superintending architect thereupon (as was not disputed) gave notice to all the persons mentioned in section 24 of the said Act, and, after hearing such persons as attended before him, issued his certificate of October 3, 1903, with plan annexed marked A. From such plan it appears that he did not confine himself to defining the general line of buildings in respect of the land occupied by the said houses, but by his said certificate he defined the general line of buildings on the southern side of Fulham Road between Munster Road and Landridge Road. It was not disputed that due notice of his certificate was served upon the persons mentioned in the said section 24.

3. The said Charles Botterill, as agent for the said Robert Roy, appealed from the said certificate to the Tribunal of Appeal. On

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November 10, 1903, having viewed the building site in question and the locality, and having duly heard the parties referred to in the order hereinafter mentioned, the Tribunal of Appeal issued their order, dated November 10, 1903, with the plan annexed thereto marked A. [It appeared from plan B that the Tribunal of Appeal had defined a general line of buildings extending from a point A at the north-east corner of Munster Road to a point B some hundreds of yards to the west of Landridge Road. The line which they defined was in front—i.e., nearer the centre of the street—of the line fixed by the superintending architect. By their order the Tribunal of Appeal also awarded Mr. Roy, the appellant before them, a lump sum for costs.]

4. No application as to costs was made by either party.

5. Fulham Road is a public highway. The buildings, Nos. 90; to 921, Fulham Road, inclusive, shown on plan B annexed to the order of the Tribunal of Appeal, are built up to the highway. The shops shown on the said plan in the Fulham Road, between the corner of Munster Road and No. 861, Fulham Road, were, at the time the Tribunal of Appeal made their said order, built to an advanced line upon the site formerly occupied by No. 47, Munster Road, with the consent of the London County Council, dated March 24, 1903, and subject to the conditions of such consent. [Nos. 907 to 921, Fulham Road, extended from the point B, to which the line fixed by the Tribunal of Appeal extended westwards, for a short distance eastwards. The shops referred to occupied sites extending from Munster Road for a short distance westward. They were spoken of on the argument as Ellis's shops.]

6. All the before-mentioned documents and plans are incorporated in and form part of the case.

7. The London County Council contend that the Tribunal of Appeal have no power to make their said order or to define the line defined by them on the following grounds:—

(a) The line so defined by them from Landridge Road to the point marked B on the plan marked B purports to define the general line of buildings for a portion of the Fulham Road in respect whereof the superintending architect has not defined any general line of buildings.

(b) The line defined by the Tribunal of Appeal which varied the said certificate of the superintending architect, as appears by the said plan marked B, is not a general line of buildings within the meaning of the London Building Act, 1894.

(c) There was no power in the Tribunal of Appeal to order (in the absence of consent) a lump sum for costs.

8. If the contentions of the London County Council are, or if any one of them is, correct, this honourable Court are requested to make such order

in the premises and as to costs of this appeal, and of the appeal to the Tribunal of Appeal as to this honourable Court may seem fit.

The following are the material provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

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Section 22 (1). No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor.

Section 24. The superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of his certificate to be served on the local authority and on the owner of the building or land to which the certificate relates and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates

Section 25. The local authority or any person deeming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal.

Section 26. In giving their consent for the erection of any building or structure beyond the general line of buildings in any street or part of a street place or row of houses the council may attach any conditions to such consent and such conditions may include all or any of the conditions following

Section 27. The consent of the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent.

Section 175. For the purposes of this Act a tribunal of appeal shall be constituted as follows

Section 182. It shall be lawful for the tribunal at any time to state . . . a case for the opinion of the High Court on any question of law involved in any appeal submitted to them

Section 183. The tribunal of appeal shall subject to the provisions of this Act have jurisdiction and power to hear and determine appeals referred to them under this Act.

For all the purposes of and incidental to the hearing and determination of any appeal the tribunal shall subject to any rules of procedure duly made have power to hear the council and the parties interested either in person or by counsel solicitor or agent as they may think fit and to administer oaths and to hear and receive evidence and to require the production of any documents or books and to confirm or reverse or vary any decision and make any such order as they may think fit and the costs of any of the parties to the appeal including the council shall be in the discretion of the tribunal.

Bailhache for the London County Council. The Tribunal of Appeal were wrong in law in defining a general line of buildings for a greater

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length of street than was taken for the purpose by the superintending architect. They have, moreover, completely misconceived the nature of their jurisdiction. The scheme of the legislation is this: Section 22 of the Act of 1894 prohibits, subject to exceptions immaterial for the present purpose, building beyond the general line of buildings; and goes on to provide that the general line of buildings, if required, is to be defined by the superintending architect, subject, under section 25, to appeal to the Tribunal of Appeal. What is contemplated, therefore—and what happens in practice—is that the building owner applies to the superintending architect to define the line of buildings. And the question the superintending architect has to determine is—What is, in fact, as things stand, the general line of buildings at the particular locality? And that on appeal is the question for the Tribunal of Appeal. Neither the superintending architect nor the Tribunal of Appeal have any power to consider what would be a good line of building for the street. That is not the question they have to determine: *Spackman v. Plumstead Board of Works* (1885) 10 App. Cas. 229; 54 L. J. M. C. 81; *Barlow v. Kensington Vestry* (1886) 11 App. Cas. 257; 55 L. J. Ch. 680; *Reg. v. Vulliamy* (1872), an unreported decision of Mellor, Lush, and Quain JJ. In the present case it is clear that the Tribunal of Appeal have addressed their minds to the question of what would be a good building line for the street, and not to the question what the building line at the place where Mr. Roy purposes to build, in fact, is. That the Tribunal of Appeal cannot be intended to have power to define a general building line extending for many hundreds of yards beyond the premises, with reference to which the question arises, is shown by the provisions of section 24, as to the persons who are to have notice of the line defined by the superintending architect. The line once defined by the Tribunal of Appeal is binding on the landowners. And the result, in such a case as this, if the other side are right, is that the decision of the Tribunal of Appeal is binding on landowners who never heard of the decision of the superintending architect, and had no opportunity of being heard on the question at all, either before him or before the Tribunal of Appeal.

The Tribunal of Appeal have gone wrong in law in another way. It is clear, looking at the plans, that their line is really determined by the line of Ellis's shops. But those shops were erected beyond the building line with the consent of the County Council, and to pay any attention to these shops in defining the building line is to disregard the express provisions of section 27 of the Act. The meaning of that section is that the general building line is to be fixed precisely as if any buildings erected beyond the line with the County Council's consent had never been built.

Lastly, the Tribunal of Appeal had no power to award the appellant before them a lump sum for costs. They should have awarded costs, without specifying the amount; and then, upon that award, an action could have been brought in which the costs could be taxed. This course has, in fact, been adopted in previous cases.

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Bartley Denniss for the respondent, Mr. Roy. The Tribunal of Appeal have not made any mistake in law. And so far as their decision is on question of fact this Court has no jurisdiction to override it. In determining the general line of buildings at any point the question what length of street is to be taken into consideration must always arise. The superintending architect must in the first instance decide how much of the street he will take into account in defining the line; and there can be no reason why his decision in this respect, as much as in any other, should not be reviewed by the Tribunal of Appeal. The building line drawn by the Tribunal of Appeal is only effective as to Mr. Roy's premises, though it is drawn for a great length of the street. Therefore there is nothing in the argument the appellants sought to found on section 24.

The order of the Tribunal of Appeal as to costs is good. It is a sensible order, and in accordance with the usual practice of inferior courts, *e.g.*, courts of summary jurisdiction.

Bailhache in reply.

WILLS J. This is a case of considerable importance undoubtedly, and one not free from a certain amount of difficulty. We have had the advantage of having it very well argued, and I certainly am much indebted for the assistance I have received in the determination of the question before us. The question is whether the certificate or order of the Tribunal of Appeal on appeal from the superintending architect is erroneous in point of law. Of course, on any question of fact there is no appeal. The legislation we have to consider is this: By section 22 of the London Building Act, 1894, "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same"—that is the building—"is situate . . . Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor." We are told the application in practice is always made by the building owner. The general line of buildings referred to in the section is not defined as necessarily applicable to any particular length of the street, but, as far as that section is concerned, is left in general. Section 24 provides that: "The superintending architect shall within fourteen days after

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the issue of the certificate defining the general line of buildings"—using the same language as before—"cause a notice of his certificate to be served on the local authority and on the owner of the building or land to which the certificate relates"—"owner" is in the singular, and "the building or land to which the certificate relates," I think, means the building or land as to which the building owner asks to have the line defined—"and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates . . ." Therefore the certificate is treated as applicable to a specific building or a specific piece of land, and I think there can be no doubt that the building or land which is referred to is a building which it is proposed to erect or the land upon which it is proposed to put a building. It follows from the language of section 22 that somebody has to decide whether the general line of buildings shall be ascertained with reference to the whole of the street or to part of the street or to a place or row of houses. The application does not apparently make any request to have the line settled with regard to a particular length, or a portion of the street or the whole of the street; and it therefore rests with the superintending architect to decide—as we understand he does, in fact—what length of the street, or place, or row of houses shall be that in respect of which he will fix the general line of buildings, and it is obvious that the line he takes may vary considerably according as one length or another length is taken. That, it seems to me, therefore, is one of the things which the superintending architect must of necessity decide; and having decided that, he then proceeds to ascertain in the best way he can what he thinks to be the general line of buildings in that part which he chooses for his standard. It is quite obvious, as Mr. Bailhache said, that there may be differences of opinion as to what would be the correct line of buildings to draw upon a plan with reference to the buildings which already stand there; but that is a difficulty which is simply incidental to the determination of any question of fact; and there may be a considerable number of facts which go towards proving what is sought to be proved on one side or on the other; and I wish to point out at once that the question where the general line of buildings is to be drawn is a question of fact which ought to be decided with reference to the physical aspect of the street, and with reference to the buildings in it, and the gardens in it, and the other physical peculiarities which go towards showing whether the general line of buildings shall be taken in one place or the other. I wish to emphasise that, because a part of Mr. Bailhache's argument touched upon what seemed to me to be very

dangerous ground. He pointed out, and I rather thought almost as a thing to be taken into consideration in fixing where the general line should be, the advantages to the London County Council as representing the public—or rather the advantages to the public as represented by the London County Council—according as one line or another was fixed; because he very properly pointed out that when the building line is once ascertained a man cannot build beyond it without the consent of the London County Council; and the Act of Parliament says in terms, in section 26, and it is reasonable enough that it should say so, that where a man applies for leave to build beyond the general building line, the county council may take into consideration whether they can induce him as a *quid pro quo* to give up a portion of his land for the public benefit. If, when the general line of buildings has been once ascertained, a man wants to build beyond it, then that section operates, and it may be very convenient for the London County Council, as representing the public, that the building line shall be fixed in one place rather than another, because in one place the owner may not be likely to want to build beyond it, and in the other place he may; and as the land which is outside the building line does not cease to be his property because the building line has been established, unless they have got some power of putting this persuasion upon him, they cannot get land which they may want very much for widening the footpath or widening the road without paying for it. Now that is a very legitimate matter to be taken into consideration when a man wants to build beyond the building line. But it seems to me that it is a matter that ought not for one moment to enter into the consideration of anyone who is fixing, by looking at the street or by hearing any evidence that may be necessary, and so on, what is the actual general line of the buildings. It may be that I misunderstood Mr. Bailhache's argument, but it was only when I took it as going that length that I said, what I do not withdraw from, that I think that method of putting the screw on a landowner is not legitimate, because it is not a matter that has anything to do with what is the general line of buildings.

So far we have arrived at this, that the superintending architect has to decide, first, what length of street he will take into consideration in fixing his general line; and, secondly, with reference to the physical features of that part of the street, what shall be the general line fixed.

The appeal from the superintending architect's certificate to the Tribunal of Appeal is an appeal given in very general terms. It is provided that the owner of the land who wants the certificate shall have notice of the building line adopted, and that people who own property—I am putting it very shortly and concisely—for fifty yards on each side of his property should also have that notice. That defines

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the persons who have notice of the decision, and are entitled to be heard when the appeal comes on; and Mr. Bailhache's argument, that we must take the appeal to apply only to the block which the superintending architect has chosen as his standard would have been perfectly sound if it were a correct view of section 24, that notices are to be given to the whole of the persons affected in that block and for 50 yards on each side of it. But I think that on looking at section 24 it is perfectly clear that that is not what the section says; and that the persons to whom notice is to be given, and who are to have the right to be heard on the appeal, are expressly and clearly defined, and consist of persons who will not vary according to the points that are taken as the points between which the architect determines the general line of buildings. They are the person who applies for the certificate in order to ascertain how far he may build on his land without contravening the Act of Parliament, and the persons whose property extends for fifty yards on each side of the applicant's property. Therefore the persons who are to come before the Tribunal of Appeal are left in no doubt, and the question of who they shall be is in nowise affected by the length of the street that is taken for the standard of comparison. The power given to the appellate tribunal is a very general one—"to confirm or reverse or vary any decision and make any such order as they may think fit." I cannot see why that important element in the determination of the general line of buildings which consists of defining the place from which the line is to start is not within the competence of the Tribunal of Appeal to consider, to decide, to confirm, to reverse, or to vary, equally with any other part of the decision which is undoubtedly within the jurisdiction of the superintending architect; and if that be so, it seems to me to remove all difficulty from this case, because, if I am right in saying that that is a matter of appeal, a matter comprehended in the appeal, the appellate tribunal has a perfect right to say that the superintending architect has not taken what in their judgment is the right point to start from, and that it is a fairer and a better thing to take a greater length of the road, and to lay down the general line along that length, rather than along the shorter portion which has been taken by the superintending architect. The superintending architect has to determine this matter, and if so, surely it must be equally within the competence of the Tribunal of Appeal to do the same thing, and then all difficulty in this case vanishes, because the tribunal have said they think the portion which they have marked "A" to "B," including a much more considerable length of the $2\frac{1}{2}$ miles of the Fulham Road, is a better space to take than that taken by the architect; and in their order they say that these points makes fairer starting places from which to draw the general line. If that be so I can see no ground for holding

that they made any mistake in point of law. It is not a very easy thing to draw a general line amongst buildings which vary very much, and some of which project towards the street much further than others ; but this is a difficulty which always exists, and which is in this case entrusted to a tribunal consisting of persons eminently qualified for the purpose of such tasks. In my view there was amply enough before the tribunal to justify them in saying that from "A" to "B" was a better length to take as the standard than from Munster Road to Landridge Road.

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The only thing that remains for me to consider is whether there is anything in the operation of section 27, upon which Mr. Bailhache has founded a considerable part of his argument, which would make it right to hold that the Tribunal of Appeal could not legally do what they have done. Now, it seems to me that what took place with regard to the particular property—Ellis's shops—as to which this objection arises was that in 1903, I think it was, but the date does not matter, the county council, without laying down where the general line was, gave the landowner permission to cause the buildings which he wanted to put up and which now come forward to what has been made the edge of the line of buildings, to project, on the terms that he should give up part of his land for the footpath. In so doing, the London County Council availed themselves of section 26 (1). Section 27 is a section the construction of which may be open to some doubt. It says this : "The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent." That, says Mr. Bailhache, throws us back to what the state of buildings was before they were altered, in order to ascertain where the general line of buildings was. I do not desire to be understood as saying definitely that that is my view of the meaning of the section. I would rather wait until it becomes necessary to say absolutely what it is, but I am quite content for this purpose to accept the contention for which Mr. Bailhache argued. It seems to me that that simply alters somewhat the elements of fact which the Tribunal of Appeal would have to take into consideration in fixing the general line of buildings ; and there is certainly nothing to my mind in the position of the buildings as they then stood before the alteration to make it at all extravagant for the appellate tribunal to have come to the conclusion that they could draw a general line of buildings passing through the property as it stood before the alterations, and could continue it to where they have continued it, and put it in the place in which they have put it. There is nothing to my mind extravagant in this decision, as a matter of fact ; and at all events

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I do not hesitate to say that, as far as that consideration is concerned, the question is one of pure fact, with the decision on which we have no right to interfere.

The only other point has reference to the costs. Objection is taken because the Tribunal of Appeal instead of simply awarding costs to the successful appellant before them, fixed the very moderate sum of ten guineas as the costs which he should receive. Now, the Act of Parliament contains no provision as to the costs except the general one that the costs shall be in the discretion of the Tribunal of Appeal. It contains no provision for the taxation of costs: and the result would be, if they were not to fix the costs, that some exceedingly cumbrous proceeding, such as Mr. Bailhache tells us was once actually put in force, must be adopted. He says that where the appellate tribunal had simply awarded the costs, an action was brought to enforce payment of the costs, and then the bill was taxed in that action by the taxing officer of this Court. That is a most cumbersome proceeding, and it cannot be supposed that anything of that sort was in the contemplation of the Legislature. I have the very strongest impression that orders of the kind made by the Tribunal of Appeal have been made in the High Court under the section which gives discretion to the Court to award costs, though I do not think I have made such an order myself, as far as I can recollect; and certainly Mr. Bartley Denniss is well founded in saying that the Summary Jurisdiction Acts place the costs in the discretion of the magistrates; and that it is the almost invariable practice under these Acts for the court to fix the amount of costs without giving the parties the trouble of going to taxation. I think, therefore, that it was well within the power of the appellate tribunal to name a sum for costs instead of simply awarding costs to the successful appellant and leaving him to get them in the best way he could.

For these reasons I think that this appeal must be dismissed.

KENNEDY J. I am of the same opinion, and my brother Wills has so very clearly and fully stated the views in which I entirely concur that I shall not take up time by putting the same considerations in less apt language.

I only desire to say a word or two with regard to sections 26 and 27, because so much of Mr. Bailhache's argument seems to me to have depended upon a certain view of those sections being applied to a portion of the land in question, which has been called Ellis's shops, as to make really his argument almost disappear unless that view is finally adopted. I agree with what my brother Wills has said entirely. In this case there is nothing to show—there is nothing which ought to lead us to assume that the particular view of section 27, against which

Mr. Bailhache has argued, was in fact adopted by the appellate tribunal in coming to the conclusions to which they have come, and against which this appeal is brought. But, as it strikes me, I will just say this, that in giving their consent to the erection of these shops to the extended front, no doubt under section 26 the consent of the county council (acting as the representative, no doubt, of the public) is a consent which I suppose assumes from the language of section 26 that at the time of the erection of these buildings there was a general line of buildings in the street, or part of a street, place, or row of houses. That seems to be inferred to necessarily follow from the first three lines of section 26, because the consent is a consent to be given for the erection of a building or structure beyond the general line of buildings. As far as I know, no general line of building had at that time been fixed under section 22 at all, but I suppose it is fair to assume that the London County Council, in granting the consent, were consenting upon the view that there was a general line of buildings which would not have sanctioned the structure being placed where it was without their special consent.

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Then comes section 27, and I desire, with my brother Wills, not to be taken as expressing definitely upon the arguments before us which have been very fully and ably developed, a final opinion as to what the section means; but at all events I think I ought to say this, looking at the prominence to which that section attains in the argument of the appellants' counsel that I am by no means satisfied that the meaning of that section is the meaning that he placed upon it. It seems to me that the words "deemed to affect or alter . . . the general line of buildings as existing at the time of such consent" would be satisfied by its meaning that supposing that without the consent (which those structures have got by consent) the general line would have been found to be different, the mere fact of the extension of the houses to the point to which they have been built under the consent, is not to be taken necessarily as altering or affecting the line. It is not the ground upon which it is to be said, if any further question arises as to parts of the street in the neighbourhood, that you cannot take the building line as taken, as the general building line, because there are these "consent blocks" erected further into the street; and I think in that way it becomes a valuable section, both as protecting the public from an inference of that kind—a necessary inference, and also in the case of questions arising under section 23. Here the building line, the general line of building, has been taken on appeal in a different way, but the order of the Tribunal of Appeal has been granted on facts; and unless there were no such facts, and therefore no evidence upon which the appellate tribunal could so decide, it seems to me we have

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no jurisdiction or call to reverse the decision upon which the order as to the general building line has been granted, for reasons which, as my brother has pointed out, may be conveniently adopted by the appellate tribunal.

Appeal dismissed.

Solicitor for the appellants—W. A. Blaxland.

Solicitors for the respondents—Hilder, Thompson, and Dunn.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

NISBET v. LLOYD.

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Mar. 2.

Vaccination—Child not vaccinated—Conscientious belief that vaccination would be prejudicial to child's health—Failure to obtain certificate—"Trifling" offence—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 2 (1)—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16.

The fact that the parent of a child has repeatedly, within four months of the child's birth, sought without success to obtain a justices' certificate of his conscientious belief that vaccination would be prejudicial to its health, is not sufficient to justify a court of summary jurisdiction in dismissing an information preferred against the parent in respect of the non-vaccination of the child, as being for a "trifling" offence within the meaning of section 16 of the Summary Jurisdiction Act, 1879.

CASE stated by justices, who had dismissed an information preferred by the appellant, a vaccination officer, against the respondent for unlawfully neglecting to cause his child to be vaccinated.

The facts, &c., were stated in paragraphs 3 *et seq.* of the case, as follows:—

3. (a) The respondent was the parent having custody of a certain child, named Gwendoline Mary Lloyd, born on December 15, 1902.

(b) The respondent did not cause the child to be vaccinated according to the provisions of the Vaccination Acts, 1867 to 1898.

(c) The respondent, within four months of the birth of the child, applied on seven different occasions to two justices sitting in petty sessions for a certificate of such justices that he had satisfied them that he conscientiously believed that vaccination would be prejudicial to the health of the child, but the respective justices to whom such applications were made refused to grant such certificate.

4. Section 2 (1) of the Vaccination Act, 1898, provides as follows:—
 "No parent or other person shall be liable to any penalty under section twenty-nine or section thirty-one of the Vaccination Act of 1867, if within four months from the birth of the child he satisfies two justices, or a stipendiary or metropolitan police magistrate, in petty sessions, that he conscientiously believes that vaccination would be prejudicial to the health of the child, and within seven days thereafter delivers to the vaccination officer for the district a certificate by such justices or magistrate of such conscientious objection."

5. It was contended by the respondent that he had complied with

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the provisions of the section above set out to the best of his power and ability ; that, inasmuch as he had stated on oath before the justices that he conscientiously believed that vaccination would be prejudicial to the health of the child, he had no further means whereby to satisfy the justices, who had not acted judicially or reasonably, but capriciously ; that he was entitled to such certificate ; and that the information should be dismissed.

6. The appellant contended that an offence within the meaning of the Vaccination Act, 1867, had been proved, and that the justices were compelled to convict the respondent.

7. The Summary Jurisdiction Act, 1879, s. 16, provides as follows :—
“ If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment—(1) the court, without proceeding to conviction, may dismiss the information, . . . ”

8. Having regard to the repeated efforts which it was proved and admitted the respondent had made, as above stated, in order to comply with the Vaccination Act, 1898, and which efforts had been rendered of no effect owing to the justices refusing to comply with his applications, the justices hearing the information considered the offence of a trifling nature, and dismissed the information under the provisions of the Summary Jurisdiction Act, 1879, s. 16, hereinbefore in part set forth.

9. The question for the opinion of the Court was whether, upon the above statement of facts, the justices had come to a correct determination in point of law, and if not what should be done in the premises.

Lias for the appellant. There should have been a conviction. Upon the authority of *Phillips v. Evans*, 1896, 1 Q. B. 305 ; 65 L. J. M. C. 101, it was not competent to the justices to refuse to convict. That was a case of proceedings for keeping a dog without a licence, and the justices, thinking that the respondent was entitled to a certificate of exemption, which had been refused by the Commissioners of Inland Revenue, dismissed the information under section 16 of the Summary Jurisdiction Act, 1879, the offence being in their opinion of a trifling nature. In that case the Court held that the justices had no jurisdiction to review the decision of the Commissioners of Inland Revenue, and that they could not refuse to convict the owner of the dog.

Schultess Young watched the case for the respondent but did not argue.

LORD ALVERSTONE C.J. We are of opinion that this case must go back to the justices with our direction that there should be a conviction. 1904.
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WILLS J. I agree.

KENNEDY J. I agree.

Appeal allowed. Case remitted.

Solicitors for the appellant—Sharpe, Parker, & Co., for Cleaver, Holden, & Co., Liverpool.

Solicitor for the respondent—H. T. Nicholson.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

The narrow view taken of the scope of section 16 the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 43), in the above case and in the cases of *Banton v. Davies* (1891) 56 J. P. 294, and *Phillips v. Evans*, 1896, 1 Q. B. 305; 65 L. J. M. C. 101; 74 L. T. 314; 44 W. R. 429; 60 J. P. 120; 18 Cox C. C. 300, with reference to offences against Acts of Parliament, may be contrasted with the very broad view of the scope of the section taken in more than one case with reference to offences against bye-laws: see particularly *Salt v. Scott-Hall*, 1903, 2 K. B. 245; 1 L. G. R. 753; 72 L. J. K. B. 627; 88 L. T. 868; 52 W. R. 95; 67 J. P. 306; *Pomeroy v. Malvern Urban District Council* (1903) 1 L. G. R. 825; 89 L. T. 555; 67 J. P. 375.

High Court of Justice.

KING'S BENCH DIVISION.

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Nov. 4.

HULL v. HORSNELL.

Adulteration—Sale of food mixed with injurious ingredient—Nature of offence—Bottled peas coloured with sulphate of copper—Analyst's certificate—Certificate not stating that article is injurious to health—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 18, 20, 21, Schedule.

To justify a conviction under section 3 of the Sale of Food and Drugs Act, 1875, in respect of the sale of an article of food with which a foreign ingredient has been mixed, it must be found that the article of food has been rendered injurious to health by the admixture of the ingredient; a finding that the added ingredient is in itself injurious to health is insufficient.

It is not, however, necessary that the analyst's certificate on which the proceedings under the section are founded should state that the article is injurious to health.

CASE stated by justices for the county of Sussex:—

At a court of summary jurisdiction, holden at Bexhill, in the petty sessional division of Hastings, in the county of Sussex, on April 16, 1904, an information preferred by Arthur Horsnell (hereinafter called the respondent) against James Hull (hereinafter called the appellant), under the Sale of Food and Drugs Act (38 & 39 Vict. c. 63), charging that he, the said James Hull, on February 19, 1904, at the parish of Bexhill, in the borough of Bexhill, in the petty sessional division of Hastings, in the county of Sussex, unlawfully and wilfully did sell to the said Arthur Horsnell a certain article of food, to wit, bottled peas, which, to the knowledge of James Hull, was mixed with a certain ingredient called sulphate of copper, which ingredient was injurious to health, contrary to the Sale of Food and Drugs Acts, 1875 to 1899, was heard and determined by us (the said parties respectively being present), and upon such hearing the appellant was duly convicted before us, and we adjudged him to pay a fine of £5 and seven shillings costs.

CASE.

1. The appellant is a greengrocer, carrying on business at Bexhill, and the respondent is an inspector under the Sale of Food and Drugs Act for the Rye district of the county of Sussex, which district comprises Bexhill.

2. On February 10, 1904, the respondent, in his evidence, proved that he, the respondent, went to the appellant's shop and purchased a

bottle of preserved peas for the purpose of analysis. The respondent divided the peas so purchased by him into three parts, and sent one part to the public analyst, who gave his certificate, a copy of which is as follows :—

“ Sale of Food and Drugs Act.

To Mr. A. Horsnell.

I, the undersigned, public analyst for the administrative county of East Sussex, certify that I received on February 20, 1904, from yourself (per registered parcel post) a sample of bottled peas, No. 14, for analysis (which then weighed about $4\frac{1}{2}$ ounces), and have analysed the same and declare the result of my analysis to be as follows :—

I am of opinion that the said sample is adulterated with sulphate of copper to the extent of at least 1·87 grains per lb.

Observations.

The copper salt has doubtless been added to improve the colour of the peas.

As witness my hand this 27th day of February, 1904.

J. ALLINSON WOODHEAD.”

3. The respondent also proved that the bottle containing the peas purchased by him from the appellant bore a label, of which the following is a copy :—

“ ENGLISH GARDEN PEAS.

To open this bottle turn back tongue on rim.

Colour preserved with a small portion of sulphate of copper.

Finest English Marrowfat Peas.

Preserved in Kent.

Peety, Wood, & Co.

London.”

4. The public analyst was called for the prosecution, and he proved—

(a) That the sample of bottled peas purchased by the respondent was analysed by him, and contained sulphate of copper to the extent of at least 1·87 grains per lb.

(b) That sulphate of copper is a poisonous substance, and injurious to health.

(c) That sulphate of copper was used to preserve the colour of the peas.

(d) That he had never known anyone personally, or heard of anyone, injured by eating peas containing copper, but that he, the public analyst, suffered from colic if he ate coppered peas.

(e) That out of eight samples examined by him during the previous quarter seven contained copper.

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Hull v. Horsnell. 5. The following is a copy of the information and summons upon which we convicted the appellant :—

“ In the county of Sussex.

Petty sessional division of Hastings.

To James Hull of Devonshire Road in the parish of Bexhill in the county of Sussex, fruiterer.

Information on oath has been laid before me this day by Arthur Horsnell of 67 Vale Road in the parish of St. Matthew, Hastings, in the said county, inspector of weights and measures for that you on the 19th day of February, 1904, at the parish of Bexhill in the borough of Bexhill in the division and county aforesaid unlawfully and wilfully did sell to him the said Arthur Horsnell a certain article of food to wit bottled peas which to the knowledge of you the said James Hull was mixed with a certain ingredient called sulphate of copper which said ingredient is injurious to health, contrary to the Sale of Food and Drugs Acts 1875 to 1899 the statute in such case made and provided.

You are therefore hereby summoned to appear before the court of summary jurisdiction sitting at the sessions court Bexhill on Saturday the 16th day of April, 1904, at the hour of half-past eleven in the forenoon to answer the said information.

Dated the 16th day of March, 1904.

H. L. M. DUNN,

Justice of the Peace for the county aforesaid.”

6. No evidence was called on behalf of the appellant, but it was contended on his behalf that the information did not disclose any offence under the Sale of Food and Drugs Acts, because it did not allege that the admixture of the ingredient called sulphate of copper rendered the article of food, namely, the bottled peas, injurious to health, but merely that the ingredient itself was injurious to health, and that therefore the information was bad in law, and the appellant could not be convicted upon it.

It was also contended on behalf of the appellant that the certificate of the public analyst did not disclose any offence, and was insufficient, and did not comply with the requirements of the Sale of Food and Drugs Acts, and that therefore the appellant could not be convicted.

7. It was contended on behalf of the respondent that the information did disclose an offence under the Food and Drugs Act. That it is sufficient to constitute an offence under the latter part of section 3 of the Sale of Food and Drugs Act, 1875, if the ingredient itself which is mixed with the article of food is injurious to health, and it is not necessary to show that the ingredient renders the article of food

injurious to health. It was also contended on behalf of the respondent that the analyst's certificate was sufficient, being in the form provided by the Schedule to the Sale of Food and Drugs Act, and that the certificate need not disclose any offence. It was contended also that the insufficiency, if any, was remedied by the public analyst being called as a witness to give evidence of the facts. 1904.
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8. We were of opinion that sulphate of copper, which was an ingredient in the peas, is injurious to health, and we therefore convicted the appellant, being of opinion that the ingredient necessarily rendered the whole article injurious to health.

9. The questions for the opinion of the Court are :—

(1) Whether the information disclosed an offence under the Sale of Food and Drugs Acts, and was valid in law?

(2) Whether the public analyst's certificate was sufficient and valid in law?

(3) Whether we were right in convicting the appellant?

If the Court should answer all three of the above questions in the affirmative the conviction is to stand, and if the Court should answer either of the above questions in the negative the conviction is to be quashed.

Section 3 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), is as follows :—

No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered, under a penalty in each case not exceeding fifty pounds for the first offence; every offence, after a conviction for a first offence, shall be a misdemeanour, for which the person, on conviction, shall be imprisoned for a period not exceeding six months with hard labour.

Avory, K.C., and *Bonsey* for the appellant. The conviction cannot stand. In order that the sale of an article of food should constitute an offence against section 3 of the Act of 1875 it is necessary that the article itself should be injurious to health; it is not sufficient that an ingredient in the article should be injurious to health. The information, therefore, was bad as disclosing no offence known to the law.

[*Boxall, K.C.* Section 1 of the Summary Jurisdiction Act, 1848, precludes the taking of any objection of this kind to the information.]

Section 1 of the Act of 1848 merely means that the information may be amended. It does not mean that the justices can convict upon an information unamended that discloses no offence. Further, apart from any question of form, the justices have not found that the article sold was

1904. injurious to health, but merely that sulphate of copper is injurious to health. It is clear, therefore, that they have in substance convicted the appellant of a non-existing offence.

Again, the analyst's certificate is bad. It discloses no offence, for it fails to state that the addition of the small quantity of sulphate of copper present in these peas renders the peas injurious to health.

[They cited *Goulder v. Rook*, 1901, 2 K. B. 290; 70 L. J. K. B. 747; and Kennedy J. referred to *Reg. v. Smith*, 1896, 1 Q. B. 596; 65 L. J. M. C. 104.]

Boxall, K.C., and *Henriques* for the respondent were not called upon to argue.

LORD ALVERSTONE C.J. We think it better that we should send this case back to the justices with our direction that they should reconsider it. Had they convicted the appellant of an offence under section 3 of the Sale of Food and Drugs Act, 1875, upon the ground that the added ingredient, in this instance sulphate of copper, was in itself injurious to health, and not upon the ground that the bottled peas themselves were rendered injurious to health by reason of the admixture of sulphate of copper, I should be clearly of opinion that the conviction was wrong. There is no doubt in my mind that to constitute an offence under the second part of section 3 the article of food which has been sold must be found, in fact, to be injurious to health. From the way in which this case has been stated it is by no means clear that the justices have found that these bottled peas were injurious to health. For my part, I think they quite intended to do so; but they have failed to make it plain whether they were satisfied that the article itself—the bottled peas—was injurious to health, or whether they were merely satisfied that the sulphate of copper was injurious. We think, therefore, that the case must go back to them with this direction: that if they have found the peas as bottled were injurious to health the conviction is to stand; but if their finding was, not that the peas were injurious to health, but that sulphate of copper was, then the conviction cannot stand.

The second question in the case is whether the public analyst's certificate was sufficient and valid in law. It runs as follows:—"I, the undersigned, public analyst for the administrative county of East Sussex, certify that I received . . . a sample of bottled peas, No. 14, for analysis . . . and have analysed the same, and declare the result of my analysis to be as follows: I am of opinion that the said sample is adulterated with sulphate of copper to the extent of at least 1·87 grains per lb." Mr. Ivory's contention is that at the end of his opinion the analyst should have added the words, "which rendered the bottled

peas injurious to health," and that the certificate as it stood did not disclose upon the face of it any offence. I do not agree with that contention, for it must be remembered that the analyst does not know that proceedings will be taken, and cannot know with what offence the vendor of the article is to be charged. I am of opinion that the certificate is sufficient, since it discloses the nature of the ingredient put into the article analysed. It is enough if the certificate be in the form of the schedule to the Act and disclose the nature of the foreign ingredient without going on to state that this ingredient is injurious to health. Here the description of the article sent for analysis is set out together with the weight and other requirements, and the words "injurious to health" are not found in the schedule. I am, therefore, of opinion, in answer to the second question in the case, that the analyst's certificate was sufficient and valid in law. 1904.
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KENNEDY J. I agree.

RIDLEY J. I agree.

Case remitted.

Solicitors for the appellant—Neve, Berk, and Kirby.

Solicitor for the respondent—Lawson Lewis, Eastbourne.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

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CHANCERY DIVISION.

July 8.

METROPOLITAN ELECTRIC SUPPLY COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Streets—Street “leading into” another street—London County Council (Improvements) Act, 1899 (62 & 63 Viet. c. cclxvi), s. 55 (6).

A section of an Act of Parliament dealing with the construction of a new central street, and in particular with the powers of the defendant local authority to move the site of the plaintiffs' premises, provided that the defendants should “maintain a public street of not less than 25 feet in width along the northern boundary of the new site leading into the new central street.”

Held, that the obligation on the defendants was to maintain a street leading substantially, though not necessarily mathematically, straight into the new central street.

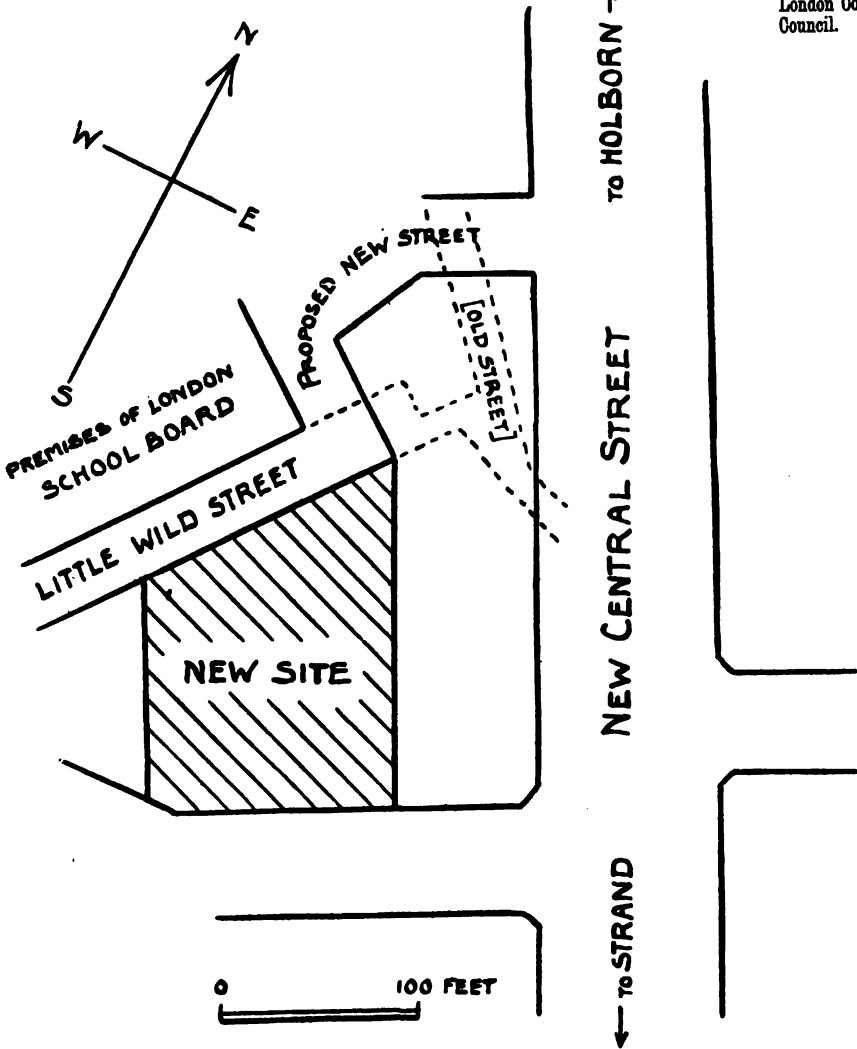
THIS was an action in which among other points the question arose as to what was a street “leading into” another.

The plaintiffs were the Metropolitan Electric Supply Company, Limited, and the defendants the London County Council. By the provisions of the London County Council (Improvements) Act, 1899, the County Council were empowered to take the company's then existing premises for the purposes of making a new central street from Holborn to the Strand, and in return were to provide the company with a new neighbouring site equal in area to the existing site for the erection of their electricity generating station. Section 55 (6) of the Act provided that “the Council shall at all times unless otherwise agreed with the company maintain public streets of not less than 25 feet in width along the northern and southern boundaries of the new site leading into the new central street.”

As appears from the accompanying sketch plan, the new site was of a more or less rectangular form, having its eastern side parallel with and at a distance of some 70 feet from the western side of the new central street. Along the whole length of the northern boundary there was at present existing a street called Little Wild Street, which was of the width required by the provision above referred to, and the Council accordingly proposed to satisfy that provision by maintaining Little Wild Street and continuing it into the new main central street. But in order, as they alleged, to suit the additional requirements of an agreement respecting some other adjacent property they proposed to make this continuation not by prolonging Little Wild Street in one

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straight and direct line but by way of two rectangular turns, the first of which (as appears from the plan) would turn northwards for about 80 feet, and the second of which would turn eastwards with a further turning of an obtuse angle so as to run into the new central street.

The plaintiffs contended that this was not a street "leading into the new central street" within the meaning of the provision of the Act.

Cripps, K.C., P. O. Lawrence, K.C., and Sargant for the company. The street proposed by the Council does not satisfy the provisions of the section, which contemplates a straight street bounding the north side of the proposed new site and running in a direct line to meet the new central street at right angles.

Stewart Smith, K.C., and T. T. Methold for the Council. The section will be satisfied by a street which, being of the requisite width, runs into the new central street. The particular direction chosen is partly dictated by the obligation of the Council under another section of the Act to provide a street accommodating further property.

KEKEWICH J. The question falling for decision is a short and simple one. I do not mean to say that it is by any means easy, but it is short and simple, that is to say, it exhibits no complications. The facts are not difficult to understand, and the language to which one has to give a meaning is the ordinary English language. The surrounding facts give one very much less assistance than is usual in a case of this kind. One is, of course, entitled to put oneself as far as one can in the position of the Legislature, that is to say, to know all that the committee by whom the Bill was passed knew about the neighbourhood, the position of the parties, and other circumstances of a like kind, and one has a plan which was signed for certain purposes by the chairman of the committee, and that is useful; but one gets very little guide from it as to the intention of the Legislature in the particular instance. There is nothing to induce one to come to a conclusion as to the real object of making this particular provision, and that being so, one is driven back on the construction of the words with reference to nothing really but a plan from which one can see what the *situs* was—what the site of what is called the reinstatement site was, and what is the situation and the line of the streets in the neighbourhood. Counsel for the defendants endeavoured to make something in this connection of another section of the Act which makes a provision in favour of a certain ancient and honourable society to the effect that a neighbouring court should not be stopped up in any place until an equivalent access to the property interfered with had been made from Sardinia Place or the new street (that is to say, alternatively, one or the other) on the

one side, and from Great Wild Street absolutely (that is to say, without any alternative) on the other; and he has shown that it would be extremely convenient to the London County Council if they are able to make a street for the benefit of the company which would at the same time meet the exigencies of that other section. That I understand, but I cannot see that, because the Legislature has required them to make certain streets and to make a certain access for the benefit of this ancient and honourable society in Wild Court, therefore that has any bearing upon the provision in favour of the company in the preceding section. The two do not seem to me to be in any way *in pari materia*. I turn, therefore, to the words themselves: "The Council shall at all times unless otherwise agreed with the company maintain public streets of not less than 25 feet in width." I pointed out at an early period of the argument that it is noticeable that the Council are not bound to construct new streets, but they must maintain them, and that, therefore, the duty will be performed if some streets are maintained even though they exist before—they are not bound to construct new streets for the purpose. I agree that is not an important part of the clause, but when one has to construe the words one must look at the whole of it, and obviously the Legislature intended that they should not be bound to construct new streets, but that they might avail themselves of existing streets; and that, as regards the northern boundary, they are proposing to do, because they are proposing to utilise Little Wild Street as the street along the northern boundary, and I do not see how it would be physically possible for them to do anything else, because I take it for granted, though nothing has been said on the subject, that they could not acquire the premises of the London School Board, and even if they could, still Little Wild Street would be necessarily the direction of the street along the northern boundary.

Then the next point is that they are bound to do it (I leave out the southern, because we are only concerned with the northern boundary) along the northern boundary. That, it seems to me, they have done, for Little Wild Street does extend the whole length of the northern boundary. Counsel for the plaintiffs endeavoured to make out that by reason of Little Wild Street itself not being at right angles to the line of the new central street the company would not get exactly what was required by the Act under the proposed plan in this respect. I cannot follow that. It seems to me that if they had Little Wild Street either with or without the proposed new street, they would still have a street along the northern boundary; that is to say, from what would be the western point to the eastern point, speaking broadly; it really runs north-eastern, I think, and south-western. It seems to me there you

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get that along the northern boundary ; but, then, it is not only to be a street along the northern boundary of the new site, but to be a street leading into the new central street. Now we know where the new central street is, and we know where it must have been. When I say we know where it must have been, of course some discretion was left to the County Council, and even on the plan signed by the chairman of the Parliamentary committee, which is before me, it is put, "line of proposed new street." I have not looked into the Act of Parliament, but no doubt there were large powers of deviation and alteration left to the County Council ; but the general line of it was determined, and could not possibly be departed from to any appreciable extent or any substantial extent, because, of course, the Act enabled certain properties to be taken for it, and it must have been within certain limits, just in the same way as a railway must be constructed within certain lines, notwithstanding that the company have large powers of deviation. So that we know where the new central street is for all practical purposes ; it runs in the direction shown on the chairman's plan, and also on the other, and there could not have been any really large departure from the direction of it. You are to have a street leading into that street. What does "a street leading into a street" mean ? The Legislature has cast upon me the duty of saying what "leading" means, without any other guide than the word "leading." Now, it would be absurd to suppose that the Legislature meant that "a street leading into" another was a street by which and by means of the intervention of other streets you could eventually get into the new street. You could push that, of course, to such an absurdity that no one would for a moment suppose that the street led into another street. It cannot have meant that. But may not the Legislature fairly have meant that it was a street leading by not inconvenient corners and diversions from Little Wild Street into the new central street ? Is not that possible ? It seems to me the ordinary meaning of the language. I think the meaning of the language "leading into the new central street" is leading straight or directly into the new street. By "straight" I do not mean mathematically "straight" ; I do not mean that the lines of the street along the northern boundary are to be parallel throughout, so that the ends according to Euclid can never meet—that there should be no curvature anywhere ; that there should be no inclination to the right or to the left anywhere—far from it. But what I understand the meaning of the words to be is that the street on which you are walking or driving leads up straight into the new street ; that between the point on which you are and the point in the new street to which you are going there should be no turn—no turn in the sense which I have mentioned. That seems to be the only common sense interpretation

which I can give to the words, and I think, therefore, that the proposal first to make a turn sharp to the left, giving a purely right angle turn, and then from that another right angle turn to the right, even though, as has been pointed out, you are only going round two corners, still that seems to me not to comply with the terms of the Act, and I think that the London County Council would not have fulfilled their obligations if they gave the company that access to the new street, and not one leading straightly in the sense which I have mentioned from Little Wild Street right away to the new central street.

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Declaration accordingly.

Solicitors for the Company—Barlow and Barlow.

Solicitor for the County Council—W. A. Blaxland.

High Court of Justice.

CHANCERY DIVISION.

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July 26.

In re CLABBON (deceased).*In re* F. W. CLABBON (an infant).

**Poor Law—Maintenance—Infant pauper—Guardians' right to recover
Necessaries—Common law right—Six years' arrears—Statutory
right—Legacy—Poor Law (Amendment) Act, 1849 (12 & 13 Vict. c.
103), s. 16.**

The common law principle which implies an obligation on the part of a person who by means of disability cannot himself contract, to pay out of his own property for necessities supplied to him, extends to the case of an infant pauper who becomes entitled to property, and the guardians of the poor who have maintained him can recover to the extent of six years' arrears of maintenance.

Section 16 of the Poor Law (Amendment) Act, 1849, which enables Poor Law guardians to appropriate or recover out of property belonging to a pauper the expense incurred by them in maintaining him during the previous twelve months, while leaving unaffected their common law right of recovering in respect of expenditure necessarily incurred for his benefit, gives them an additional security upon any property belonging to him for the amount expended by them during the period specified in the section, with power to recover the same in a summary manner.

THIS was a summons taken out by the clerk to the guardians of the poor of St. Mary, Islington, as next friend of an infant pauper in the following circumstances:—

The infant, who was born on October 9, 1889, became chargeable to the guardians, and had been maintained by them, since June 29, 1897, at the cost of five shillings per week. Recently, the infant had become entitled under the will of the above-named testator, William Clabbon, to a legacy of £100 and a share of residue amounting in value to about £170. The guardians now applied, as above stated, that a sum of £83 9s., in respect of maintenance from June 29, 1897, to November 16, 1903, might be paid to them by the respondent, the testator's executor, out of the moneys to which the infant had so become entitled.

The objection had been taken by the respondent that, under section 16 of the Poor Law Amendment Act, 1849, the guardians were only entitled to recover one year's maintenance.

Section 16 of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), provides as follows:—

Where any pauper shall have in his possession or belonging to him any money or

valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be) . . .

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S. Davey for the clerk to the guardians. This is a claim for necessities supplied to an infant, and is based upon the common law principle that the infant is liable to pay for them out of his property, and the extent of the claim accordingly is for six years' past maintenance. Cotton L.J. states the principle very clearly in *In re Rhodes, Rhodes v. Rhodes* (1890) 44 Ch. D. 94, 105; 59 L. J. Ch. 298, 302, where he says: "But whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property." That principle has been applied in the case of pauper lunatics. This is relief in respect of which the guardians can recover: *West Ham Union v. Pearson* (1890) 62 L. T. 638.

R. M. Pattison for the executor. The guardians have a statutory duty to maintain paupers, and where any pauper becomes entitled to property, the guardians' only right to recover expense incurred for his maintenance is the statutory right given to them by section 16 of the Poor Law Amendment Act, 1849, limiting the amount recoverable by them to one year's past maintenance. In both *In re Webster, Derby Union v. Sharraff* (1884) 27 Ch. D. 710; 54 L. J. Ch. 276, and in *In re Newbegin's Estate; Eggleton v. Newbegin* (1887) 36 Ch. D. 477; 56 L. J. Ch. 907, which were cases of pauper lunatics, the decision turned upon the construction of the Lunatic Asylums Act, 1853. In the latter case, although the guardians were held entitled to recover six years' arrears of maintenance, Chitty J. distinctly takes the view that under section 16 of the Poor Law Amendment Act, 1849, only one year's arrears are recoverable. *West Ham Union v. Pearson* (1890) 62 L. T. 638 was the case of an adult suffering from delirium tremens, and is distinguishable.

FARWELL J. In my opinion this case is covered by the authorities cited to me. I do not agree with the proposition that a pauper who takes relief in the form of necessities which keep him alive takes that relief as of right, so that he cannot be sued for expense incurred in supplying him with those necessities if, as has happened in this case, he subsequently becomes entitled to property. This case comes within the decision in *West Ham Union v. Pearson* (1890) 62 L. T. 638,

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where a man suffering from delirium tremens had been removed to the workhouse and after being kept for several days was discharged upon the finding of the magistrates that he was not a lunatic. The Court held that he was under a common law liability to repay to the guardians the expenses necessarily incurred for his benefit. Fry L.J. says: "The question here is whether the defendant is liable for these expenses, expenses which were properly incurred for the benefit of the defendant. I think he is so liable, and I base my decision, not upon the Lunacy Acts, but simply upon the common law liability on the part of the defendant to repay the expenses necessarily incurred for the benefit of the defendant himself." Mathew J. says: "I am of the same opinion. It has been abundantly proved here that this man was not in a fit state to protect himself, that these expenses were necessities, and that therefore the defendant is liable for them." In my opinion, an infant is also liable for expenses necessarily incurred for his benefit, and to the extent of six years. Then comes the question whether section 16 of the Poor Law Amendment Act, 1849, limits to one year the period in respect of which the guardians can recover. In the first place it is difficult to imagine why the period should be so limited, and I do not think the section can bear that construction. It was intended to give the guardians an additional security upon any property belonging to the pauper, and it also gives them power to recover in a summary manner the amount expended by them. The section leaves their common law rights unaffected, and it would require special provisions to limit those rights. Had it not been for the dictum of Chitty J. in *In re Newbegin's Estate* (1887) 36 Ch. D. 477; 56 L. J. Ch. 907, I would not have thought there was much doubt about it. That dictum was not necessary for the particular decision, which turned on the construction of the Lunatic Asylums Act, 1853, and is not now binding on me. I will, therefore, authorise the executor to repay the guardians to the extent of six years' maintenance reckoned from to-day.

Solicitors for the applicant—Samuel Price and Sons.

Solicitors for the respondent—Crossfield, Cushing, and Wheldon.

High Court of Justice.

CHANCERY DIVISION.

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In re BLUNT'S TRUSTS; WIGAN *v.* CLINCH.

Aug. 3.

Education—Charitable bequest—Bequest of annuity for support of national schools—Trust deed—Gift over if funds necessary for carrying on schools should be raised under powers of any Act of Parliament—Perpetuity—Education Act, 1902 (2 Edw. VII. c. 42).

A testatrix, who died in 1900, by her will dated in 1891 bequeathed to her trustees a sum sufficient when invested to produce a yearly sum of £20, and she directed them to pay such yearly sum to the treasurer for the time being of certain National schools so long as they should be carried on under the conditions contained in a deed of trust dated in 1873 and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect but should be null and void in certain events—inter alia, if the funds necessary for carrying on the schools should be raised under powers for that purpose contained in any then present or future Act of Parliament, and that upon the happening of such event the payment of the yearly sum should cease, and the fund purchased should fall into her residuary estate. By the deed of 1873 it was declared that the schools should be conducted according to the principles and designs of the National Society. Subject to certain superintendence by the principal officiating minister of the parish, the control and management of the schools and premises and the funds and endowments thereof were vested in and exercised by a committee consisting of such minister and certain other persons, being communicants.

Held, (1) that on the coming into operation of the Education Act, 1902, the schools ceased to be any longer carried on under the conditions contained in the trust deed of 1873;

(2) that as regarded the gift over, no question arose as to infringement of the rule against perpetuities, because on the happening of the condition in the will the property by law would fall into residue, without express gift; that the Court was entitled to look at the will in order to ascertain whether the event had happened on which the yearly sum was to cease and determine; and that on the coming into operation of the Act of 1902 the event contemplated by the testatrix had happened, and the fund producing the yearly sum fell into residue accordingly.

In re Randell; *Randell v. Dixon* (1888) 38 Ch. D. 213; 57 L. J. Ch. 899, *followed*.

ORIGINATING summons taken out by the trustee of the will of the late Mrs. Isabella Dorothea Blunt for the determination of the question whether, upon the coming into operation of Part III. of the Education Act, 1902, with reference to the Bicknor and Hucking National Schools

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mentioned in the will, the stock producing a yearly sum of £20 invested under the provisions of the will fell into and formed part of the residuary estate of the testatrix, and how the capital and income thereof ought to be applied or dealt with.

The testatrix, by her will dated August 10, 1891, after appointing the plaintiff and other persons trustees thereof, bequeathed such a sum as when invested in the purchase of certain stocks would produce a clear income or yearly sum of £20. And she directed her trustees to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools "so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated 18th June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions"; but she declared that the bequest should not take effect, but should be null and void if any of the three following events should happen in her lifetime, namely, "(1) If a school board for the parishes of Bicknor and Hucking shall be formed; or (2) if the funds necessary for carrying on the said schools shall be raised under powers for that purpose contained in any present or future Act or Acts of Parliament; or (3) if a trust shall be created and a sufficient fund shall be set apart for the purpose of carrying on the said schools under the conditions of the aforesaid deed of trust." And the testatrix further declared that if either of the two first-mentioned events should happen after her death, then immediately on the happening of such one of these events as should first happen, the payment of the income or yearly sum to the treasurer aforesaid under the aforesaid direction in that behalf should cease and determine, and the fund purchased to produce the same should fall into and form part of her residuary estate. The testatrix then made various other pecuniary bequests, and devised and bequeathed her residuary real and personal estate to her nephew, E. E. Green, absolutely.

The testatrix died on April 3, 1900, and her will was duly proved by the plaintiff alone, liberty being reserved to the other trustees to come in and prove, which they had not done.

By the deed of trust of June 18, 1873, which was in the form adopted by the National Society for Promoting the Education of the Poor in the Principles of the Established Church, it was declared "that such school shall always be in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales and subject to and in conformity with the declaration aforesaid such school and premises and the funds and endowments thereof in respect whereof no other dis-

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position shall be made by the donor shall be controlled and managed in manner following, that is to say, the principal officiating minister for the time being of the said parish of Bicknor shall have the superintendence of the religious and moral instruction of all the scholars attending such school subject to the provisions hereinafter contained, and may use or direct the premises to be used for the purposes of a Sunday-school under his exclusive control and management. But in all other respects the control and management of such school and premises and of the funds and endowments thereof and the selection appointment and dismissal of the schoolmaster and schoolmistress and their assistants (except when under the provisions hereinafter mentioned the dismissal of any master mistress or assistant shall be awarded by the bishop of the diocese or the arbitrators as the case may be) shall be vested in and exercised by a committee consisting of the principal officiating minister for the time being of the said parish his licensed curate or curates if the minister shall appoint him or them to be a member or members of the said committee, such of the churchwardens for the time being of the said parish of Bicknor and of the ancient chapelry of Hucking as shall be communicants of the Church of England and of six other persons of whom the following shall be first appointed that is to say, Edward Leigh Pemberton of Wrinstead Court in the county of Kent Esq. M.P. and the Rev. Alfred Morden Bennett Vicar of Saint Peters Bournemouth in the county of Hants such other persons continuing to be contributors in every year to the amount of 20s. each at least to the funds of the said schools and to be communicants of the Church of England as by law established and either to have a beneficial interest to the extent of a life estate at least in real property situated in the said parish of Bicknor or to be resident therein or in a parish or ecclesiastical district adjoining thereto. And any vacancy which shall occur in the number of the said other persons by death resignation incapacity or otherwise shall be filled up by the election of a person or persons qualified as aforesaid who shall be elected by the majority of votes of such of the contributors during the year current at the time of the election to the amount of 10s. each at the least to the funds of the said school being members of the said Church of England and qualified as the persons to be elected by residence or estate as shall be present at the meeting duly convened for the purpose of the election or not being present thereat shall vote by any paper sent on or before the day of such meeting to the chairman thereof and signed by any contributor wherein shall be named the person or persons whom such contributor shall desire to elect and every contributor qualified to vote shall be entitled at every such election to give one vote in respect of

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each such sum of 10s., but no person shall be entitled to give more than six votes in respect of any sum so contributed. Provided that no appointment to serve the office of churchwarden nor any election as aforesaid shall give or vest any right to or in any lay person to serve upon the committee or in anywise interfere with the management of the school and the funds and endowments thereof until after he shall have in the presence of the chairman at a meeting of the committee made and signed in a book to be kept at the said school a declaration in the manner and form following, that is to say, 'I, A. B. do solemnly and sincerely declare that I am and have been for three years last past a communicant of the Church of England.' Provided also that no vacancy during any current year shall prevent the other members of committee from acting until the vacancy shall be filled up. And it is further declared that all the provisions of the Elementary Education Act 1870 which constitute a public elementary school shall apply to the school to be constituted under this deed provided that if the committee of management herein described pass a resolution at a meeting composed of a majority of the managers for the time being to repay any grant made in aid of the establishment of the said school out of the Parliamentary grant for education and if the said committee shall accordingly repay that amount to the Lords Commissioners of the Treasury for the time being the aforesaid declaration whereby this school shall be a public elementary school within the meaning of the Elementary Education Act 1870 shall forthwith become void and of no effect . . ."

In November, 1900, £800 Midland 2½ per cent. debenture stock was purchased in the name of the plaintiff to meet the sum of £20 per annum for the schools, and under a direction signed by him the dividends were paid every half-year to the account of the treasurer of the Bicknor and Hucking Schools.

On January 8, 1904, the Board of Education made a final order under section 11 of the Education Act, 1902—first, that the appointment of foundation managers of each of the schools specified in the second schedule thereto (which included the present schools) should be made in accordance with the provisions specified in the first schedule thereto; and secondly, that the order should take effect from the date thereof as a final order for the purposes of section 11 of the Act.

The first schedule to the order was as follows:—

"1. The provisions contained in the first schedule of the interim order already made in the matter of the school shall continue in force for one year from the appointed day on which Part III. of the said Act came into operation in the area in which the school is situated.

"2. On and after the expiration of the said period the foundation

managers shall (subject as hereinafter provided) consist of one *ex officio* manager and three representative managers.

" 3. The *ex officio* manager shall be the person who is the principal officiating minister of the ecclesiastical parish or district within which the school is for the time being situated. If the said minister refuses to act, or is absent from all meetings of the managers during a period of six months, the archdeacon of the archdeaconry within which the school is situated may from time to time appoint some person to act as his substitute for a period not exceeding the current triennial period, and so in respect of each subsequent triennial period, provided that if the minister in whose place the substitute is appointed vacates the office of minister, his successor shall forthwith be *ex officio* manager in place of the said substitute.

" 4. The representative managers shall be qualified persons elected by qualified subscribers to the funds of the school at a meeting to be held triennially for that purpose. Their term of office shall be three years, but they shall remain in office till their successors are elected or otherwise appointed, and shall be eligible for re-election or re-appointment.

" If at the date of any meeting for the election of representative managers there are less than eight qualified subscribers, or if the qualified subscribers fail to elect, the right of the qualified subscribers shall, for that turn, be exercised by the persons who are at the time the foundation managers of the school.

" 5. 'Qualified persons' shall mean persons residing in or near the said ecclesiastical parish or district, or having a beneficial interest to the extent of a life estate at the least in real property situated in the said parish or district, and in each case being and continuing to be *bonâ fide* members of the Church of England, and no person who is required to possess these qualifications shall be entitled to act as a foundation manager until he has signed a declaration that he is a member of the Church of England.

" 6. 'Qualified subscribers' shall mean :

- (a) Persons who have voluntarily contributed a sum of not less than two shillings and sixpence to the funds of the school in each of the three last preceding school years ; or
- (b) Persons who have voluntarily contributed to the funds of the school not less than five pounds in one sum ; or
- (c) Societies or other bodies who have voluntarily contributed to the funds of the school not less than ten pounds in one sum.

" 7. The foundation managers shall keep a list (corrected up to date) of qualified subscribers, and this list shall be open to inspection by all persons interested. No person as respects his right to vote shall be

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regarded as a qualified subscriber unless his name is included in the said list.

"8. It shall be the duty of the foundation managers, by public notice given a sufficient time, being not less than twenty-one days, before the expiration of the term of office of the first foundation managers appointed under the said interim order, and afterwards, before the end of each triennial period, to call a meeting of subscribers for the purpose of electing foundation managers. Each subscriber shall have one vote only in respect of each vacancy.

"Subscribers may give their votes either personally at the meeting or by writing delivered before the commencement of the meeting to the person named for that purpose by the foundation managers in the notice convening the meeting.

"Any society or body may exercise its power of voting through its secretary or some other person authorised by it in writing for that purpose.

"The foundation managers shall choose one of their number to act as chairman at the meeting for the election. In case of an equal division of votes the chairman, if he is a qualified subscriber, shall have a second or casting vote. It shall be the duty of the chairman before the close of the meeting to declare the result of the election.

"The names of persons elected or appointed to be foundation managers shall be communicated to the clerk of the local education authority by the foundation managers.

"9. If the local education authority, under the provisions of section 6 (3, b) of the Education Act, 1902, have increased or at any time shall increase the total number of managers, the additional number of foundation managers required shall be provided by the co-optation from time to time by the foundation managers of a sufficient number of qualified persons, who shall hold office for the same term and subject to the same conditions as if they were representative managers.

"10. If any casual vacancy occurs among the representative managers or the managers co-opted under clause 9 hereof, it shall be filled by the appointment by the remaining foundation managers of some other qualified person to hold office for the remainder of the term.

"11. Any foundation manager (other than a manager *ex officio*) who ceases to be qualified as aforesaid, or who is absent from all meetings of the managers during a period of one year, or who is adjudicated a bankrupt, or who is incapacitated from acting, or who sends to the foundation managers his written resignation shall thereupon cease to be a foundation manager.

"12. If for any reason there is a failure to hold any election required by this order, or make any appointment (by way of co-optation

or otherwise) so required, any person interested may apply to the Board of Education, and the Board of Education may by order give such directions as are necessary for the purpose of holding the election or making the appointment, and any election held or appointment made under such directions shall be as valid as if it had been held or made in pursuance of this order.

" 13. Any dispute (except a dispute on the question whether any person is or is not a *bonâ fide* member of the Church of England) arising out of or in relation to the election, appointment, or qualifications of foundation managers or the qualifications of subscribers, shall be referred to and determined by the Board of Education.

" Until the contrary is proved foundation managers shall be deemed to have been duly elected or appointed.

" 14. The Interpretation Act, 1889, applies for the purpose of the interpretation of this order as it applies for the purpose of the interpretation of an Act of Parliament."

Voluntary subscriptions to the Bicknor and Hucking National Schools during the four years which had elapsed since the death of the testatrix, other than the annual sum of £20 bequeathed by her, had been given to the amounts following: For the year ending April 30, 1901, £39 16s.; for the year ending April 30, 1902, £30 5s. 4½d.; and for the year ending April 30, 1903, £19 1s. 8d. The amount of the subscriptions for the year ending April 30, 1904, did not appear.

Owing to the passing of the Education Act, 1902, the question had arisen whether the annuity ought still to be paid towards the support of the schools, and the plaintiff took out the present summons for the determination of the question.

G. B. Rashleigh for the summons.

O. Leigh Clare for the managers of the schools and for the Kent County Council. The gift over has not taken effect.

[BUCKLEY J. referred to section 6 (2) of the Education Act, 1902.]

At the date of the will the schools were being carried on with funds arising partly from voluntary subscriptions and partly from the Government grant. Since the coming into operation of the Act of 1902 there has been no substantial change in the way in which the schools have been carried on. By section 11 of the Act provision is made for the appointment of foundation managers. By section 13 nothing in the Act is to affect any endowment, or the discretion of the trustees in respect thereof. By section 7 provision is made for the maintenance of the schools by the local education authority. Section 18 merely deals with the manner in which the money to meet the expenses of maintaining the schools is to be raised. The school buildings remain

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the property of the trustees, and the managers are still responsible for their maintenance and repair. This will involve an expenditure which in most cases will have to be met by voluntary subscriptions. It must be assumed that the testatrix did not intend that the schools should lose the endowment if they received additional assistance.

Further, under the provisions of the will the gift over is to take effect on the happening of a future event which need not necessarily occur within perpetuity limits, and is therefore void: *In re Bowen; Lloyd Phillips v. Davis*, 1893, 2 Ch. 491; 62 L. J. Ch. 681. The gift over having therefore failed, the schools take absolutely. *In re Beard's Trusts; Butlin v. Harris*, 1904, 1 Ch. 270; 2 L. G. R. 320; 73 L. J. Ch. 176, was a case very similar to the present. There it was held, on the construction of the will and the Act, that a gift over on the schools ceasing to be supported by voluntary contributions had not taken effect.

In re Randell; Randell v. Dixon (1888) 38 Ch. D. 213; 57 L. J. Ch. 899, does not apply.

F. G. Champenowne, for the residuary legatee, was not called upon to argue.

BUCKLEY J. I think the very event has happened on which the testatrix has said that the gift of the annuity is to cease and determine. She gave a certain sum of money to trustees upon trust "to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools, dated June 18, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions." The deed of 1873 contained provisions that the school and endowments should be controlled and managed by the principal officiating minister for the time being of the parish of Bicknor; that there should be a committee consisting of the principal officiating minister for the time being of the said parish, his licensed curate or curates, if appointed by the minister, such of the churchwardens for the time being of the said parish of Bicknor and of the ancient chapelry of Hucking as should be communicants of the Church of England, and six other persons who were each to contribute 20s. a year at least to the funds of the schools and were to be communicants of the Church of England and have a beneficial interest in real estate in the parish of Bicknor or be residents therein. The deed contained a number of other provisions constituting qualifications of persons who should have control of the school. The result of the Education Act, 1902, is that that body is displaced. Are the schools carried on under the conditions contained in the trust deed? It is plain that they are not. Under

the clause of the will which I have read the annuity has come to an end.

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Then the testatrix goes on to declare that the bequest should be null and void if any of three events should happen in her lifetime—first, if a school board for the parishes of Bicknor and Hucking should be formed; secondly, if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; or thirdly, if sufficient funds should be set apart to carry on the schools under the conditions of the trust deed; and she declared that if either of the two first-mentioned events should happen after her death, then the payment of the annuity was to cease and determine, and the fund purchased to produce this sum was to fall into and form part of her residuary estate. It was said on the authority of *In re Bowen*, 1893, 2 Ch. 491; 62 L. J. Ch. 681, that such a gift over was void, because it came within the rule against perpetuities—that you cannot have a gift over which does not take effect within the prescribed period of a life or lives in being and 21 years afterwards. That principle is quite firmly established, but it does not apply to this case. There is here no necessity to resort to the gift over. The gift over is a direction that the fund should fall into the residuary estate, and that is where it would go by law if the gift failed. Therefore I have only to look at the will to ascertain whether the event has happened on which the annuity was to cease and determine. Has the event happened on which it was to cease? If so, the fund by law goes into the residue, and there is no necessity to resort to the gift over; the gift having failed, the law takes the fund into the residue. As Mr. Justice North said in *In re Randell* (1888) 38 Ch. D. 213; 57 L. J. Ch. 899, “If she (*i.e.*, the testatrix) had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion, a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law.” It results from this that I am also entitled to read the conditions in the defeasance clauses of the will and see whether they have taken effect. One of them is that the bequest of the annuity shall be null and void if the funds necessary to carry on the school shall be raised under any Act of Parliament. That is satisfied to a certain extent, for the funds are now provided under the Education Act, 1902. I am therefore of opinion that the gift of the annuity has ceased to take effect, and that the fund has fallen into the residue.

Solicitors for all parties—Wigan, Champernowne, and Prescott.

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KING'S BENCH DIVISION.

July 1.

NATHAN v. ROUSE.

Drains—Nuisance—"Drain" serving two houses—Houses held of same landlord—Leases containing covenant by lessee to contribute to cost of repairing drain—Drain repaired by one lessee under nuisance order—Implied contract—Metropolis—Contribution between parties responsible for nuisance—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 117, 120.

The fact that the lessees of two adjoining houses held of the same landlord, and drained by a common drain not vested in or repairable by the local authority, are each bound by the terms of his lease to contribute towards the expenses of repairing the drain, does not give rise to any implied contract between the lessees under which one of them who has been compelled under a nuisance order made pursuant to the Public Health (London) Act, 1891, to repair the drain can recover a contribution from the other.

The rights of the parties in such a case under section 120 of the Act considered.

APPEAL by the plaintiff from a judgment of the learned judge of the Shoreditch County Court.

The action was brought to recover the sum of £29 8s., described in the plaintiff's particulars of claim as "apportioned cost of reconstruction of joint drains running through No. 5, St. Mark's Terrace, as awarded by the surveyor to the Clothworker's Company, in accordance with the lease under which the property is held."

No. 5, St. Mark's Terrace, was held by the plaintiff under a lease granted to one Kinnell, his predecessor, and dated July 25, 1872. It was drained, in common with the adjoining houses, Nos. 4 and 6. St. Mark's Terrace, by a pipe running under No. 5, the plaintiff's premises. The defendant was lessee of one of the adjoining houses under a lease dated November 22, 1872. Each of these leases reserved to the landlord and his lessees and tenants the free passage and running of water and soil from any other building of the landlord through the sewers, channels, and drains made, and to be made, through the land thereby demised, the lessees or tenants of such other lands or buildings paying a due proportion, to be settled by the landlord's surveyor, for the cleansing and repairing the same. Each of the leases also contained a covenant by the tenant to pay a proportionate part of the expense of making and repairing all sewers and drains belonging, or which should belong to the said demised premises, and other premises thereto

adjoining or near, to the satisfaction of the landlord's surveyor, and in such proportion in common with the owners of buildings interested therein as he should direct. 1904. *Nathan v. Rouse.*

The work in respect of which the action was brought was work done in the repair of the pipe by which the plaintiff's premises and the two adjoining houses were drained as above stated, after the receipt by the plaintiff of a notice from the Hackney Vestry under the Public Health (London) Act, 1891, followed by an order made by a metropolitan police magistrate under that Act requiring the plaintiff to repair the drain. * The learned magistrate who made the order held that the pipe was a "drain," and not a sewer, as having been made under an order of the Hackney Vestry for the drainage of the three houses, 4, 5, and 6, St. Mark's Terrace, by a combined operation.

The work was almost entirely done on the plaintiff's premises, No. 5. The total bill for the work done amounted to £121 os. 7d., and of this £62 4s. 7d. was apportioned upon the plaintiff, and £29 8s. each upon the defendant and upon the owner of the other premises adjoining by the landlord's surveyor.

The learned county court judge held that under the circumstances there was no implied contract between the defendant and the plaintiff binding the former to pay the plaintiff the £29 8s. apportioned on the defendant by the landlord's surveyor. He found that the pipe was laid by the order of the Hackney Vestry for the drainage of Nos. 4, 5, and 6, St. Mark's Terrace by a combined operation, and held that £29 8s. was a proper sum for the defendant to pay, if liable either under section 120 (3) of the Public Health (London) Act, 1891, or under an implied contract. He further held that since section 120 of the Act gives a remedy by proceedings in a court of summary jurisdiction the plaintiff could not succeed under that section in the county court. He gave judgment accordingly for the defendant with costs.

The learned judge, however, appended the following memorandum to his notes:—"19 May, 1904, This day section 117 of the Public Health (London) Act, 1891, has been pointed out to me by counsel on behalf of the plaintiff; had this been done at the hearing on 12 May I should have given judgment for the plaintiff for £29 8s."

The material provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), are as follows:—

Section 117. (2) Proceedings for the recovery of a demand not exceeding fifty pounds, which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the county court as if such demand were a debt.

Section 120. (3) Where some only of the persons by whose act or default any nuisance has been caused have been proceeded against under this Act, they shall,

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without prejudice to any other remedy, be entitled to recover in a summary manner from the other persons who were not proceeded against a proportionate part of the costs of and incidental to such proceedings and abating such nuisance, and of any fine and costs ordered to be paid by the court in such proceedings.

Clay for the plaintiff. The plaintiff is entitled to succeed on two grounds—first, on the basis of an implied contract between himself and the defendant, secondly, under sections 117 and 120 of the Public Health (London) Act, 1891.

On the question of implied contract, it is submitted that the case falls within the principle of the *Satanita*, 1895, P. 248; 64 L. J. P. 96, affirmed in the House of Lords, 1897, A. C. 59; 66 L. J. P. 1, namely, that where two persons enter into a joint arrangement, though each directly deals with a third party, the two are bound by the terms of the arrangement *inter se*. This principle in no way clashes with the decision in *Austerberry v. Oldham Corporation* (1885) 29 Ch. D. 750; 55 L. J. Ch. 633.

Secondly, the plaintiff is clearly entitled to recover under section 120 of the Act of 1891. Indeed, the county court judge would have so held had not section 117 (2), which enables advantage to be taken of section 120 in the county court as well as in a court of summary jurisdiction in the case of small claims, been overlooked on all sides.

[*R. Cunningham Glen*. The point that section 117 (2) enables the plaintiff to sue in the county court is not open, as it was not taken in the county court: *Smith v. Baker*, 1891, A. C. 325; 60 L. J. Q. B. 683. Further, the case does not come within section 120 at all. In the first place, it is not admitted that the pipe is not a sewer repairable by the local authority. Secondly, even if it is a drain, there is nothing to show that the defendant was guilty of any default with regard to it such as would bring him within section 120. There is no duty on the owner of No. 4 to repair the drain running under No. 5 merely because his drainage passes through it: *Reeve v. Sadler* (1903) 1 L. G. R. 441.]

The defendant took the point in the county court that the pipe was a sewer, but this was decided against him. He did not take the point that there was no act or default on his part that would bring the case within section 120, and that point is not open to him now.

R. Cunningham Glen for the defendant. The learned judge was right on the question of implied contract. The defendant contracted with the landlord, and not with the plaintiff at all. As to the point under section 120, if that is open to the defendant, there is more than one answer. In the first place there was no evidence on which the learned judge could hold that the pipe was a drain. There is no record of any such order or approval of the local authority as is necessary to establish that the pipe is a drain and not, as it *prima facie* is, a sewer.

Secondly, there is nothing to bring the defendant within the section as a person by whose act or default the nuisance was in fact caused.

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LORD ALVERSTONE C.J. This action was brought to recover £29 8s., being the proportion of the expenditure of £121, found by the surveyor to the landlord to be the amount due, as he thought, from the defendant as a contribution to the work done on a combined drain.

The action was based upon two grounds. The first ground taken was that, having regard to the terms of the leases under which the adjoining houses were held, the plaintiff was entitled to sue the defendant for the amount of the contribution. The action was based, in the second place, on the rights given to a person called upon to do work and made to pay for the work to recover a proportionate part from other persons in default by section 120 of the Public Health (London) Act, 1891.

We are of opinion that upon the first point the learned county court judge's decision was right. The lease to Kinnell, the plaintiff's predecessor in title—and I will assume that the other leases were in the same terms *mutatis mutandis*—reserved “to the landlord and his lessees and tenants the free passage and running of water and soil from any other land and buildings of the landlord, by and through the sewers, channels, and drains, made or to be made in and through the land hereby demised, the lessees or tenants of such other lands or buildings paying a due proportion to be settled by the landlord's surveyor for the cleansing and repairing the same.” And it contained a covenant by the tenant to pay “a proportionate part of the expense of making and repairing all sewers and drains belonging or which shall belong to the said demised premises and other premises thereto adjoining or near, to the satisfaction of the landlord's surveyor and in such proportion in common with the owners of buildings interested therein as he shall direct.” I certainly should think it was a very desirable thing that the landlord should provide for rights between the adjoining tenants being settled by proceedings taken by one tenant against the other, and I am surprised that the point has not been the subject of direct decision; especially as one knows that what I may call combined drains are so commonly laid, and that covenants of this character to pay a proportionate part of the expenses are so very common. But, speaking for myself, my recollection of the arguments in *Austerberry v. Oldham Corporation* (1885) 29 Ch. D. 750; 55 L. J. Ch. 633, and the fact that Mr. Clay has not been able to show us any authority for legal proceedings being taken against an adjoining tenant, appear to me to afford strong arguments against his view. He has ingeniously and very ably argued that we ought to hold that the

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principle of the *Satanita*, 1895, P. 248; 64 L. J. P. 96 (affirmed in the House of Lords, 1897, A. C. 59; 66 L. J. P. 1), applies to this case. In that case the Court of Appeal and the House of Lords decided that where two yacht owners entered into a yacht race there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other. Speaking for myself, I think the analogy is too far-fetched. In that case, there being a sort of invitation made to all people who were going to compete with reference to the obligations between the competitors, the two competitors both entered upon the terms of those conditions. And perhaps I may be allowed to say that, although this point was referred to, it was never disputed either before Bruce J. or anywhere else, as far as I know, seriously, by those who were unsuccessful in that case that it did involve a contract of some kind. The whole point was, did that contract exclude the provisions for the limitation of liability under the Act of Parliament. I think that, in the absence of authority, we ought not to hold that this obligation on each tenant to the landlord gives a right of action by one adjoining tenant against another: and I think, for the reasons that Mr. Glen rather indicated when he was dealing with the other part of the case, that there may be considerations, based upon what the obligations of each tenant are in regard to his own particular tenement, that may make it right that such a liability should only be enforced by the parties to the contract themselves. We therefore think that upon the first point the appeal fails.

The second point is, of course, entirely different. In the court below the whole case, after the plaintiff's point based upon the leases was disposed of, proceeded on section 120. Unfortunately, at the end of the proceedings (probably no one having thought about it), the judge forgot that there was section 117. He thought proceedings under section 120 could only be taken in the police court, and he therefore held that the 120th section did not apply; though, with characteristic candour, he stated, when the point was mentioned to him next week, that if section 117 had been pointed out to him by counsel on behalf of the plaintiff he would have given judgment for the plaintiff for the £29 8s. which, assuming there is no answer to the point, would be quite sufficient for us. Now Mr. Glen has raised several contentions. He first contended strenuously that we ought not to give effect to this addition to the judgment, because section 117 was never mentioned to the learned county court judge at the trial. He says that because that point or that answer to a point was not taken in the court below, *Smith v. Baker*, 1891, A. C. 325; 60 L. J. Q. B. 683, applies. Well, we often have *Smith v. Baker* cited; we are, of course, bound by it, and we follow it loyally and act upon it repeatedly, and we constantly

have to confine counsel to the points of law that have been really raised. But I must say that where a plaintiff is contending that section 120 applies, and the judge himself has said that he overlooked section 117, and counsel for the respondents frankly says that he did not mention anything about section 117, it would be a very strong thing to say that as the plaintiff is basing his claim on section 120 he ought not now to be allowed to succeed on section 120 if the evidence warrants it. I therefore think that it is clearly open to us to deal with the matter on the basis of that section. Then Mr. Glen says we ought not at any rate to enter judgment for the plaintiff, because there are substantial matters to enquire into which we have not gone into because of the ruling of the learned judge in his favour. I think we are going rather far in acceding to that view. The case seems to have been conducted by a variety of points being raised from time to time and being disposed of either in favour of the plaintiff or the defendant as the case went on: and I think it right to call attention to the fact that the learned judge says, "I hold that £29 8s. is a proper sum for the defendant to pay if he is liable either under the section or under an implied contract. I hold that section 120 gives a remedy, that there is no other remedy, and hence such remedy must be taken." I know the difficulty counsel are put in. If counsel here had remembered section 117, and had foreseen the possibility of the case coming here, he probably ought to have said: "Your honour, I prefer to take it on some other point," and then have raised his contention. I feel that if we are to apply the rule in *Smith v. Baker* we might be invited to apply it on the ground that Mr. Glen ought to have raised the point that there was no proper evidence of a nuisance caused wholly or partially by the act or default of two persons, as an answer to the view the county court judge was taking under that section. But our main object ought to be to see that justice is done. Mr. Glen contending that he would have raised that point, and is entitled, at any rate, to raise it, if we take a view contrary to that of the learned judge, I do not think we ought to act on the theory that that point cannot now be taken, and that there is nothing in it. I think, therefore, the case must go back for a new trial, upon section 120 of course, and that, as it has arisen by this slip of everybody concerned, the costs of this appeal and of the first trial should abide the result of the second trial.

KENNEDY J. I entirely concur.

Judgment accordingly.

Solicitors for the plaintiff—Wainwright, Pollock, & Co.

Solicitors for the defendant—Paines.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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KING'S BENCH DIVISION.

Apr. 12.

ISLE OF THANET JOINT HOSPITAL BOARD *v.* FARQUHAR.

Hospitals—Maintenance of patients not paupers—Children—Liability of parents or persons *in loco parentis*—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 132.

There is no statutory liability cast, by section 132 of the Public Health Act, 1875, upon persons in loco parentis to pay for the maintenance of children, not paupers, maintained in a hospital by a local authority.

Hull Corporation v. Maclaren, Loc. Govt. Chron., 1898, 585, approved and followed.

APPEAL by the defendant, treasurer of the Victoria Hospital for Children, from a judgment of a county court in favour of the plaintiffs, the Isle of Thanet Joint Hospital Board, in an action to recover the cost of maintenance of six children removed from a convalescent home, a branch of the Victoria Hospital, to the plaintiffs' hospital. The learned judge gave judgment for the plaintiffs for the sum of £26 11s. 6d.

The plaintiff board were constituted under Provisional Orders of the Local Government Board made in pursuance of section 279 of the Public Health Act, 1875, and duly confirmed by Local Government Board's Provisional Orders Confirmation Acts (56 & 57 Vict. c. cxxxi. ; 57 & 58 Vict. c. cxxv. ; 59 & 60 Vict. c. xxx.), for a united district comprising, *inter alia*, the rural district of the Isle of Thanet, for the purpose of the provision, maintenance, and management, for the use of the inhabitants of the constituent districts, of a hospital or hospitals for the reception of cases of infectious diseases. By the Provisional Orders, sections 131 and 132, *inter alia*, of the Public Health Act, 1875, were made applicable for the purposes of the Orders, and the plaintiff board were invested with the functions of an urban authority thereunder. The plaintiff board had duly established a hospital in accordance with the Provisional Orders.

In November, 1902, the matron of the plaintiffs' hospital received a message by telephone from the surgeon in attendance at the Victoria Hospital Convalescent Home, which was situate within the rural district of the Isle of Thanet, requesting that six children, patients at the convalescent home, who had whilst there developed scarlet fever might be admitted to the plaintiffs' hospital. The children were admitted, and the cost of their maintenance at 10s. 6d. a week amounted

to the sum claimed in the action. The judgment of the learned county court judge was as follows :—

"I hold that under section 132 [of the Public Health Act, 1875], in case of children not *sui juris*, who are not paupers, and are residing with or under the care of their parents or other guardians, such parents or guardians would be liable for the expenses of their maintenance in the plaintiffs' hospital; and I hold that the defendants' hospital and convalescent home standing *pro tempore in loco parentis* to the children under its care is equally liable. There being no evidence as to the status of the children beyond the fact that they were being maintained in the defendants' hospital and convalescent home, I hold that they were not pauper children."

Section 132 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), is as follows :—

Any expenses incurred by a local authority in maintaining in a hospital, or in a temporary place for the reception of the sick (whether or not belonging to such authority), a patient who is not a pauper, shall be deemed to be a debt due from such patient to the local authority, and may be recovered from him at any time within six months after his discharge from such hospital or place of reception, or from his estate in the event of his dying in such hospital or place.

W. B. Campbell and *Farquhar* for the defendant. The learned judge held that the defendant was liable under section 132 as being *in loco parentis* as regards these children. The section, however, does not bear such a construction. In *Hull Corporation v. Maclaren, Loc. Govt. Chron.* 1898, 585, it was held that there is no statutory liability on a father to pay for the maintenance of his child in a corporation hospital. The section gives no remedy except against the person who is a patient; it gives none against a parent or employer. The question whether apart from the statute the defendant had contracted to pay for the children was not considered by the county court judge; but there was no contract, either express or implied, between the parties, because the plaintiffs were bound to take in children suffering from an infectious disease, and to maintain them until they had recovered: *Reg. v. Rawtenstall Corporation* (1894) 10 *Times L. R.* 643.

Low, K.C., and *Weigall* for the plaintiffs. "Patient," in section 132, must include the parent or guardian or person *in loco parentis* of a child patient. Otherwise, if a child suffering from a contagious fever were sent to a hospital by order of a justice under section 124 the local authority could not recover for its maintenance; there could in that case be no question of contract, because the child would have been sent compulsorily. If *Hull Corporation v. Maclaren* be a binding authority, the Court is asked to send the case back to the county court

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judge upon the question as to the defendant's liability in contract, which was raised below, but not dealt with by the learned judge.

W. B. Campbell replied.

LORD ALVERSTONE C.J. Upon the main point dealt with upon the argument of this appeal from the county court, I am of opinion that the defendant is entitled to succeed. I cannot adopt the view presented by counsel for the plaintiffs that "patient" in section 132 includes the defendant, who is the treasurer of the Victoria Hospital for Children. I entirely agree with the reasons given by Ridley and Channell JJ. for their judgment in *Hull Corporation v. Maclaren*, *Loc. Govt. Chron.*, 1898, 585, when this question upon the statute was before them; and I should certainly have arrived at the same conclusion in that case. The provision of section 132 is that the expenses incurred by a local authority in maintaining in a hospital a patient, who is not a pauper, shall be deemed to be a debt due from such patient to the local authority, and may be recovered from him within six months after his discharge or from his estate in the event of his dying in such hospital. But these words do not entitle us to hold that "patient" will include such guardians of children—in reality charitable guardians—as the defendant or any other of the authorities who conduct the Victoria Hospital for Children, and who occupy this convalescent home as a branch establishment. I am, therefore, of opinion that as the learned county court judge based his judgment simply upon section 132, and placed an entirely wrong construction upon that section, the defendant is entitled to succeed in his appeal. The question, however, seems to have been raised in the court below as to whether or not there was an implied contract on the part of the defendant to pay for these children; but apparently this was dropped. I am not entirely satisfied that no case could be made on behalf of the plaintiffs on contract; and the fact that they were not required to be heard upon the point by the county court judge confirms me in the view that the point was never dealt with at all below. I think, therefore, as the question is one of some importance, the case ought to go back for a new trial if the plaintiffs desire it. The appeal will, therefore, be allowed with costs as to the defendants' non-liability under section 132; but at the plaintiffs' option the action may be re-entered for trial on the question of contract.

Judgment accordingly.

Solicitor for the appellant—E. A. Dowse.

Solicitors for the respondents—Kingsford, Dorman, & Co., for A. B. Burrows, Ramsgate.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

ALCOTT v. EMDEN.

May 3, 4.

Elections—"Bill, placard, or poster"—Name of printer and publisher—Circular relating to pending election of mayor of metropolitan borough—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 14.

Circulars despatched, in sealed envelopes marked "private," and in some instances initialled by the sender, to the clerk and certain members of a metropolitan borough council, in August, relative to the then generally understood candidature of one of the councillors for the office of mayor in the following November, is a bill having reference to a municipal election within the meaning of section 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884; and if it fail to bear upon the face of it the name and address of the printer and publisher, is in contravention of the section.

CASE stated by a metropolitan police magistrate, before whom the appellant had been convicted of an offence against section 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Edward Alcott, the appellant, was summoned on an information by Walter S. Emden, the respondent, for that he unlawfully did cause to be printed and did publish a certain bill and placard having reference to a municipal election, to wit, the election of a mayor for the city of Westminster, which said bill and placard failed to bear upon the face thereof the name and address of the printer and publisher, contrary to the statute.

On the hearing of the information it was proved on the part of the respondent, and the magistrate found as a fact, that the appellant had caused to be printed the circular annexed hereto, and marked A, B, C [The terms of the circular were not disclosed at the hearing of the case in the High Court]; that he, on August 28, 1903, published the same by despatching six copies of it in sealed envelopes respectively to the informant, to the town clerk of Westminster, and to four councillors of the city council of Westminster; that the word "private" was written in the appellant's handwriting on each of the six envelopes; that his initials "E. A." were printed on the back of three of the six envelopes.

The magistrate further found that in July, 1903, the name of the respondent, who was then an alderman on the city council, had been informally mentioned as a candidate for the office of mayor of West-

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minster for the year 1903-4, and that it was a matter of common knowledge in August, 1903, that he was going to stand as such candidate.

It was also proved that the city council of Westminster consisted of seventy members, including the mayor, nine aldermen, and sixty councillors; that sixty-five of the members were to retire in November, 1903, but were eligible for re-election; that the nomination for members as councillors took place in October, and that the polling was to take place on November 2, 1903; that the election of a mayor and aldermen was to take place on November 9; and that no formal nomination as mayor would take place before November 9.

It was contended by the appellant that the said circular annexed hereto, and marked A, B, C, was not a "bill, placard, or poster" within the meaning of section 14 of the Act, and that on August 28, 1903, when the circular was published, the respondent was not a candidate for the office of mayor of Westminster, and that there was at the time no municipal election within the meaning of the section.

The magistrate was of opinion that the circular was a "bill," though not a "placard" or "poster," within the meaning of section 14 of the Act, and that the respondent was at the time of the printing and publishing a candidate for the office of mayor of Westminster; and that the circular or bill had reference to a municipal election, to wit, the election of a mayor of Westminster.

The magistrate held that the appellant was legally liable under the statute, and gave judgment against him; but the appellant questioned the proceedings on the following grounds:—(1) That the said circular was not a "bill, placard, or poster" within the meaning of section 14 of the Act; (2) that the respondent was not at the time of the said printing and publishing a candidate for the office of mayor of Westminster, nor was there at the time a "municipal election" within the meaning of section 14.

The question for the Court was whether the magistrate was correct in point of law in his determination.

Section 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), provides that:—

Every bill, placard, or poster having reference to a municipal election shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster as aforesaid, which fails to bear upon the face thereof the name and address of the printer and publisher, shall, if he is a candidate, be guilty of an illegal practice, and if he is not a candidate, shall be liable on summary conviction to a fine not exceeding one hundred pounds.

The section applies with reference to the election of the mayor of a metropolitan borough by virtue of section 2 (4) of the London Govern-

ment Act, 1899 (62 & 63 Vict. c. 14), and sections 2 and 75 of the Local Government Act, 1888 (51 & 52 Vict. c. 41): see *ex parte Walker* ^{1904.} *Alcott v. Emden*. (1889) 22 Q. B. D. 384.

The appellant in person. The words printed on the envelopes did not convert the circulars into a bill, placard, or poster. Documents of this description would be in large print, which this circular was not. The object of section 14 was to stop the circulation of anonymous documents at election time. This was not election time, for the circulars were posted in August, while the election was not held till November.

George Elliott for the respondent. The magistrate found that this document was a bill, and it is clear from the findings in the case that it was published, and that the respondent had, as early as July, 1903, been spoken of as a likely candidate for the office of mayor of Westminster. It is clear that there was a municipal election pending at the time the bill was published within the contemplation of the section.

[*Bettesworth v. Allingham* (1885) 16 Q. B. D. 44, and *In re Shrewsbury Election* (1888) 5 Times L. R. 160, were referred to in the course of the argument.]

Cur. adv. vult.

May 4. LORD ALVERSTONE C.J. I certainly entertain some doubts as to the conclusion we ought to come to in this case, for it appears to be one of the class of cases which depend to a large extent upon their particular facts. I do not think that section 14, which enacts that the name and address of the printer and publisher of bills, placards, or posters contemplates that a municipal election must already have commenced by nomination or other formal proceeding. And I cannot think that what the appellant did here was outside the section, because the mischief aimed at is publication without sufficient indication of authorship. In the present case Mr. Emden, the respondent, was at the time of publication only known to be a gentleman, among others, who was coming forward at the next election. On the face of the document itself reference is made to the election, for it is headed, "Mr. Walter Emden—shall he be our new mayor?" This sentence seems to me to have been deliberately constructed in reference to Mr. Emden's prospective mayoralty. I quite agree with the appellant's contention that a line must be drawn somewhere, but at the same time I cannot say that I think we should be justified in saying that the magistrate was wrong in holding as he did that this was a document having reference to an election. As to its being a "bill, poster, or placard," which is the other point in the case, I am clear that this

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Alcott v. Emden. document was not a poster. But the facts found are that Mr. Alcott, the appellant, printed and caused to be published the document in question, and, as the section deals with printing and publishing as well as posting, I think the magistrate was right in convicting him of an offence within it. Looking at the document itself, I am of opinion that it is a bill; and it being a bill printed with reference to a municipal election by the appellant the conviction must stand.

WILLS J. I am of the same opinion.

KENNEDY J. I agree.

Appeal dismissed.

Solicitors for the respondent—Merton and Steele.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

1904.

FRIEND v. MAPP.

May 16, 17.

Adulteration—Sale to prejudice of purchaser—Preserved peas—Sulphate of copper used as colouring matter—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.

An information under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser, as preserved peas, an article not of the nature, substance, and quality demanded, was dismissed by the justices, on the ground that there had been no sale to the prejudice of the purchaser; subject to a case finding as facts that the purchaser asked for preserved peas, that he was supplied with preserved peas containing, as added colouring matter, sulphate of copper in a quantity insufficient to be injurious to health, and that preserved peas are habitually sold with added colouring matter.

Held, that the justices were justified in point of law in dismissing the information.

CASE stated by six of His Majesty's justices of the peace for the county of London acting in and for the Kensington Petty Sessional Division of the said county:—

1. The respondent was summoned before us to answer a complaint laid by the appellant for that the respondent on December 3, 1903, at No. 325, Portobello Road, in the borough of Kensington, in the county of London, did unlawfully sell to the prejudice of the purchaser an article of food, to wit, preserved peas (sample No. 75) which was not of the nature, substance, and quality of the article demanded by such purchaser, for the reason that the same contained, as stated in the certificate of the public analyst for the said borough, 0.00924 per centum of copper, equivalent to 2.55 grains per pound of crystallised sulphate of copper, contrary to the provisions of section 6 of the Sale of Food and Drugs Act, 1875.

2. On February 2, 1904, after hearing the case, we dismissed the summons on the grounds hereinafter mentioned. The appellant, being dissatisfied with our determination as being erroneous in point of law, has applied to us in writing to state a special case, and duly entered into a recognisance to prosecute this appeal. We accordingly state this case for the opinion of the King's Bench Division of the High Court of Justice.

3. At the hearing of the summons the following facts and documents were admitted or proved in evidence before us:—

(a) That on December 3, 1903, the appellant, an inspector appointed

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to act under the provisions of the Sale of Food and Drugs Acts, 1875 to 1899, by the council of the Royal Borough of Kensington, in the county of London, caused to be purchased a bottle of preserved peas at the respondent's place of business, No. 325, Portobello Road. The purchaser asked for and was served with a bottle of preserved peas.

(b) The said bottle was purchased with the intention of submitting the same to analysis, and the provisions of the Sale of Food and Drugs Acts, 1875 to 1899, were duly complied with.

(c) That a third portion of the contents of the bottle retained by the appellant was submitted to be and was analysed by Mr. Charles E. Cassal, the public analyst for the Royal Borough of Kensington, who certified that the sample (which was numbered 75) contained 0.00924 per centum of copper in the peas, equivalent to 2.55 grains per pound of crystallised sulphate of copper. The said certificate, dated December 21, 1903, is attached hereto and marked A, and forms part of this case.

4. The appellant also called evidence to prove that copper is not a normal constituent of peas or of the human body. That a medicinal dose of sulphate of copper is from $\frac{1}{4}$ to 2 grains, and acts as an astringent. That in large doses sulphate of copper acts as an irritant, and is apt to produce vomiting, and is a cumulative poison. That its occasional consumption in such a quantity as had been found in the said peas would not harm a healthy individual, but that habitual consumption thereof might injuriously affect the health and produce chronic ill health, and that copper is added to preserved peas to give them a fresh bright green colour; but the appellant's witness admitted that such peas have been generally used for some years, and that he knew of no recorded case of injury arising from their use.

5. No evidence was called by the respondent, and the correctness of the analyst's certificate was not disputed.

6. The appellant contended (1) that inasmuch as copper or crystallised sulphate of copper was foreign to the said preserved peas, the same were not of the nature, substance, and quality of the article demanded; and (2) that by reason thereof there had been a sale by the respondent to the prejudice of the purchaser; and (3) that the addition of copper or crystallised sulphate of copper in the proportion aforesaid was injurious to health; and (4) that in the absence of evidence by the respondent that the matter or ingredient was required for the production or preparation of the peas as an article of commerce in a state fit for consumption, even if the said copper or crystallised sulphate of copper was not injurious to health, an offence had been committed under section 6 of the Sale of Food and Drugs Act, 1875.

7. It was contended on behalf of the respondent that as the purchaser

asked for preserved peas, and was supplied with peas usually known and sold as preserved peas, there was no sale to the prejudice of the purchaser within the meaning of the Sale of Food and Drugs Act, 1875. 1904.
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8. It was within our own knowledge that preserved peas usually contain a small quantity of added colouring matter which is used for the purpose of preserving the natural green colour of the peas, and we found as a fact that the quantity of copper present in this instance, being only one grain of metallic copper to about 10,800 grains of peas, was not sufficient to render the peas injurious to health. We were further of opinion that as the appellant asked for preserved peas, and was supplied with peas usually known and sold as preserved peas, and containing no foreign ingredient other than that which is usually found in preserved peas, and in no greater quantity than as aforesaid, there was no sale to the prejudice of the purchaser within the meaning of section 6 of the Sale of Food and Drugs Act, 1875.

We, therefore, dismissed the summons by a majority of the justices present.

9. The question for the opinion of the Court is whether upon the facts stated we were right in point of law in dismissing the summons.

If the Court should answer the above question in the affirmative, the order dismissing the summons is to stand. If the Court should answer in the negative, the order dismissing the summons is to be rescinded, and the case remitted to us with such direction as the Court may think fit to give.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), contains the following provisions :—

Section 3. No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered, under a penalty in each case not exceeding fifty pounds for the first offence . . .

Section 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

(1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof;*

(4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

1904. *Manisty, K.C., and Courthope Munroe* for the appellant. The respondent should have been convicted. The addition of sulphate of copper, which is a poison, is a very different thing from adding matter simply for preserving an article of food. The finding, that in this instance the quantity of copper was not enough to render the peas injurious to health, does not *per se* take the case out of the statute. There was no evidence that the copper was required at all. The appellant only wanted preserved peas, and not coloured peas. There is no finding of fact that an ordinary purchaser asking for preserved peas would know that they would have sulphate of copper in them. Therefore the case falls within section 6, and the respondent ought to have been convicted. The section aims at the absolute purity of the article demanded unless the purchaser demands an article for the preparation of which some addition is necessary within the contemplation of the provisoes (1) and (4). Accepting the finding that sulphate of copper was not in this particular instance present in sufficient quantity to be injurious to health, yet it is a cumulative poison, and the section does not speak of quantity. Being a poison it is potentially injurious to health, and moreover its introduction might make a bottle of very inferior peas look like very superior ones. The finding by the justices that in their knowledge preserved peas usually contain a small quantity of added colouring matter, is not to be taken as a finding of their knowledge that the added colouring matter is sulphate of copper.

Bonsey for the respondent. This was entirely a question of fact for the justices, who have found, as they were entitled to do, that there had been no sale to the prejudice of the purchaser. A seller does not offend against section 6 because the preserved peas he sells happen to be preserved with a small quantity of copper. The practice of preserving peas with copper has gone on for years, and it is admitted in the case that no case of injury to the purchaser has yet arisen. A purchaser who asks for and obtains an ordinary article of commerce under its ordinary name is in no way prejudiced. Asking for preserved peas in a grocer's shop is a totally different thing from asking for fresh peas at a greengrocer's, where a purchaser would naturally expect to get fresh peas. Here the appellant asked, not for an article in its natural state, but for a manufactured article. All he was entitled to receive was the article usually known and sold as the article he asked for. That it happened to contain an infinitesimal quantity of poison does not affect the question, for the purchaser is entitled to have an article containing poison if he ask for it. The Act was not passed to fetter ordinary and honest usages of trade. Had these peas really contained anything injurious to health the appellant could have proceeded under section 3, which prohibits the mixing of injurious

ingredients with articles of food and the sale of articles of food with which such ingredients are mixed. That section is a perfect protection to the public, if the ingredient mixed with article sold be really injurious. [At this point he was stopped.]

Manisty, K.C., in reply. Paragraph 4 of the case is important. The fact that bottled peas usually do contain added copper does not carry the matter far enough; it must be shown that the public know it. A sale may be to the prejudice of the purchaser within section 6 although the actual purchaser had special knowledge, not derived from information given by the seller, that the article sold is not of the nature, substance, and quality demanded by him. The test is whether the sale would have been to the prejudice of an ordinary purchaser who had not that special knowledge: *Pearks v. Ward*, 1902, 2 K. B. 1; 71 L. J. K. B. 656. The justices say that they are of opinion that preserved peas usually have some colouring matter in them, but that is not a finding of fact that the sale was not to the prejudice of the purchaser. In *Roberts v. Egerton* (1874) L. R. 9 Q. B. 494; 43 L. J. M. C. 135, it was held that the mode by which green tea was coloured, which was known to the trade but unknown to the public, was an adulteration. No member of the public would knowingly buy peas poisoned by being artificially coloured; he may expect some colouring matter, but he is not called upon to expect the existence of a poison.

LORD ALVERSTONE C.J. I am of opinion that in this case we cannot interfere with the decision of the justices; but it must be quite understood that we are only dealing with the facts stated in this particular case, and that we express no opinion as to the views which ought to be taken by justices in cases where the evidence is different; nor must it be considered that we express any opinion as to what conclusion should have been drawn from the facts even as stated here. We must be satisfied, before we can interfere, that there has been some mistake in law, and it appears to me impossible to say that in the case before us the justices have gone wrong in law. The case contains no statement which can admit of the point counsel for the appellant has endeavoured to raise, which in itself would be a point of substance, that when a person asks for a bottle of preserved peas he means to get a bottle of peas which have not been treated in any manner for the purpose of preserving them. If it can be said that preserved peas mean nothing more than mere peas in a bottle with water perhaps, and nothing else, there might indeed be some ground for such a contention, but the finding of fact in the case does not allow of such a point being raised. The finding in paragraph 3 (a) of the case is that "the purchaser asked for and was served with a bottle of preserved peas;"

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and in paragraph 4 that "the appellant's witness admitted that such peas have been generally used for some years, and that he knew of no recorded case of injury arising from their use." Furthermore the justices in paragraph 8 make the following statement: "It was within our own knowledge that preserved peas usually contain a small quantity of added colouring matter which is used for the purpose of preserving the natural green colour of the peas;" and "the appellant . . . was supplied with peas usually known and sold as preserved peas, and containing no foreign ingredient other than that which is usually found in preserved peas and in no greater quantity than as aforesaid," namely, "one grain of metallic copper to about 10,800 grains of peas." Under these circumstances it seems to me that a great many of the arguments put forward by counsel for the appellant would be very properly used in some other case to induce justices to come to a different conclusion of fact, or, on a case stated differently from the present case, to show that an offence had been committed, but in our opinion we cannot send this case back to them. Here the very finding of the justices prevents the case coming within the initial words of section 6 of the Sale of Food and Drugs Act, 1875, which are, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." Had the appellant, the purchaser in the present case, not got what he asked for, I should have been of opinion that neither proviso (1) nor proviso (4) of section 6 would have afforded any protection to the seller; since to justify the supply of an article different from that demanded under any of the provisos to section 6, evidence of a character entirely different from the evidence suggested in this case must be given. I should like to point out that, so far as we are in a position to judge, the appellant's real remedy in this particular case would have been under section 3 of the Act, which prohibits the colouring of articles of food so as to render them injurious to health. But, as I have said before, to satisfy section 6 evidence very different from that given in the present case must be given; and the only possible thing we could do would be to send it back to the justices for further enquiry; but as we certainly cannot send it back to them with a direction to convict, and since we cannot say that the justices were wrong in law, I am of opinion that the appeal must be dismissed.

WILLS J. I am of the same opinion. It is clear that the protection afforded by provisos (1) and (4) of section 6 cannot be claimed, for the substantive part of section 6 goes far beyond the provisos. I should certainly be sorry to say anything which would sanction the notion that people can sell unwholesome mixtures simply because they happen to be known in the trade by a particular name; but when anyone asks for

preserved peas he must be taken to know that he is going to get peas 1904.
that have a colouring tincture of some sort. I am not prepared to say Friend v. Mapp.
that in the present case I should, upon the evidence, have come to the
conclusion the justices did, but that is beside the question, for it was
well within their powers to decide as they did, and, to put the matter
shortly, they have stated the appellant out of Court.

KENNEDY J. I agree.

Appeal dismissed.

Solicitors for the appellant—Pontifex, Hewitt, and Pitt.

Solicitors for the respondent—Neve, Beck, and Kirby.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Supreme Court of Judicature.

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COURT OF APPEAL

Aug. 10.

OLDHAM CORPORATION *v.* BANK OF ENGLAND.

Education—Local education authority—School board—Appointed day—Transfer of property—Stock standing in bank books in name of school board—National Debt Act, 1870 (33 & 34 Viet. c. 71), ss. 18, 22—Elementary Education Act, 1870 (33 & 34 Viet. c. 75), s. 30—National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Viet. c. 39), s. 4—Education Act, 1902 (2 Edw. 7. c. 42), ss. 1, 5, 25, Sched. II. clause 1.

The effect of the provision in section 5 of the Education Act, 1902, that school boards "shall be abolished" is that, upon the day fixed as the "appointed day" for the purposes of the section in relation to any school board, that school board is dissolved, and ceases to exist for all purposes.

The effect of the provision in Sched. II. (1) to the Act that the property, powers, rights, and liabilities of any school board existing at the appointed day "shall be transferred" to the council exercising the powers of the school board, is, that on the appointed day all the property, powers, rights, and liabilities of the school board ipso facto, by operation of the Act, vest in the council in question without the aid of any additional instrument of any sort or kind. Consequently Consols standing in the name of a school board in the books of the Bank of England on the appointed day, immediately vest, by virtue of the provision in question, in the council exercising the powers of the school board, and that council are entitled to be entered in the bank books as owners thereof.

APPEAL from a decision of Farwell J.

The plaintiffs were under the Education Act, 1902, the local education authority for the county borough of Oldham. The Act came into operation, so far as related to that borough, on January 1, 1904, the day appointed in that behalf by the Board of Education. On the appointed day there stood in the books of the Bank of England, in the name of the Oldham School Board, a sum of £780, os. 2d., 2½ per cent. Consols, representing moneys set aside by that board to meet liabilities in respect of loans raised for the erection of elementary schools within the borough.

The plaintiffs' allegation was that on the appointed day the school board was dissolved by virtue of the provisions of the Act of 1902, and by virtue of the same provisions the plaintiffs, acting as the local education authority, succeeded to, and had since exercised, the powers formerly vested in the school board. The plaintiffs claimed to be entitled, under the Act, to the £780, os. 2d. Consols, and the dividends

due or to become due in respect thereof, and to all the rights of registered stockholders in respect thereof; and they claimed a declaration to that effect, and an order on the defendant bank to pay to the plaintiffs the dividends due or to accrue due in respect of the said sum of Consols, and to register the plaintiffs in the books of the defendants as entitled thereto.

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The defendants alleged that the stock in question formed part of the National Debt, of which the Bank had the management and kept the books under the provisions of the National Debt Act, 1870, and that under the provisions of that Act (section 22) the person or corporation in whose name stock was standing in the books, or the attorney thereunto lawfully authorised by writing under the hand or seal of such person or corporation, was alone entitled to transfer such stock, and any such transfer must be signed by the stockholder or his attorney in the books kept by the Bank; and (section 18) the Bank, before allowing the receipt of any dividend on any stock might, if the circumstances of the case appeared to them to make it expedient, require evidence of such nature as the Bank required of the title of any person claiming a right to receive the dividend; and they alleged that the circumstances of the present case appeared to the Bank to make it expedient to require evidence of the title of the plaintiffs to receive the dividends on the Consols in question, and they did so require it; but none had been tendered sufficient in the judgment of the Bank, or in fact, to establish the right of the plaintiffs to receive the dividends on the stock.

The defendants did not admit that the Oldham School Board had been dissolved, and alleged that if they had not been dissolved they were, under section 30 of the Elementary Education Act, 1870, a corporation having a common seal, and they only could transfer the Consols, and were entitled to receive the dividends thereon; but if the corporation had in fact been dissolved, the Consols could only be transferred and the dividends received by an appointment of new trustees and a vesting order under the Trustee Act, 1893.

At the hearing it was suggested on their behalf that if the Court should decide that the right to the stock was under the Act of 1902 vested in the plaintiffs they could transfer it into their own names in the Bank books under section 4 of the National Debt (Stockholders' Relief) Act, 1892.

The Education Act, 1902 (2 Edw. VII. c. 42) contains the following provisions:—

Section 5. The local education authority shall throughout their area have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in

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public elementary schools not provided by them, and school boards and school attendance committees shall be abolished.

Section 25 (1). The provisions set out in the First and Second Schedules to this Act relating to education committees and managers, and to the transfer of property and officers, and adjustment, shall have effect for the purpose of carrying the provisions of this Act into effect.

Section 27 (2). This Act shall, except as expressly provided, come into operation on the appointed day, and the appointed day shall be the twenty-sixth day of March nineteen hundred and three, or such other day, not being more than eighteen months later, as the Board of Education may appoint, and different days may be appointed for different purposes and for different provisions of this Act, and for different councils.

SCHEDULE II.

(1) The property, powers, rights, and liabilities (including any property, powers, rights, and liabilities vested, conferred, or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board.

. Section 4 (1) of the National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), is as follows:—

Where, by virtue of any provision in an Act of Parliament, the right to stock is vested in any person, he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock and to receive and give a valid receipt for any accrued or accruing dividends on the stock.

Farwell J. was of opinion that "shall be transferred" in clause 1 of Schedule II. to the Education Act, 1902, referred to a future transfer by some appropriate deed or instrument, and that school boards were not under section 5 of the Act dissolved so far as regards the transferring of property which remained vested in them, and had not been divested by the Act. He declared that under and by virtue of clause 1 of Schedule II. of the Education Act, 1902, the right to the £780 os. 2d. 2½ per cent. Consols, and to any accrued and accruing dividends on such Consols, was on January 1, 1904, being the "appointed day," within the meaning of the said Act, vested in the plaintiffs acting by their council as local education authority under the said Act for the district of the borough of Oldham within the meaning of the National Debt (Stockholders' Relief) Act, 1892, s. 4, and that the plaintiffs acting as aforesaid were entitled to transfer such Consols into their own names, and thereafter to give a valid receipt for such dividends under that section.

The plaintiffs appealed.

The Attorney-General (Sir R. B. Finlay, K.C.) and R. J. Parker, for the appellants. "Shall be abolished" in section 5 of the Education Act, 1902, means that on the appointed day the school board shall cease to exist. That is borne out by clause 10 of Schedule II. to the

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Act, which provides that the term of office of members of a school board holding office at the passing of the Act shall continue to the appointed day. The words "shall be transferred" in clause 1 of Schedule II. must mean "are transferred" without any further process on the appointed day. They cannot point to any future act of transfer, as the members of the board could not make any transfer after the appointed day, their term of office then coming to an end. Further, the words are applied to powers, rights, and liabilities as well as to property, and no act of transfer is required for powers, rights, or liabilities. The expression must mean that on the appointed day they all shall vest, that is, pass *ipso facto* by the operation of the Act. If it is so read the whole Act becomes simple; otherwise it is full of difficulties.

Under section 27 the Act, except as expressly provided, is to come into operation on the appointed day; and sections 6 and 7 provide for the management and maintenance of schools by the local education authority. Section 18 provides for the expenses of a council of a county or borough under the Act, and section 20 provides for arrangements between councils. Under section 24 (3) the expressions "powers," "duties," "property," and "liabilities" are, unless the context otherwise requires, to have the same meaning as in the Local Government Act, 1888 (s. 100), and under section 25 the provisions set out in Schedules I. and II. to the Act, relating to education committees and managers and to the transfer of property and officers and adjustment, are to have effect for the purpose of carrying the provisions of the Act into effect.

Clauses 1, 2, 3, 4, and 6 of Schedule II. show that the powers, duties, and liabilities of a school board are *ipso facto* transferred to the new authority under the Act, and clause 7 bears that out. Under clause 8, sections 85 to 88 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), are to apply with respect to any transfer mentioned in the schedule, subject as therein stated. Those sections deal with rates current at the "appointed day" under that Act, and contain savings for existing securities and debts, and for existing bye-laws and pending contracts; and they are important in this way, that they use the expression "are by this Act transferred" when speaking of the property, powers, duties, and liabilities which are transferred to the authorities constituted under the Act. They show that a continuity from one body to the other was intended. Clause 16 of Schedule II. provides that the officers of any authority whose property, rights, and liabilities "are transferred" under the Act to any council shall be transferred to and become the officers of that council; and under clause 17 an officer so transferred is to hold his office by the same tenure and on

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the same conditions as before the transfer; and under clause 21 certain provisions relating to the compensation of existing officers are to apply as respects officers transferred under the Act. The circular No. 475 of the Board of Education of March 23, 1903, 1 L. G. R. (Orders) 83, as to the transfer of cash balances to local education authorities, speaks of balances which pass on the transfer of powers under the Act of 1902, thus showing the view the Board take of the matter.

The provisions as to the transfer of stocks in the books of the Bank of England are contained in sections 22 to 24 of the National Debt Act, 1870. Under section 50 (3) of the Bankruptcy Act, 1883, the trustee of a bankrupt may exercise the right to transfer the stocks which the bankrupt had before his bankruptcy.

There have been two decisions as to transfers of stock standing in the names of a body which had come to an end—*Hyde Corporation v. Bank of England* (1882) 21 Ch. D. 176; 51 L. J. Ch. 747, and *Morton v. Bank of England*, 1904, 1 Ch. 664; 2 L. G. R. 734; 73 L. J. Ch. 503; but they were cases under different Acts.

If Farwell J. is right in holding that the right to the Consols and the accruing dividends was vested in the plaintiffs on the appointed day within section 4 of the National Debt Act, 1892, they have a statutory right to transfer the stock to anyone and to receive the dividends generally; the right ought not to be restricted, as in his order, to a transfer to themselves, and thereafter to receive the dividends. There is no reason for so limiting their right.

Latham, K.C., Upjohn, K.C., and Howard Wright, for the respondents. The order of Farwell J. is right. The dividends are payable to the stockholder.

[VAUGHAN WILLIAMS L.J. That makes section 4 of the National Debt Act, 1892, read as if the word "thereafter" were in it.]

It means that. The word is "and" receive the dividends, not "or."

[COZENS-HARDY L.J. Has the section any application to the case of an equitable title to stock?]

Yes; it applies to that.

The words in clause 1 of Schedule II. are "shall be transferred." During the whole 200 years that the books of the Bank have been kept, there is only one instance of stock being passed without a transfer in the books.

[VAUGHAN WILLIAMS L.J. Do you say that if the word were "vest" a transfer would be required?]

No. In that case we should have to accept the decision in *Hyde Corporation v. Bank of England* (1882) 21 Ch. D. 176; 51 L. J. Ch. 747; but the words "shall be transferred" do not mean "vest." "Transfer" is not equivalent to "vest." In the case of school appliances, they would have to be delivered like other chattels. Something

would have to be done to complete the transaction. The Bank do not dispute the plaintiffs' right to the stock. All that they ask is that they should execute a transfer under the Act of 1892. In the case of a bank balance something would have to be done in the books of the bank before it could pass.

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[COZENS-HARDY L.J. How is a school-house, the freehold of which is in the school board, to be transferred if the school board is abolished?]

By a vesting order under the Trustee Act. It comes to this—that any property which requires some instrument to transfer it in the ordinary way requires an instrument under the Act. Section 5 of the Education Act, 1902, means that school boards are abolished as educational authorities. It does not mean that they are altogether dissolved. The apt word for that would be “dissolve,” and that is not used. Clause 10 of Schedule II. only means that members of the school board shall not give up performing their duties before the appointed day. It does not say that the board are to be dissolved on that day.

[VAUGHAN WILLIAMS L.J. Could the school board sue or be sued?]
Its rights and liabilities have passed.

[COZENS-HARDY L.J. A debt might want an assignment to pass it.]

Stock is a peculiar kind of property with a mode of passing it technically known as a “transfer,” and the Bank expect that mode to be adopted.

By the Local Government Acts of 1888 and 1894 old local authorities were abolished and new authorities were constituted. In section 5 (2, c) of the Act of 1894 it was provided that the legal interest in property vested in the overseers “shall, if there is a parish council, vest in that council,” and see section 67; but it was found necessary to pass the Local Government (Stock Transfer) Act, 1895 (58 & 59 Vict. c. 32), for the safety of the Bank of England and other companies who keep a register of stocks. That is a recognition that the Bank are not obliged to act on a statutory vesting.

[VAUGHAN WILLIAMS L.J. That assumes that the property had passed, and provides for evidence being given of the person in whom it had vested.]

All that the Bank want is something to indemnify them against any risk if they transfer the stock.

VAUGHAN WILLIAMS L.J. We have had a somewhat long discussion as to the meaning of certain sections of the Education Act, 1902; and many questions have been suggested, the answers to which may have more or less bearing upon the determination of the particular question that we have to decide in this case. That question is, whether the

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terms of Schedule II. of the Education Act of 1902, are such that the property, powers, rights, and liabilities of any school board or school attendance committee existing at the appointed day are transferred by virtue of the Act of Parliament to the council exercising the powers of the school board, or whether some additional instrument is necessary before such transfer can be effected. The suggestion is that, whatever may be the case with regard to other property, at all events with respect to stock with which the Bank of England has to deal, and with respect to which, generally speaking, upon a transfer there is an entry of the transfer in the transfer books of the Bank of England, there is no vesting of the property independently of the execution of some instrument.

Part of the argument that was addressed to us was based upon the words "shall be transferred" in clause 1 of Schedule II., and I will say something about that presently; but I observe that in the argument addressed to us by counsel on behalf of the Bank they did not really ultimately rely upon the fact of the words being "shall be transferred" instead of "shall vest" or similar words. Their final argument was an argument which would have applied equally whether the words were "shall be transferred" or "shall vest." I will deal first, and very shortly, with the question of the meaning of the words "shall be transferred." There is no doubt that sometimes one does find in Acts of Parliament somewhat cognate to the present Act the words "shall vest" used as distinguished from the words "shall be transferred." In the Local Government Act, 1894, s. 5 (2, c), one finds these words used: "The legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish . . . shall, if there is a parish council, vest in that council." It is quite true to say that the words used in the section in question here are not "shall vest," but "shall be transferred"; but there is very good reason for using the future words there, and one which is quite consistent with holding that the property on the happening of "the appointed day" was to vest, and vest independently of any future or additional instrument. It must be remembered that the Act of Parliament when it passed was contemplating the happening of a future event—the occurrence of a future day, "the appointed day"; and it seems to me that that was quite a sufficient reason for the draftsman employing the words in the future form as he has. They were employed in that form in order to make them fit and suitable for what the Legislature contemplated—a future event.

Let us see what are the provisions generally of the Act of Parliament. [His Lordship read section 5 of the Act of 1902, and continued:—] I cannot conceive myself but that the word "abolished" in section 5 involves dissolution. It means that the school boards and school

attendance committees shall be abolished; and it really is not denied that the effect of that section is that from the happening of "the appointed day" the school boards and the committees would be incapable of doing anything. The corporation of the school board would in fact by virtue of that section be dissolved in the sense that it would cease to have a legal existence. It could not sue, or be sued, and it could not hold or transfer property; and therefore one finds this state of things—that if one accedes to the argument that has been addressed to us on behalf of the Bank—namely, that some additional instrument of transfer or conveyance is essential to the passing of the property notwithstanding the occurrence of "the appointed day"—this much is perfectly certain, that that instrument could not be executed by the school board.

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Then it was said that, with regard to the Bank of England and to certain stocks, although a transfer could not be executed by the defunct corporation, the school board, yet a transfer of these stocks might under section 4 of the National Debt (Stockholders' Relief) Act, 1892, be executed by the new educational body as being a body in whom the right to the stock is vested by Act of Parliament. I will say something more as to this section presently, but I shall at once point out that it is obvious that that Act of Parliament, if it gets over at all the difficulty arising from the cessation of the existence of the school board, can only do so in respect of a very limited subject-matter. It is not suggested that it does so as to all property, or that it does so even as to all stocks. It was mentioned by counsel for the Bank that there were certain Colonial Government Stocks, for instance, which would not be governed by that section; and the result of that is that it is quite plain that there is this difficulty about the transfer of property if the meaning is given to the word "abolished" in section 5 which, it seems to me, is its plain and obvious meaning. Further, we have here the words "shall be transferred" applied not only to property, but to powers, rights, and liabilities. It is quite true that with regard to some sorts of property a deed is required, or it may be in some cases a written transfer; but it is not true of rights or liabilities—all all events, it is not true as to liabilities—that any transfer is, according to the general law, either necessary or proper; so that the outcome of all this is that the argument which has been put forward on behalf of the Bank cannot really be made good, unless in one section of one Act of Parliament a different meaning is given to the words "shall be transferred" in the case of some of the subject-matters dealt with by the section, from what one would be bound to do in the case of others. It really, to my mind, could not be maintained for one moment that with regard to liabilities, or with regard to certain species of property, any transfer or additional

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instrument of transfer was necessary for vesting. I think that it is unnecessary for me to go at greater length through the numerous matters that one finds in the Education Act, 1902, which go to show—first, that “abolished” is used in the fifth section in its natural sense; and, secondly, that the words “shall be transferred” in clause 1 of Schedule II. are used to the intent that the moment that the future day arrives all property of the school board shall *ipso facto*, by virtue of and under the Act of Parliament, vest in the new educational body without the aid of any additional instrument of any sort or kind.

I do not know that it is necessary for me to say anything more as to the National Debt (Stockholders' Relief) Act, 1892, because in the view that I take of this case the question as to the effect of that section is no longer really of any importance. Its only importance arose because Mr. Justice Farwell in his judgment relied upon it as showing that in the case of certain stocks, transfers of which are entered in the Bank of England transfer books, the difficulty of there being no possibility of a transfer by the defunct school board, although it might be right that the Bank of England should, in accordance with their practice, insist upon having a transfer, might be got over by a transfer being executed by the new educational body as being a body in whom by virtue of an Act of Parliament the right to transfer stock was vested, and as to whom it could be said they “shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock and to receive and give a valid receipt for any accrued or accruing dividends.” It was said that the Act of Parliament gave an equitable right to the new educational body, and that they might, without any transfer being executed even by them to themselves, give a valid receipt for any accrued or accruing dividends of stock, and might also execute, either afterwards or before, as they thought fit, a transfer to themselves. As I have not to decide what the construction of that section is, I do not wish to say more than this, that my opinion is, as at present advised—and it is not an absolute decision—that these words “vested in any person” in section 4 of the National Debt (Stockholders' Relief) Act, 1892, mean legally vested. That is my view of that section.

Having disposed of those matters, I wish to say a word or two upon the argument that was addressed to us, that, even assuming that the effect of the Act of Parliament is to immediately vest the property of the school board in the new educational body on the appointed day, yet there is a necessity for an additional deed. It was said, in the first instance, that it is essential to the long and venerable practice of the Bank of England that there should be some such document. I do not think that that can affect the construction of an Act of Parliament. Then it was suggested that there was something in the nature of stock

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which really prevented it from being transferred without some instrument of transfer. All I can say in answer to that is that, in so far as that is true (and in a sense it is quite true), it is equally true of a number of other things. It is equally true of every *chore in action*, that if there were not a transfer by the Act of Parliament there might be a necessity for some deed or written transfer in order to accomplish the passing of the particular piece of property. I think that disposes of the argument that, notwithstanding that the words "shall be transferred" must be construed as "shall vest" on the appointed day, we ought not to hold that this stock so vests under the Act that the Bank of England ought to act upon its statutory vesting without the production of any written instrument. I think that they ought. It was said by counsel for the Bank that in consequence of some previous legislation under which undoubtedly property, including property in the stocks, did vest without a transfer, an Act was passed—the Local Government (Stock Transfer) Act, 1895; and they said that the passing of that Act recognised that the Bank of England ought not to act upon a statutory vesting without the production of some instrument of transfer. I do not agree with that. The Act of Parliament does not seem to me to have done anything of the sort. It recognises, and was passed upon the basis, that the effect of the statute was that, without more, the property vested in the person denoted by the statute as being the person in whom the property should vest; but, although that was true and it did vest, and the Bank of England took it for granted, and recognised it for all purposes, still, until the passing of the Act of 1895, in the particular case they of course had to assure themselves of the identity of the person. They had to assure themselves that the person who came and claimed to be the statutory appointee or donee of the stock was in fact the person that he pretended to be. In the statute of 1895 they got that by a certificate of the clerk to the local authority. All one can say is that at present, as regards this matter, no equivalent Act of Parliament has been passed. If it is desirable from a business point of view that such an Act of Parliament should pass, I do not suppose that the Legislature, when once satisfied of that from the representations of the Bank of England, would make any difficulty in passing an Act. I know nothing as to how far it is desirable, or how far it is not. If it is desirable, I have no doubt that it will be done. But as things stand, in my view, it is perfectly plain under this statute that the stocks do vest by virtue of the words in the first clause of Schedule II., and, so far as the Bank of England are concerned, they have an absolute indemnity by the very words of the Act of Parliament, and are not put in any danger or difficulty at all. I do not suppose that the Bank of England were thinking principally of any danger to themselves. I suppose they

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thought that it would be a matter of public convenience that the same formalities should be gone through in respect of all transfers of stocks, whether the transfer was a transfer by the terms of an Act of Parliament, or under an Act of Parliament, or a transfer in any other way. I daresay they think that it would be very much more convenient that all transfers should pass through the transfer books. If that is so, they will no doubt obtain legislation to that effect, but I offer no opinion about that.

I think that this appeal ought to be allowed.

ROMER L.J. The first clause of Schedule II. to the Education Act, 1902, on which the question we have to decide turns, is certainly not happily framed; but on the construction of it, and having regard to the provisions of the Act as a whole, I have come to the conclusion that the appeal should be allowed. I cannot take the same view of the construction of that section as was taken in the Court below.

For brevity, I will refer to the old educational authority—that is to say, the school board, or school attendance committee, which was abolished by the Act on “the appointed day”—as “the old board,” and I will refer to the new educational authority as “the council.”

One thing to my mind is clear about this Act, and that is that on what is defined as “the appointed day” the old board under the very words of section 5 of the Act was abolished, and I cannot find throughout this Act any indication that when the Act says that it is to be abolished it does not mean what it says. I cannot think for myself of any word stronger in the English language—whether it is the word usually used for this purpose or not does not seem to me to matter—I cannot find any word in the English language which more thoroughly expresses the non-continuance for any purpose of the old board than the phrase used by the Act of Parliament that on the appointed day it “shall be abolished.” As I have said, there is nothing in the Act from beginning to end to suggest that after the abolition the old board is, in the eyes of the law, for any purpose whatever, to be regarded as existing; and, indeed, section 5 is borne out by the provision in clause 10 of Schedule II. of the Act, for that carefully provides that existing members of the old board shall continue in office to “the appointed day,” the reason being obvious—that on the abolition of the old board its members would also, of course, cease to occupy the position of members of any body whatever. On the appointed day, therefore, to my mind, under this Act it is clear that for all purposes the old board ceased to exist, and the new body—the council—only comes into existence as a new educational authority with its rights and duties, including its right to take property on “the appointed day.”

That being the position of affairs, let me for a moment consider the

wording of clause 1 of Schedule II. It says that the property, powers, rights, and liabilities of the old board existing at the appointed day shall be transferred to the council. The transfer contemplated, whatever that may be, is a transfer to take place at "the appointed day." It could not take place before the appointed day by reason of the council not being in a position to take any transfer before that day. It could not take place after that, because, as I have pointed out, after "the appointed day" the old board is abolished; and it is noticeable that the property which has to be transferred is the property existing at the appointed day—not the property before or the property after, but the property at that precise moment. The word "transfer" as used in the section is a general expression, covering not only property, but powers, rights, and liabilities. It could not mean that in respect of powers, rights, and liabilities anything in the nature of an instrument in writing should be executed. Nor can I really conceive that under this clause, with regard to property, any distinction was intended to be drawn between one kind of property and another kind of property—namely, the kind of property which only passes at law by an instrument in writing, and that which does not require an instrument. What the clause to my mind contemplates is an immediate passing from the old board to the council of all properties, powers, and liabilities, and no writing or deed or any further act was contemplated. I think the transfer mentioned in the clause was intended to be a transfer effected by the Act of Parliament—effected instantaneously on the appointed day—not before, and not after; and the effect of that is clearly, on the construction of the Act as a whole, that, without more than the operation of the Act of Parliament, all property, powers, rights, and liabilities passed by virtue of the Act to the new body—that is to say, vested in the legal sense in the new body. That view is, I think, borne out by other parts of the Act. The word "transfer" is used with reference to the officers employed by the old board. Clause 16 of Schedule II. provides that "the officers of any authority whose property, rights, and liabilities are transferred under this Act to any council shall be transferred to and become the officers of the council." There is the same word "transferred" used with regard to officers as there is with regard to duties, powers, liabilities, and property. Further, sections 85 to 88 of the Local Government Act, 1894, are incorporated, as it were, in the Act of 1902, clause 8 of Schedule II. providing that those sections shall apply with respect to any transfer mentioned in the schedule—that is to say, with respect to the transfer mentioned in clause 1 of the schedule. In section 86 it is provided that "nothing in this Act shall prejudicially affect any securities granted before the passing of this Act on the credit of any rate or property transferred to a council or

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parish meeting by this Act"; and in subsection (2) of that section it is provided that "it shall be the duty of every authority whose powers, duties, and liabilities are transferred by this Act to liquidate so far as practicable before the appointed day, all current debts and liabilities incurred by such authority"; and in section 88 (1) there is this: "If at the time when any powers, duties, liabilities, debts, or property are by this Act transferred to a council or parish meeting, any action or proceeding, or any cause of action or proceeding is pending or existing by or against any authority in relation thereto the same shall not be in anywise prejudicially affected by the passing of this Act, but may be continued, prosecuted, and enforced by or against the council or parish meeting as successors of the said authority in like manner as if this Act had not been passed."

Those sections, incorporated as they are to the extent and in the manner that I have indicated, strongly bear out the view which I think is forced upon this Court as to the true construction of clause 1 of Schedule II. I might also refer, without going through them in detail, to the other provisions for ensuring the continuance without a moment's break of the rights, duties, work, and general position of the old educational authority to the new authority, which appear in the Act. To my mind it would be inconsistent with the general scope of that continuity if we did not give to clause 1 of Schedule II. the construction that I have indicated.

I can only say that it is a pleasure to think that our decision will very much enure for the benefit, as far as I can see, of everybody concerned under this Act, and will afford the greatest protection to those who have to act upon it; and it certainly will be, as far as I can see, the very best indemnity to the Bank of England, for example, among others, which they could possibly have. It puts them in a far better position than they would be under the interpretation adopted in the Court below.

I think for these reasons that the appeal should be allowed.

COZENS-HARDY L.J. I agree, and I have very little to add. Any other view than that which has been adopted by my Lord and by Lord Justice Romer would, as it seems to me, make this Act of Parliament absolutely unworkable. The word "abolished" in section 5, as applied to school boards, is, no doubt, not a very happy word, and, in this collocation, is probably a novel word; but it seems to me that, as applied to a corporation, it must mean "dissolved." It must mean, as applied to the school board, that on the appointed day it ceases to exist. There is no provision in the Act of Parliament for the continuance of the school board. There is no possibility of any further election of members of the school board. There is nobody who could on the

part of the school board do any of those acts which it was the duty of the school board to discharge before the appointed day.

The words in clause 1 of Schedule II. which have been so much discussed, "shall be transferred," must mean, as it seems to me, "shall vest," without more, on the appointed day. One interpretation must be given as regards all kinds of property, and as regards everything which is covered by the clause. It cannot reasonably be suggested that the words are to have a different meaning when applied to real property from that which they have when applied to stock. To take the case which I ventured to put to counsel during the course of the argument, of schools which are freehold property vested in the school board. I failed to obtain any suggestion as to how any further deed of transfer or conveyance could be obtained after the appointed day to the new educational authority, and I certainly am not prepared so to construe this section as to make an exception in favour of the Bank of England because there happens to be in the National Debt (Stockholders' Relief) Act, 1892, a section which may or may not enable the difficulty to be got over with reference to the particular stocks with which that Act deals.

In my view, the conclusion at which we have arrived is very strongly borne out by section 88 of the Local Government Act, 1894, which is made applicable to this Act, and that is a section applying not merely to powers, duties, liabilities, and debts, but it speaks of property "by this Act transferred." That makes it more easy to read clause 1 of Schedule II. in the way which I have suggested—namely, that "shall be transferred" means "shall vest," without more, on the appointed day.

Appeal allowed; declaration that the stock in question passed on the appointed day to, and became vested in the plaintiffs, and order that the Bank must enter them in their books as the owners thereof.

Solicitor for the appellants—The Treasury Solicitor.

Solicitors for the respondents—Freshfields.

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KING'S BENCH DIVISION.

July 11.

CHENEY v. TALLOWIN.

Poor rate—Recovery—Period—Apportionment on change of occupation—Title of rate—Retrospective rate—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 14, 16.

The objection that a poor rate, good in point of form, is in fact retrospective, cannot be taken by way of defence to proceedings for the enforcement of the rate, but by appeal against the rate only.

The period of a poor rate, for the purposes of apportionment in cases of change of occupation, commences with the date of the rate, i.e., the date of allowance. Consequently a person who is in occupation at that date cannot claim an apportionment of the rate in his favour on the ground that the rate in fact covers expenses incurred before his occupation commenced.

It is not necessary that the heading of a poor rate should state the commencement of the period for which it is made otherwise than by stating the date when it is made. The form of heading prescribed by the Agricultural Rates Order, 1896, is therefore not open to objection on the ground that it does not sufficiently state the period of the rate.

CASE stated by two of His Majesty's justices of the peace for the county of Norfolk pursuant to the statute 42 & 43 Vict. c. 49, on the application of the appellant in writing dated March 10th, 1904, who was dissatisfied with their determination in the matter of the complaint hereinafter stated as being erroneous in point of law, the appellant having duly entered into recognisances to prosecute the appeal:—

1. At a court of summary jurisdiction held for the division of Swainsthorpe, in the county of Norfolk, at Swainsthorpe, in the said county, on March 4, a complaint dated February 27, 1904, was preferred by the appellant, acting as assistant overseer of the parish of Bramerton, in the said county, that the respondent, described as of Bramerton, being a person duly rated and assessed to the relief of the poor of the said parish in and by a certain poor rate made on November 6, 1903, in respect of a house and farm land, in the sum of 5s. 4½d. had not paid the sum or any part thereof, but had refused to do so. The following facts were proved or admitted:—

The respondent was summoned to appear on March 4, 1904, to show cause why he had not paid the rate mentioned in the complaint hereinbefore set forth. (The sum in question, 5s. 4½d., was part of a larger sum, the balance of which had been duly paid by respondent

without demur). The following is a copy of the heading of the said rate :—

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“ Parish of Bramerton, Norfolk.

Rate made the sixth day of November, 1903.

An assessment for the relief of the poor of the parish of Bramerton, in the county of Norfolk, and for other purposes chargeable thereon according to law, made the sixth day of November, 1903, after the rate of one shilling and sixpence in the £ on buildings and other hereditaments not being agricultural land, and at one half of the said rate on agricultural land, which is estimated to meet all the expenses for the above purposes which will be incurred before the twenty-fifth day of March next, and which rate we declare to be payable by two equal instalments, that is to say in November and February next.”

2. At the hearing of the summons the appellant appeared, proved his authority to take proceedings, and produced the rate book for Bramerton, showing the making and publication of the rate. He also proved the rating of the respondent and non-payment after demand for seven days previous to the summons. The appellant gave evidence on oath that he was present when the rate was made by the overseers in Bramerton parish, that the overseers met for that purpose, and that precepts or contribution orders from the guardians of the Henstead Union were produced, each dated October 8, being the contributions required by the guardians from the said parish of Bramerton, and that the meeting was certainly held after the 8th October aforesaid ; that the rate was duly allowed by the justices on 6th November following ; that the respondent came into occupation of his premises on October 11, 1903, and that he refused to pay the 5s. 4½d. because he was not the occupier from September 29th, 1903, up to that day. That the rate was in respect of expenses to be incurred by the guardians up to March 25, 1904, that the period from which the rate was to start was not set out in the heading of the rate because it was not the custom, and the appellant had never heard it was his duty to do it. Appellant would not admit it was a six months' rate, though he produced on request the contribution orders served on him in the previous half-year, which mentioned expenses to be incurred by guardians up to September 29, 1903.

The appellant contended that though the respondent, if he had quitted the day before the 6th November, the date of allowance, could under the decision in *Reg v. Tempest* (1898) 14 *Times* L. R. 199 have escaped all payment, he, by staying on and his name appearing in the rate book, now became liable to the entire rate, and that it was no concern of the overseers whether he had or had not been in occupation between September 29 and October 11, 1903 ; that in fact so far as

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the overseers were concerned there was a blank time between September 29 and the date of allowance; but that, as soon as the allowance took place, the persons rated, if they were then in occupation, became liable in regard to the entire rate.

3. There was no dispute as to sending of demand notes for the rate; correspondence was put in on both sides showing that the respondent had declined to pay the proportion of the rate demanded, which he (respondent) found to be 5s. 4½d. for the period from September 29 to October 11 when he took possession.

4. Respondent then gave evidence on oath that he had paid the whole of the first instalment of the rate demanded, less 5s. 4½d., the proportion for the period between September 29 and October 11, 1903, on the assumption that the rate was a six months' one from September 29, 1903, to March 25, 1904; that his tenancy only began on October 11, 1903, and he objected to pay rates for a period when he could not have been in possession. It was contended on behalf of the respondent:—

(a) That under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), section 14, overseers were required to set forth in the title of the rate the period for which the same is estimated, and this by giving no starting date they had failed to do.

(b) That under section 17 of the same Act a poor rate shall be deemed to be made on the day when it is allowed by the justices, and that liability to pay a rate is incurred between the time when it is made and a given date (in this case March 25, 1904), and that the period for which the rate is made is the period between these two dates, consequently that the respondent, had he wished, could have refused to pay the whole proportion up to date of allowance (November 6, 1903), whereas he had only exercised his rights as regards the few days previous to the commencement of his tenancy (see *Davis v. Woodfield* (1900) 81 L. T. 782; 64 J. P. 215).

(c) That it was absurd to say, as appellant had done, that the rate was not a six months' rate, beginning on September 29, and only dated from the day of allowance.

(d) That the guardians as regards contribution orders, and the overseers as regards preparation and obtaining allowance of rate were guilty of *laches* and delay, and should get their rates allowed at beginning of each half-year.

5. It was contended by the appellant, supplementing his before-mentioned argument and answers to cross-examination:—

(a) That the rate and heading had been made in accordance

with the form prescribed by article 16 of the order made under the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), and the form in Schedule Y to the Agricultural Rates Order, 1896, and that the order requires every poor rate to be made in such form. Cheney v. Tallowin.

(b) That section 14 of the Poor Rate Assessment and Collection Act, 1869, must be read as amended by the Agricultural Rates Order, 1896, the effect of which is to render the statement of the date previously to which the expenses, which the rate is made to meet, will be incurred, a sufficient compliance with section 14 of the Poor Rate Assessment and Collection Act, 1869.

(c) That it had been the invariable custom for the contribution orders to be made out by the guardians at their first meeting in the half-year, in this case October 8, and that it was not possible for the rate collectors as a body (some being uneducated men) to get their rates ready for allowance before the first fortnightly meeting of the magistrates in the following month (in this case November).

6. We found as a fact that the respondent only came into occupation on October 11, 1903, that though not stated at the head of the rate, the rate was intended, and was generally to be meant to cover the period of six months from September 29, 1903, to March 25, 1904, and that respondent under *Reg. v. Tempest* (1898) 14 T. L. R. 199, and *Davis v. Woodfield* (1900) 81 L. T. 782, could, had he wished, have declined to pay the entire proportion of such six months rate previous to date of allowance (November 6, 1903), and was therefore *a fortiori*, not liable for the 5s. 4½d., the proportion from September 29, 1903, to October 11, 1903, the period previous to his occupation, and we therefore dismissed the complaint.

7. The question for the opinion of the Court is whether in the circumstances aforesaid, as the respondent admitted that at the date when the said rate was allowed he was in occupation of the premises for which he was rated in the said rate, and as the rate had been duly allowed, we were bound to issue a distress warrant for the unpaid balance of the sum at which the respondent was rated in the said rate.

W. C. Ryde for the appellant. The objection raised by the respondent is in substance that the rate was retrospective; and that is an objection which affords no defence to proceedings for the enforcement of the rate, but is a matter in respect of which the only remedy is by appeal to quarter sessions. Where the rate is good in form the questions which the justices can go into are practically limited to the questions whether the defendant is the person rated, whether he was in occupation of the premises, whether these premises are in the parish,

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and whether he has paid. When they have disposed of these questions against the ratepayer their duty is merely ministerial: *Westminster City Council v. Army and Navy Co-operative Supply*, 1902, 2 K. B. 125; 71 L. J. K. B. 546; *Durrant v. Boys* (1796) 6 T. R. 580; *Ex parte May* (1862) 31 L. J. M. C. 161; *Reg. v. Kingston-upon-Hull Justices* (1858) E. B. & E. 256; 27 L. J. M. C. 199.

There can be no question but that the rate was good in form in this case. It was in the form prescribed by the Agricultural Rates Order, 1896.

The respondent seeks to say that the rate ought to be apportioned in his favour under section 16 of the Poor Rate Assessment and Collection Act, 1869. But for the purposes of such an apportionment the period of a rate runs from the date when it is made, that is, under section 17 of that Act, the date when it is allowed. For this purpose the question of the expenses the rate is in fact made to cover is immaterial. On this point the case is on all fours with *Reg. v. Tempest* (1898) 14 Times L. R. 199, which is conclusive against the respondent. *Davis v. Woodfield* (1900) 81 L. T. 782, is to the same effect.

W. H. Stevenson for the respondent. The rate is bad on the face of it. Section 14 of the Poor Rate Assessment and Collection Act, 1869, provides that "the overseers of every parish when they make a poor rate shall set forth in the title of the rate the period for which the same is estimated." To satisfy this requirement, the commencement of the period must be stated as well as its termination. Here the title of the rate discloses no date of commencement. The Agricultural Rates Order, 1896, was never meant to override the provisions of section 14. "The period for which the same is estimated" must mean the period the expenses for which the rate is made to meet. Therefore the period of this rate did in fact commence at the beginning of the half-year. On the other hand if the rate did commence on November 6, whilst it covered expenses from the previous September 29, it was to that extent a retrospective rate and bad. Had the overseers got the rate allowed on or immediately after September 29, the respondent would only have been liable for a part of it apportioned as from October 11, when his occupation commenced, and would have escaped the precise proportion of the rate he now objects to pay. It will be a hardship upon him if the Court hold that he must suffer for the overseers' neglect of duty in delaying to get the rate allowed at the earlier date. There should be a proportionate reduction of the amount of the rate in respect of the time during which the respondent was not in occupation of his holding. The point that the title of the rate specified no date of commencement was raised in *Davis v. Woodfield* (1900) as reported in 64 J. P. 215, but the Court did not deal with it.

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LORD ALVERSTONE C.J. In cases of distress warrants for rates hitherto brought before us, in which the point has been raised as to whether the justices have a discretion in the exercise of which they may decline to enforce payment of a rate, we have in several instances said that we do not pretend to give an exhaustive enumeration of all the objections which may be taken upon the application to them for their warrant of distress ; and we have frequently added that, in our opinion, it is sufficient to decide upon each case as it stands whether the particular objection taken by the ratepayer be valid or otherwise. We have lately pointed out more than once, in dealing with orders *nisi* for writs of *mandamus* obtained by rating authorities to compel justices to issue distress warrants, that justices have a certain discretion, as in *Rex v. Gillespie*, 1904, 1 K. B. 174 ; 2 L. G. R. 59 ; 73 L. J. K. B. 106. Still, I do not pretend to give a complete enumeration of all the grounds upon which justices may decline to enforce the payment of a rate.

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In the present case a poor rate had been made on November 6 to meet a precept of the guardians of October 8, and it was alleged to have been made in respect of expenses from the previous September 29 to the following March 25. The respondent was certainly in occupation of his premises when the rate was made—*i.e.*, allowed—on November 6, for the justices have found as a fact that he took possession of his holding on October 11, 1903, that the rate was made on November 6, 1903, and was intended to cover the expenses incurred for a period of six months onwards from September 29. His occupation having begun on October 11, he took the objection that he was not liable to pay the proportion of the rate applicable to the expenses incurred between the previous September 29 and that date. I am clearly of opinion that it was not open to him to take that objection upon an application for a distress warrant. The rule laid down and the principle acted upon in *Reg. v. Tempest* (1898) 14 *Times* L. R. 199, and *Davis v. Woodfield* (1900) 81 L. T. 782, appears to me to be the right one. It is this : that the date of the allowance of the rate is to be taken as the date of the commencement of the period for which the rate has been made. But if the rate be intended to cover expenses incurred before that date it may well happen that upon an appeal against it an objection may be taken that the rate is bad as being retrospective : see *Waddington v. City of London Union* (1858) E. B. & E. 370 ; 28 L. J. M. C. 113. Yet whether this be so or not, the objection that the rate is retrospective, is one that cannot be properly raised in defence to an application for a distress warrant ; for *Waddington's* case decided that an objection that a rate is retrospective is no ground for the refusal of a distress warrant, though it may be an excellent ground for an

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appeal to quarter sessions. As to this objection being no answer to enforce payment of a rate there is the further authority of *Reg. v. Kingston-on-Thames Justices* (1858) E. B. & E. 256; 27 L. J. M. C. 199. It has been contended for the respondent that although the old law may have stood in this way yet section 14 of the Poor Rate Assessment and Collection Act, 1869, has worked an alteration, because it enacts that the title of the rate shall specify "the period for which the same is estimated." That is to say that a *terminus a quo* should be stated on the title of the rate and that as it disclosed no starting date there was such an invalidity on the face of the rate itself as to entitle the justices to take it into account in determining whether they would issue their distress warrant. I am unable to assent to that contention for I think the words mean nothing more than the period for which the rate is made. Section 14 was drawn with regard to the law as it existed at the passing of the Act, and taking the date of the rate as its starting point, required the period to be set forth in the title merely to give ratepayers notice of the date up to which it was to operate. There is therefore nothing in the point that the rate is bad on the face of it, on the ground of supposed omission to state the two *termini*.

It has been further contended that there ought to be a proportionate reduction of the amount of the rate in respect of the time during which the respondent was not in occupation. It is true that when the occupier goes out of occupation after the making of the rate, section 16 of the Poor Rate Assessment and Collection Act, 1869, as amended by section 3 of the Poor Rate Assessment and Collection Act, 1869, Amendment Act, 1882 (45 & 46 Vict. c. 20), allows a reduction on the amount of the rate, but there is no authority for saying that where the rate has been made after the commencement of the occupation there must be a reduction in respect of non-occupation during the earlier part of the period expenses incurred for which the rate was intended to cover. I am therefore of opinion that the respondent has mistaken his remedy, he ought to have appealed to quarter sessions against the rate as being retrospective. I am also of opinion that the justices ought to have issued their distress warrant.

KENNEDY J. I am of the same opinion.

PHILLIMORE J. I agree.

Appeal allowed.

Solicitors for the appellant—Crowders, Vizard, and Oldham, for Mills and Reeve, Norwich.

Solicitors for the respondent—Rawlings and Butt, for W. E. Keefe, Norwich.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

GARLICK v. KNOTTINGLEY URBAN DISTRICT COUNCIL.

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July 1.

Infectious disease—Destruction of clothing—Compensation—Powers of medical officer of health—Sanction of local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120, 121, 308.

The power given to the local authority by section 121 of the Public Health Act, 1875, to direct the destruction of articles which have been exposed to infection is not exercisable by the medical officer of health on his own initiative. Consequently, where such articles have been destroyed by the direction of the medical officer of health, given without the sanction of the local authority, the owner of the articles cannot, at all events in the absence of evidence of ratification of the medical officer's action by the local authority, claim compensation in respect of their destruction under section 308 of the Act.

APPEAL from the county court.

The action was brought on an award purporting to be made under section 308 of the Public Health Act, 1875, under the following circumstances :—

In or about April, 1902, smallpox broke out in the plaintiff's house, which was situate in the defendant council's district. Some five or six weeks after the outbreak the medical officer to the defendant council directed the inspector of nuisances to the council to destroy certain articles of clothing and bedding which had been exposed to infection, and the articles in question were destroyed accordingly. These directions the medical officer gave without any special authority from the defendant council.

The plaintiff claimed compensation from the defendant council in respect of the articles destroyed under section 308 of the Public Health Act, 1875, and on the refusal of the defendants to satisfy his claim appointed an arbitrator. The defendants repudiated liability altogether, and refused to appoint an arbitrator, and the arbitration proceeded, in the absence of the defendants, before the plaintiff's arbitrator. The arbitrator awarded the plaintiff £14 8s. as compensation, and ordered the defendants to pay costs, which (including the arbitrator's charges of £6 19s. 6d.) were taxed at £24 6s. 10d.

The action was brought on this award to recover the two sums in question, making together £38 14s. 10d.

The learned county court judge gave judgment as follows :—

“ In my opinion the only substantial question in this case is whether

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it is within the power of the medical officer of health to order the destruction of articles which have been exposed to infection from any dangerous infectious disorder without getting special permission in each case from the urban district council or other authority. It is clearly essential that in matters of this sort, action should be taken without delay to prevent the possible spread of infection; the urban district council is certainly not in session daily, and to wait until the next meeting in ordinary course, or until a special meeting of that body could be summoned, might have the most prejudicial consequences to the health of the community. The medical officer of health is appointed and paid by the defendants (see sections 190 and 191 of the Public Health Act, 1875), and at all events in the absence of any express limitation of his authority by that body, he appears to me to be their representative in regard to this matter. If this view be correct, and, if, as in this case, in consequence of such action, a person sustains damage, his claim to compensation must fall within the provisions of section 308 of the Public Health Act, 1875, as he is a person who has sustained damage by reason of the exercise of one of the powers of the Act in relation to a matter as to which he is not himself in default, and is therefore entitled to full compensation by the local authority."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), provides as follows:—

Section 121. Any local authority may direct the destruction of any bedding clothing or other articles which have been exposed to infection from any dangerous infectious disorder, and may give compensation for the same.

Section 308. Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act. . . .

Bairstow for the defendants. The medical officer had no power to order the destruction of these articles without the special permission of the urban district council. The damage sustained by the plaintiff was therefore not due to the exercise of their powers by the defendants, and does not come within section 308. The plaintiff may have a remedy against the medical officer, but he cannot claim compensation from the defendants under section 308. The medical officer is not the representative of the local authority in these matters so as to enable him to act on his own initiative; nor could the defendants delegate their powers in the matter to him: *High v. Billings* (1903) 1 L. G. R. 723.

Scholefield for the plaintiff. It was open to the county court judge to assume that the medical officer had the authority of the defendants to destroy the articles. The case is one of those in which, in view of the

necessity for prompt action, he must be intended to act on his own initiative: *Cheetham v. Manchester Corporation* (1875) L. R. 10 C. P. 249; 44 L. J. C. P. 139. Further, in the particular circumstances, the county court judge might well hold that the medical officer had authority from the council, or, at all events, that they ratified his action. The outbreak of smallpox had been going on for six weeks when the articles were destroyed, and it is obvious that the whole of the circumstances must have been within the cognizance of the council, and that they must have known what their officer was doing. A disastrous state of things might arise were a medical officer, in times of virulent epidemic disease, to wait for the express sanction of the district council before destroying infected bedding and clothing.

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LORD ALVERSTONE C.J. In this case it is clear that the act in respect of which the claim is made is at any rate on the face of section 121 of the Public Health Act, 1875, intended to be the act of the local authority. I do not intend to decide or express any opinion as to what might happen in a case in which there was evidence that the local authority had acted by means of an officer to whom they had delegated powers, or by whom they had directed the thing to be done. That question may arise. All I say is that in this case I see no evidence whatever of any delegation of authority, and I see no evidence of any act by the local authority. The clothes were destroyed in the month of April. Some report of the case appears to have been made in the month of May, but the medical officer who reported it does not suggest that he made any report of the destruction of the articles, and what happened when the claim was made, some three or four months afterwards, does not seem to me to fit in with any view that the report of the destruction had previously been made. I think in a case in which there is no evidence whatever of acting by means of a committee or an officer, and no evidence of adoption or ratification of the act, we must look at the language of sections 120 and 121, and we must find on the face of the statute either expressly or by implication that the local authority could act through their medical officer. When we look at section 120, which says "Where any local authority are of opinion, on the certificate of their medical officer of health or of any other legally qualified medical practitioner, that the cleansing and disinfecting of any house or part thereof, and of any articles therein likely to retain infection, would tend to prevent or check infectious disease, it shall be the duty of such authority to give notice in writing"; when we find the next section is: "Any local authority may direct the destruction of any bedding clothing or other articles which have been exposed to infection," it is plain that when rights of property are being dealt with,

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the destroying of a person's property ought to be upon the authority, and by the sanction of the local authority. This is not a matter lightly to be left to the discretion of the medical officer. Of course, in cases of very bad infection it may be necessary for the medical officer to take steps and to have a special meeting of the local authority to deal with it; or if that state of things existed the local authority would be meeting to deal with the danger; but it seems to me that section 121 does not contemplate the mere opinion of the medical officer, and I do not think it contemplates the local authority acting upon or ratifying the act of the officer. I express no opinion upon that, because we may have a case in which different things have occurred. Here nothing was proved, except that the medical officer, who, by the way, was the medical attendant of the plaintiff himself, thought that the clothes should be destroyed, and ordered them so to be. With regard to ratification, what happened afterwards I do not understand, and do not think it can be pressed on the lines Mr. Scholefield has pressed it. A claim was made, the defendants said they would not pay it, they refused to accept it, refused to appoint an arbitrator, and at the outset asked the plaintiff to send in a more reasonable claim. How that can be ratification of this claim I do not quite see. I am of opinion, with great deference to the opinion of the county court judge, that there is no act of the local authority making them liable.

KENNEDY J. I am of the same opinion. There are only two ways in which the local authority, who exist for public purposes and spend public money with which they are entrusted, can be made liable for the act, which unquestionably was not an act to which they gave in any form sanction at the time, or expressed it afterwards. Those two ways would be that it was part of the general duties entrusted to the medical officer of health to destroy articles exposed to infection, and therefore that the destruction by him was the destruction by them through their servant. There has been no attempt made, or could be made, as far as I know, to show that a medical officer of health *virtute officii* has a right to order clothes and property to be destroyed. As far as that is concerned, it would seem to be a dangerous power to give. Then we were fairly, if the facts justified it, pressed by the argument that it would be a sad thing for the public if a doctor had to wait before destroying infected clothes. The fact is that this case was not a case of urgency. The medical officer waited six weeks before he ordered the destruction of the articles; and there could be no inference of authority from his being a person who might be said in emergencies to be entrusted with special powers with which the local authority is invested. It is not a case in which he can be said to be put in the position of one who acts because the emergency demands that somebody should act, and he was

the only officer. He waited six weeks, and ordered the destruction of the articles by the inspector of nuisances. There was ample time to communicate with the local authority to get them to order something, which, according to the argument of the respondent, justifies a money claim against the district.

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As to ratification, I do not see any evidence of ratification of the act, and considering that by section 126 (3) this bedding or clothing could not have been lent, sold, transmitted, or exposed without incurring a penalty not exceeding £5, it is quite clear to me that it was quite safe where it was, and the natural thing would be that the local authority, who had never given any express authority, nor given a general authority in their appointment of the medical officer, should be consulted before anything should be destroyed, the destruction of which is to give birth to a legal right to compensation for the value of the thing destroyed, which might have been disinfected, and as regards which certainly the local authority, as representing the public, ought to have the opportunity to say whether the additional expense ought to be incurred if any was involved. I think, with great respect, there was no evidence on which the judge could properly come to the decision he did.

Appeal allowed.

Solicitor for the plaintiff—Ernest Darley Atkinson, Knottingley.

Solicitors for the defendants—Charles Russell & Co., for Charles Lowden, Pontefract.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

It may be observed that there is some doubt whether section 308 of the Public Health Act, 1875, applies at all with reference to the destruction of infected articles under section 121, seeing that that section itself contains provisions as to compensation in such cases.

High Court of Justice.

KING'S BENCH DIVISION.

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July 4.

Re HANWELL URBAN DISTRICT COUNCIL and SMITH.

Streets—Private street works—Apportionment—Arbitration—Jurisdiction of arbitrator—Recovery of expenses—Jurisdiction of Justices—Appeal to Local Government Board—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 268.

An objection to an apportionment of expenses of private street works under section 150 of the Public Health Act, 1875, on the ground that it includes, in addition to expenses properly chargeable against the frontagers, expenses not properly so chargeable—e.g., expenses of sewerage where the street is already sewered to the satisfaction of the local authority—cannot be taken either before an arbitrator to whom a dispute as to the apportionment is referred under section 257, or whether the apportionment has been disputed or not, by way of defence to proceedings for the recovery of the amount apportioned. The only remedy of the frontager in such a case is by appeal to the Local Government Board under section 268.

Wake v. Sheffield Corporation (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1, *followed*.

Hornsey Local Board v. Davis, 1893, 1 Q. B. 756; 62 L. J. Q. B. 427, *explained*.

AWARD of an umpire stated in the form of a special case as follows:—

1. This is an award stated by me the undersigned Robert Ernest Moore in the form of a special case for the opinion of the Court under section 7 (b) of the Arbitration Act, 1889.

2. The parties to this arbitration were the Hanwell Urban District Council and Mr. F. W. Smith of Shirley Gardens Hanwell in the county of Middlesex, and the dispute in question was with reference to the apportionment of certain expenses as having been incurred by the said Council under section 150 of the Public Health Act, 1875.

3. Within the jurisdiction of the said Council is a certain street known as Shirley Gardens which at the date of the service of the notice next hereinafter referred to was not a highway repairable by the inhabitants at large.

4. On the 29th day of August, 1901, the said Council caused to be served on the owners of premises fronting adjoining or abutting on the said street (including the said F. W. Smith) a notice that the road was not sewered levelled paved metalled flagged channelled and made good to their satisfaction, and required the owners to execute the works mentioned in the notice.

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5. The owners did not comply with the said notice and the Council accordingly executed the said works themselves.

6. The said works having been completed, the surveyor of the Council proceeded to apportion the sum of £1,112 17s. od., as being the total cost thereof, among the owners of the premises adjoining or abutting on the said street. Particulars showing how the said sum of £1,112 17s. od. was made up are shown in the document marked A which is annexed to and forms part of this case.

7. On the 22nd September, 1902, the surveyor to the Council made his apportionment whereby he apportioned the said sum of £1,112 17s. od. according to frontage among the owners of the premises abutting upon the said road without inserting therein the names of the persons to whom he ascribed the ownership of the said premises respectively. The document marked B which is annexed to and forms part of this case is a copy of the said apportionment. Notice of the said apportionment was duly served on the owner of each of the premises mentioned therein by delivering copies thereof to some person upon the said premises.

8. The surveyor of the Council also caused to be served on the said Mr. F. W. Smith the notice copy of which marked C is also annexed to and forms part of this case. Enclosed under the same cover with such last-mentioned notice was a document purporting to show that the total sum of £665 11s. 10d. had been apportioned in respect of the premises mentioned in the list therein set out, and also showing the amount apportioned in respect of each of the premises contained in such list. A copy of the said document marked D is also annexed to and forms part of this case.

9. The said F. W. Smith duly gave notice to the Council that he disputed the surveyor's apportionment and thereupon each party to the dispute appointed an arbitrator pursuant to the Public Health Act, 1875, and the said arbitrators having failed to appoint an umpire, application by the Hanwell Urban District Council for the appointment of an umpire was made to the Local Government Board, and the said Board duly appointed me to act as umpire in the matter of the said dispute.

10. The said arbitrators having failed to make their award within the time limited in that behalf both parties to the said arbitration called upon me to adjudicate in the said dispute and I accordingly duly took upon myself the burden of the reference.

11. Upon the hearing of the said arbitration before me counsel for the said F. W. Smith put forward the following contentions by way of objection to the apportionment namely:—

(a) That the total sum apportioned among the owners was larger

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than the sum which the surveyor was legally entitled to apportion amongst them under section 150 of the Public Health Act, 1875, as it included the cost of laying a surface water sewer although there was at the date of the service of the notices under the said section an existing surface water sewer with which the Council must in point of law be taken to have been satisfied within the meaning of the said section.

(b) That even if the surveyor was entitled to include in his apportionment the cost of such portion of the said surface water sewer as was laid in the said road itself the total sum apportioned was nevertheless larger than the sum which the surveyor was legally entitled to apportion amongst the owners as it included the cost of carrying the said sewer beyond the limits of the said road to its outfall in the main sewer in the Uxbridge Road.

(c) That the total sum apportioned among the owners was excessive as it improperly included an addition of 5 per cent. to the amount actually paid to the contractors for carrying out the works, such percentage having been added for the purpose of covering office expenses and other incidental expenses.

(d) That the said F. W. Smith had been wrongly charged as the owner of two parcels of land adjoining the said road of which he was not in fact the owner.

(e) That the total sum apportioned among the owners was excessive as it improperly included the amount charged by the contractors who executed the works for "maintaining the same in good condition, regularly cleaning out the gulleys and channels scavenging the road and paths for 12 months after the surveyor's certificate of completion free of all expenses to the Council."

12. It was contended by counsel on behalf of the Hanwell Urban District Council that I had no jurisdiction to entertain any of the said objections so raised on behalf of the said F. W. Smith and further that none of the said objections even if I had jurisdiction to entertain them could be sustained in point of law. It was however arranged that I should hear the evidence which the parties should respectively think fit to place before me with reference to the said points and should state my award in the form of a special case for the opinion of the Court pursuant to section 7 (b) of the Arbitration Act, 1889, both parties agreeing to abide by any order the Court should think fit to make with regard to the costs of the special case.

15. With reference to objection (a) the following facts, which were proved to my satisfaction, constitute the circumstances from which it was contended I was bound in point of law to hold that the Council were satisfied with the existing surface water sewer:—

(i.) In the month of January, 1890, before Shirley Gardens had been

actually laid out, a plan of the proposed road was submitted to the Local Board (the predecessors of the said Council) by the persons proposing to lay out the same. The said plan indicated that it was intended to lay along the course of the said road a soil sewer and a 9 inch surface water sewer.

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(ii.) The said plan was approved by the Local Board on the 6th January, 1890.

(iii.) Shortly after the approval of the said plan Shirley Gardens was laid out and a soil sewer and a 9 inch surface water sewer were in fact laid in it along the lines shown on the said plan.

(iv.) No notice of completion of the said work was ever given to the said Council or their predecessors as required by their bye-laws and the said sewer was never in fact passed by their surveyor nor did the Council or their predecessors ever formally express themselves as satisfied with the said sewer although they did not express any dissatisfaction with the same. The present surveyor of the Council was however certainly aware of its existence in October, 1900, and although there was no direct evidence on the point, I drew the inference that he and his predecessors must have been aware of its existence since it was first laid.

(v.) The said surface water sewer was never in fact properly laid and was wholly useless.

(vi.) It was the intention of the Council that all houses to be erected in the said road should be provided with a separate system for soil and surface water drainage respectively and that the surface water drains of each house should be connected with a surface water sewer, and in the month of October, 1900, when several houses in the said street were in course of erection notices were served by the Council's surveyor on the said F. W. Smith as the person erecting the same calling his attention amongst other things to the fact that the said houses were not provided with separate surface water drains and requiring him to provide them.

(vii.) In or about the month of November, 1900, the said surveyor served upon the said F. W. Smith notices in respect of 11 other houses which were in course of erection or had then been recently erected by him in the said street calling his attention to the fact that the surface water drains of such houses had been connected with the soil sewer and requiring him to disconnect them and connect with the surface water sewer. Such last-mentioned notices however had not in fact been complied with at the date when the notices under section 150 of the Public Health Act were served.

(viii.) In the course of erecting certain of the houses in the said road the said F. W. Smith had occasion to undermine the said

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surface water sewer for the purpose of connecting the soil drains of such houses with the soil sewer and in order to prevent the said sewer from collapsing the said F. W. Smith by the instructions of the said surveyor placed a packing of concrete between each drain and the surface water sewer at the point where the drain passed under it.

(ix.) Upon the instructions of the said Council the said surveyor in the year 1901 prepared (with a view to the service on the owners of notices to make up the said road under section 150 of the said Act) plans sections and estimates of the works which he deemed necessary to be carried out in the said road, the resolution of the Council upon which the said surveyor acted in preparing such plans was in the following words:—

“That the surveyor be instructed to prepare the necessary plans, &c. for the making up of Shirley Gardens and the approach thereto under the 150th section of the Public Health Act, 1875.”

(x.) Amongst the works included in the plans sections and estimates so prepared by the said surveyor was the laying of a new surface water sewer. The said plans sections and estimates were laid before the Council who thereupon passed a resolution whereby they authorised the service of notices under the said section requiring the owners to execute the works comprised in the said plans sections and estimates.

(xi.) The new surface water sewer which was laid by the Council was connected with a sewer which had about 12 months previously been laid in the Uxbridge Road whereas the old one discharged into a water course running along the Uxbridge Road. The new sewer was also laid at a greater depth than the old sewer.

14. With regard to objection (d) no direct evidence of title was given either on behalf of the council or on behalf of the said F. W. Smith other than a mere denial by the said F. W. Smith that he was the owner. The said F. W. Smith however in cross-examination stated that he knew who the owner was but declined to give his name. He also admitted that the houses he had erected adjoining Shirley Gardens had been erected under a building lease granted to him of the whole building estate which included both the plots referred to. That he had excavated gravel from one of such plots and used the gravel in making up the roadway of Shirley Gardens. And that building plans which were produced by the Council and put in had been submitted by him pursuant to the Council's bye-laws upon which plans the other of such plots was shown as included in the garden at the rear of the proposed building. If I had jurisdiction to entertain this objection at all I find that the onus of proof if upon the Council was not satisfied by them and if upon the said F. W. Smith was not satisfied by him.

15. With regard to objection (e) the contractor who carried out the works contracted as follows: "The whole of the works to be maintained in good condition the gullies and channels regularly cleaned out and the road and paths scavenged and watered by the contractor for 12 months after the surveyor's certificate of completion free of all expense to the Council." I was however satisfied that the payments made by the Council to the contractor for the works executed by him were fair and reasonable charges for the works done and the materials supplied. And that all the quantities of the work done had been properly measured up and the contractors paid upon such quantities only.

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16. The following cases were cited in argument before me:—*Bayley v. Wilkinson* (1864) 33 L. J. M. C. 161; *Sandgate Local Board v. Keene*, 1892, 1 Q. B. 831; 61 L. J. Q. B. 775; *Reg. v. Local Government Board* (1882) 10 Q. B. D. 309; 52 L. J. M. C. 4; *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1; *Walthamstow Local Board v. Staines*, 1891, 2 Ch. 606; 60 L. J. Ch. 738; *Derby Corporation v. Grudgings*, 1894, 2 Q. B. 496; 63 L. J. M. C. 170; *Cawston v. Bromley Urban District Council* (1900) 17 T. L. R. 25; *Hornsey Local Board v. Davis*, 1893, 1 Q. B. 756; 62 L. J. Q. B. 427; *Bonella v. Twickenham Local Board* (1878) 20 Q. B. D. 63; 57 L. J. M. C. 1; *Handsworth District Council v. Derrington*, 1897, 2 Ch. 438; 66 L. J. Ch. 691; and *Handsworth Local Board v. Taylor* (1893) 1897, 2 Ch. 442 n.; &c., &c.

17. I was of opinion upon the cases cited that I had no jurisdiction to entertain any of the objections set out in paragraph 11 of this case and that the apportionment made by the surveyor of the Hanwell Urban District Council ought to be confirmed. My award therefore subject to the opinion of the Court is as follows:—

AWARD.

I award that the apportionment made by Sidney W. Barnes surveyor to the Hanwell Urban District Council and dated the 22nd day of September, 1902, be confirmed and I do hereby confirm the same. And I declare that there is due from the owners of all the premises mentioned in the document marked D annexed to this award the total sum of £665 11s. 10d. which sum I apportion among the owners of the said respective premises in manner shown in the said document marked D. And I further award and direct that the said F. W. Smith do pay to the Hanwell Urban District Council their costs of the reference which I assess at £31 4s. 10d. And further that the said F. W. Smith do bear and pay the costs of this my award (including the fees of the two arbitrators and the umpire). And in case the said Council shall pay such last-mentioned costs in the first instance I

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award and direct that the said F. W. Smith do forthwith repay to the said Council the amount which they shall so pay.

18. I was also of opinion that if I had jurisdiction to entertain any of the said objections set out in paragraph 11 I was entitled to entertain objection (a) and objection (b) on the ground that they were objections which "go to the jurisdiction of the local authority to execute the works in question at the expense of the frontagers," but that I had no jurisdiction to entertain objections (c) (d) or (e).

19. Assuming that I was entitled to entertain objections (a) and (b) but not objections (c) (d) or (e) I was of opinion as to objection (a) that in the circumstances set out in paragraph 13 the Council must be taken to have accepted the said surface water sewer and that they were therefore precluded from alleging that they were not satisfied with the same. I accordingly hold that this objection has been sustained, and if this view is correct it will be unnecessary to deal with objection (b) which relates to part only of the said surface water sewer.

My award therefore, on the assumption that I had jurisdiction to entertain objections (a) and (b) but not objections (c) (d) or (e) and subject to the opinion of the Court is as follows:—

ALTERNATIVE AWARD.

I award and declare that the total sum to be apportioned under section 150 of the Public Health Act, 1875, among the owners of premises fronting adjoining or abutting on Shirley Gardens is £980 os. 9d. of which sum £586 6s. 7d. is the total amount which I find to be payable by the owners of the premises hereinafter mentioned being the premises of which the said F. W. Smith is alleged by the Hanwell Urban District Council to be the owner and I apportion the said sum of £586 6s. 7d. among the said respective premises in manner following that is to say:—[Here followed a schedule containing an apportionment of the £586 6s. 2d. into 36 items.]

And I do further award and declare that the Hanwell Urban District Council do pay to the said F. W. Smith his costs of the reference which I assess at £34 18s. 2d. And further that the said Urban District Council do bear and pay the costs of this my award (including the fees of the two arbitrators and the umpire). And in case the said F. W. Smith shall pay such last-mentioned costs in the first instance I award and direct that the said Council do forthwith repay to the said Council the amount which they shall so pay (*sic*).

20. If it should be held that in the circumstances above set out objection (a) ought not to be sustained in point of law I am also of opinion that objection (b) has not been sustained either, as I find as a fact that the portion of the said surface water sewer in the Uxbridge Road served Shirley Gardens only and was necessary for the purpose of leading the said surface water sewer to its outfall.

21. Assuming then that I was entitled to entertain objections (a) and (b) but not objections (c) (d) or (e) but that I ought to hold that objection (a) had not been sustained then my award set out in paragraph 17 hereof will stand. And (subject to the opinion of the Court) I confirm the said award accordingly.

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22. The questions for the opinion of the Court are:—

Whether I had jurisdiction to entertain all or any and which of the objections set out in paragraph 11 hereof and if so whether any and which of such objections ought to be sustained in point of law.

Upon a previous occasion when the present case came into the paper for argument, the learned judge (Channell J.) pointed out that as it was a case under the Arbitration Act, any judge deciding it under that Act was simply in the position of an arbitrator, and could only decide matters that the arbitrator could decide, and nothing useful to the parties. The case then stood over in order that the parties might agree upon some terms which would give the Court a wider jurisdiction. Accordingly the parties agreed to the following terms:—"The judge shall decide whether in proceedings to recover any portion of the amount the Court before whom such proceedings shall come shall have power to enforce payment for a less amount than £665 11s. 10d., the amount of the first award. The judge shall decide whether on the facts there is any liability on the owners whoever they may be in respect of the surface water sewage works. The judge shall also decide whether the sums of £51 18s. 4d., 5 per cent. on £1,038 5s. 10d. contractors' account as agreed are rightly included in the apportionment as expenses incurred by the Council within the meaning of section 150 of the Public Health Act, 1875."

R. Cunningham Glen for the District Council. The objections which the respondent sought to take before the arbitrator are not such as can be taken either as objections to the apportionment or by way of defence to proceedings for the recovery of the expenses. The only remedy in respect of such objections is by appeal to the Local Government Board under section 268 of the Public Health Act, 1875: *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1. In *Hornsey Local Board v. Davis*, 1893, 1 Q. B. 756; 62 L. J. Q. B. 427, no doubt the arbitrator did entertain the question whether the street was or was not already sewered to the satisfaction of the local authority. But no objection was taken to his jurisdiction; and the arbitration appears to have been treated as an arbitration at common law rather than as an arbitration under the Act.

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Secondly, on the merits, the arbitrator was wrong in holding that the Council must be taken to have been satisfied with the sewerage of the street as regards the surface water sewer. When they, as the local board, passed the plan for the old surface water sewer the estate was in course of development, and they merely accepted the plan as a plan of a sewer which would be satisfactory in the meantime. It was not necessary for them to make up their minds finally as to whether they were satisfied or not until the estate had been completely developed.

Naldrett for the respondent Smith. It is submitted that the Court has jurisdiction to entertain the objection the respondent takes, namely, that he is not liable for the expenses of the new surface water sewer, on the ground that the Council must be taken to have been satisfied with the surface water sewer which had previously been laid. If the apportionment were confined to the expenses of the surface water sewer the respondent would clearly be able to raise the objection by way of defence to proceedings for the recovery of the apportioned amount. But it is suggested that because other works were included in the apportionment, and the respondent's objection therefore goes to part only of the apportioned sum, he cannot raise his objection otherwise than by appeal to the Local Government Board. No doubt if he had not disputed the apportionment that would be so. But the apportionment was disputed, and the arbitrator has split up the figures. The very object of going to arbitration was to get the figures split up so that the Court could deal with the matter. There is no case exactly in point. In *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1, and in *Derby Corporation v. Grudgings*, 1894, 2 Q. B. 496; 63 L. J. M. C. 170, the apportionment had not been disputed, and the cases are distinguishable from the present on that ground. The respondent is not concerned to dispute the principle of *Bayley v. Wilkinson* (1864) 33 L. J. M. C. 161, and *Cawston v. Bromley Urban District Council* (1900) 17 *Times* L. R. 25, which show that the arbitrator cannot entertain the question whether the expenditure of the local authority is reasonable or not. The respondent's contention is merely that the arbitrator can split up the figures, and that when that has been done the frontager can dispute his liability as to part of the works on the ground of want of jurisdiction in the local authority as regards that part of the works. The course here adopted is substantially that taken without objection in *Hornsey Local Board v. Davis*, 1893, 1 Q. B. 756; 62 L. J. Q. B. 427. In the Court below in that case Mathew J. followed an earlier decision of his in *Eccles v. Wirral Rural Sanitary Authority* (1886) 17 Q. B. D. 107; 55 L. J. M. C. 106. In *Bournemouth Commissioners v. Watts* (1884) 14 Q. B. D. 87; 54 L. J. Q. B. 93, A. L. Smith J. held that an objection to an apportionment on

the ground that it included expenses of work done by a contractor whose contract with the local authority was not under seal, if a good objection at all, should have been taken on an objection to the apportionment under section 257. And in *Manchester Corporation v. Hampson* (1886) 35 W. R. 334, Manisty J. said "the substance of this case is that the original notice though erroneous was not void. And as the defendant refused to do any of the work, and did not dispute the first apportionment within three months, if the local board had proceeded for a charge on that apportionment they would have been strictly entitled to succeed." This passage is quoted by Collins J. in *Derby Corporation v. Grudgings*.

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Bonella v. Twickenham Local Board (1878) 20 Q. B. D. 63; 57 L. J. M. C. 1, supports the contention that the plaintiffs having adopted this sewer and kept it for ten years cannot now charge the defendant with the apportioned expense of a new one.

[He also cited *Cook v. Ipswich Local Board* (1871) L. R. 6 Q. B. 451; 40 L. J. M. C. 169, and *Midland Railway v. Watton* (1886), 17 Q. B. D. 30; 55 L. J. M. C. 99.]

R. Cunningham Glen replied.

CHANNELL J. My view about the question is that there is enough in this special case to show that the council had committed themselves to this sewer. There are several points, both as to time and as to the way they required houses to be connected with it, and the cement laid under it, and so on, which are strong evidence to that effect. I quite follow Mr. Glen's point that there may be cases in which a thing is done for a portion of an estate, and in which the time referred to in *Hornsey Local Board v. Davis*, 1893, 1 Q. B. 756; 62 L. J. M. C. 427, when the local authority ought to make up their minds finally, may not be until the termination of all the buildings upon the estate, and in which they may postpone their decision. It is perfectly possible that may be the case, so that I do not want to say for certain in this case that there was a wrong decision by the local authority when they came to the conclusion to include in the lump sum the cost of this part of the work. But I think there is a great deal of ground, notwithstanding this point about the building estate being incomplete, for saying that they did come to a wrong conclusion in reference to that matter, namely, the conclusion to include in the lump sum to be apportioned this portion of the expenses.

Then as to the 5 per cent. I am not satisfied that they were justified in coming to the conclusion to order that. That is not so clear as the other point. I merely point that out—I do not give any decision hostilely upon it; but, for the purpose of the rest of the case, I am

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willing to assume that the Council did come to a wrong decision to include so much of the expenses as related to remaking the surface water sewer, and of so much as concerned the 5 per cent. I am willing, for the purposes of the argument, to assume that those were wrong decisions; but then they were wrong decisions as to part of the amount in a matter in regard to which they had jurisdiction to impose upon the defendant and his co-frontagers some liability.

Now, it seems to me that the case of *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1, decides that, assuming they have come to a wrong decision as to that matter, the magistrates, when required to enforce payment, could not entertain the question. According to that case, if the objection went to a total want of jurisdiction in the local authority to direct the works to be done at all, then the magistrates might entertain it, and hold their hands; but if, instead of going to the whole jurisdiction, it only went to part, and the local authority had made a wrong decision as to part, but the decision, although wrong, was within the jurisdiction, the magistrates would have no power to disregard it. I do not find anything to the contrary of that in any of the cases. In the case of *Derby Corporation v. Grudgings*, 1894, 2 Q. B. 496; 63 L. J. M. C. 170, Charles J. seems to distinctly recognise that, because he emphasises in two places the statement about the whole of the work being done. On page 504 he says: "He (the frontager) may say that the place is not a street, or that he has no premises fronting upon the street, or that the place is a highway repairable by the inhabitants at large. He may set up all those defences, and, as it seems to me, any other defence which offers an answer to the whole of his legal liability. But here he cannot say that he has a defence as to the whole legal liability which is sought to be imposed upon him, because he is admittedly liable in respect of the footpath, and I am of opinion that the question in this case, not being one which goes to the whole of his liability, becomes a question of the amount of his liability." And then he goes on to talk about the amount of the apportionment and so on. That seems to me to deal with the question of what the magistrates can do. Then as to the question of what the surveyor or the arbitrator appointed in reference to the apportionment can do when that is disputed, I think that all the cases which have dealt with what he can do say distinctly that all he can do is to divide up in the proper way the figure which is given to him, and which the local authority have decided to be the proper sum; that he must deal with that figure, apportioning it in the right way between the parties, if necessary measuring the frontages, and all that kind of thing; but that he can deal with that and only that. If that is so, then upon the first case that was submitted to me, it is evident that

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as that was a case under the Arbitration Act, the judge, deciding under the Arbitration Act, is simply in the place of the arbitrator, and can only decide that which the arbitrator can decide. Therefore, if the arbitrator was bound by this gross sum which was given to him as the sum which the local authority had decided to be the sum which the works had cost, then the judge under the Arbitration Act was bound also. Consequently, I pointed out to the parties, upon the case stated to me, that I could not decide anything which could be useful to the parties, and the case stood over in order that the parties, if possible, might give me a wider jurisdiction. They have given me a wider jurisdiction, which I have got in this paper before me. The first part distinctly deals with the question of the court before whom such questions should come. That is the magistrates, and I have got—not the powers of an arbitrator under a special case, but the powers of magistrates; but it seems to me, according to the case of *Wake v. Sheffield Corporation* (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1, that the magistrates' hands are as much tied as mine were before, and they would be limited, as I am limited, in this way, and, although I may come to the conclusion that the local authority have come to a wrong decision, yet, nevertheless, if that wrong decision goes to part of it and not the whole, I cannot question it any more than the magistrates could.

The next question is a little more difficult. It is agreed that "the judge shall decide whether on the facts there is any liability on the owners, whoever they may be, in respect of the surface water sewerage works." As to that there is undoubtedly a difficulty. It depends on what is meant by "on the facts." If by "on the facts" it means on the facts that there has been a decision of the local authority that this one thousand and odd pounds, whatever it is, is the sum to be apportioned, and then there has been an arbitrator appointed, and he has divided the figures for the benefit of the parties to see if they could make any use of it, and has stated the case to see if he had jurisdiction to deal with the facts, including the fact that the local authority had come to that erroneous decision, and there has been no appeal to the Local Government Board upon those facts, and there is liability, not because they were not satisfied with the sewer, but because there was nothing in these proceedings which would enable the question to be raised, I quite understand it. But if, on the other hand, that means I am to be put in the position of the Local Government Board, then I should have to try it finally, and come to a decision upon a point which I have already said I will not finally decide, but as to which my opinion is on the whole that it would turn out that the owners were not liable. Then I should have to consider Mr. Cunningham Glen's final point, namely, that the time never came, and as to whether this was a building

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scheme, and so on. I have no opinion upon that, because it seems to me upon the whole of the case I have no power to go into it at all.

Then there remains the case of the *Hornsey Local Board v. Davis*, 1893, 1 Q. B. 756; 62 L. J. Q. B. 427. That was a case in which an action was brought upon an award. I was at first inclined to think it must have been an award upon disputes at common law between parties, because there was nothing raised about jurisdiction. But at that time it had not been decided that an award of this kind can only be enforced in the special way provided, and Mr. Justice Mathew (as he then was), both in that case and in *Eccles v. Wirral Rural Sanitary Authority* (1886) 17 Q. B. D. 107; 55 L. J. M. C. 106, seems to have thought that as the county court had jurisdiction as to certain amounts, it seemed to follow that the High Court had jurisdiction in regard to other amounts. That is a *dictum* which does not seem to have been followed; in fact, there have been decisions to the contrary. That being so, when the case of the *Hornsey Local Board v. Davis* came on everybody took it for granted that it might be brought in the High Court, and there the whole question might be raised. There the whole question was gone into, and no objection was raised. Why the plaintiffs in that case started their action I do not pretend to know. I think it is very obvious why the counsel for the defendants did not take objection to it, and that is because it was the most favourable thing for them. They got before the judge—and not only that, but before a special jury; and the special jury said that if a man had made a sewer and paid for it, it was rather hard to make him pay a second time, and the jury found against his paying a second time, and the learned judge gave judgment in his favour, and the Court of Appeal supported the learned judge. It seems to me that, even if, as in that case, the local authority have lost their opportunity of objecting to this surface water sewer, yet nevertheless it is only part of the matter, and the decisions are that as the local authority has decided upon that sum there is no power, either in the magistrates or an arbitrator, to go behind it; and therefore the matter must stand. The only tribunal which can deal with it is the Local Government Board, and the local authority here have from the first pointed out that the Local Government Board were the proper authority to apply to.

Therefore there must be judgment against the respondent on the special case, both as it stood originally and with the amendments too.

Judgment for the Urban District Council.

Solicitor for the Urban District Council—P. J. Dennis.

Solicitor for Mr. Smith—Proctor, Hanwell.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

High Court of Justice.

KING'S BENCH DIVISION.

STONE v. TYLER.

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Nov. 4.

Weights and measures—Fraudulent use of scale—Sugar already weighed in paper wrapper—Sale of packet over counter—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26.

To constitute the offence, under section 26 of the Weights and Measures Act, 1878, of fraud wilfully committed in the using of a scale, there must be some fraud in the actual use of the scale, consequently a shopkeeper who sells, as a pound of sugar, a package of sugar of which the total weight, inclusive of the wrapper, is one pound, and which he has previously accurately weighed in anticipation of custom, is not guilty of that offence.

CASE stated by six of His Majesty's justices of the peace for the county of Middlesex :—

At a petty sessions holden at Brentford in and for the petty sessional division of Brentford, in the county of Middlesex, on March 3rd and 24th and April 21st, 1904, an information preferred by Walter Tyler, hereinafter called "the respondent," against Samuel Stone, hereinafter called "the appellant," under section 26 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), charging that he, the said Samuel Stone, on January 25, 1904, at Chiswick, in the county aforesaid, did unlawfully and wilfully commit a fraud in the use of a certain weighing instrument contrary to the statute in that case made and provided, was heard and determined by us (the said parties respectively being there present), and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay a fine of forty shillings and costs.

Upon the hearing of the said information the following facts were admitted and proved in evidence before us :—

1. The appellant is a grocer carrying on business at Chiswick, and the respondent is an inspector of weights and measures for the county of Middlesex.

2. On January 25, 1904, the respondent went to appellant's shop at Chiswick and purchased, among other things, one pound of loaf sugar. The respondent asked for one pound of loaf sugar and paid 2½d., the price of it. The sugar was handed to the respondent wrapped in a paper bag or wrapper. The gross weight of the package, that is to say, the weight of the sugar and the paper bag or wrapper, was exactly one pound, and the sugar without the paper bag or wrapper weighed three-

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quarters of an ounce less than one pound. This package of sugar had been previously weighed by the appellant or his servants, in the paper in which it was delivered to the purchaser, in the scales mentioned in the following paragraph, and the package was one of a similar number of one pound packages of sugar in the shop that had been previously weighed in the same scales, and none of which packages weighed as much as one pound without including the paper in which they were wrapped.

3. The scales in which the sugar had been weighed with the wrapper were perfectly just and accurate, and gave the weight of the package correctly.

4. The respondent when he asked for one pound of sugar expected to get one pound weight of sugar without including the weight of the paper in which it was wrapped. The appellant knew, and the respondent did not know, that in fact the appellant was giving the respondent less than one pound weight of sugar, and, as the sugar was not weighed in the presence of the respondent, the respondent had no means of knowing that he was being given less than one pound weight of sugar. The paper bag in which the sugar was weighed and afterwards handed to the respondent contained 35 per cent. of mineral matter, and was unnecessarily heavy for the purpose of wrapping sugar. The pecuniary value of three-quarters of an ounce of sugar was shown to be greater than the value of the paper bag.

5. Evidence was tendered on behalf of the appellant that it was the custom or usage in the trade to weigh sugar in the paper wrapper in which it was delivered to the purchaser, and the appellant himself gave evidence to the same effect. Such evidence was objected to on the part of the respondent on the grounds (a) that the use of an abnormally heavy bag weighted with mineral matter would constitute a fraud assuming that the custom did exist in England ; (b) that a trade custom or usage in contravention of an Act of Parliament was invalid ; (c) and *a fortiori* when not known and agreed to by the purchaser, and that on the evidence already given, it was found that this alleged custom or usage was not known to the respondent at the time of the purchase.

6. It was contended on behalf of the appellant that the evidence established a custom or usage of England in the trade for grocers to weigh sugar in the paper in which it was delivered to the purchaser, and that even if there was no such custom no offence had been committed. That weighing the sugar with the paper wrapper, the weight of the package being correct, did not constitute an offence under section 26 of the Weights and Measures Act, 1878, and that this section was not applicable to the facts of the case. That there was no evidence of any fraud in the using of the scales in which the sugar with

the paper wrapper was weighed, and again, even if there was no such custom, no offence had been committed in the absence of fraudulently heavy paper. 1904.
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7. No evidence was given on behalf of the respondent to disprove the custom or usage in the trade to weigh the sugar in the paper as stated by the witnesses who gave evidence on behalf of the appellant, although the hearing was adjourned in order to give the respondent an opportunity of doing so, and the respondent admitted that he knew that with a great many grocers it was the custom to weigh the sugar in the paper bag or wrapper in which it was sold and delivered.

8. It was contended on behalf of the respondent that there could be no valid custom or usage of trade to weigh the sugar with the paper, and that even if such a custom or usage of trade existed it was not material. The weighing sugar in the paper in which it was delivered was in itself an offence under section 26 of the Weights and Measures Act, 1878.

9. It was admitted and we found as a fact that the appellant made no attempts to conceal, and had no intention of concealing, the fact that the sugar was weighed with the paper, and that in so weighing it he had no intention to defraud the purchaser.

10. We held that weighing the sugar in the paper in which it was sold and delivered, although the weight of the package, that is to say, the weight of the sugar with the paper, was correct, and although it was done in the mistaken belief that there was in England such a custom in the trade, this was in itself sufficient to constitute a fraud wilfully committed in the using of the scales within the meaning of section 26 of the Weights and Measures Act, 1878.

The question for the opinion of the Court is whether upon the facts stated we were right in law in convicting the appellant of the offence charged.

If the Court should answer the above question in the affirmative the conviction is to stand ; if in the negative, the conviction is to be quashed.

The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), contains the following provisions :—

Sect. 25. Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited.

Sect. 26. Where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine not exceeding five pounds, or in case of a second offence ten pounds, and the weight measure scale balance or steelyard shall be liable to be forfeited.

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Asquith, K.C., Ivory, K.C., and Bonsey for the appellant. In the first place it is submitted that section 26 of the Weights and Measures Act does not apply at all in such a case as this. The section is concerned with fraud in the use of a weighing machine. It follows upon section 25, which imposes a penalty for the use in trade, or the possession for use in trade, of a weighing machine in itself unjust, whether there is fraud or not; and it strikes at the fraudulent manipulation of an accurate machine so as to arrive at an inaccurate result. Nothing of the kind occurred in this case. It cannot fairly be said that a grocer who puts sugar in a bag and then accurately weighs the whole package, whether or not he intends to commit a fraud in the sale of the package afterwards, commits a fraud in the use of the machine.

Secondly, the section, assuming it to apply at all, applies only in the case of wilful fraud; and in this case the findings of the justices in paragraph 9 of the case negative fraud. The respondent did what he did in the belief that he was justified by a custom of the trade, and cannot be said to have been guilty of wilful fraud.

Eustace Hills for the respondent. The conviction is right. Assuming that what was done was fraudulent, the weighing of the sugar in the paper was a part of the machinery by which the fraud was perpetrated. And section 26 therefore applies to the case. *King v. Spencer* (1904) 2 L. G. R. 979, was a weaker case than this, yet there it was held that a fraud might have been committed and the case was sent back to the justices for further investigation. If section 26 does not apply, there is no appropriate remedy for a fraud of this description at all. Proceedings under the Merchandise Marks Act are not available because there is nothing in writing describing the packet of sugar as containing one pound of sugar. Secondly, there is ample evidence of wilful fraud within the meaning of the section. The appellant did knowingly what resulted in the cheating of the purchaser, and that being so, the absence of an intention to cheat or defraud is immaterial: *Derry v. Peek* (1889) 14 App. Cas. 337; 58 L. J. Ch. 864. The word wilful adds nothing to the meaning of fraud, unless perhaps by way of making it clear that the cheating of the customer must be brought about otherwise than by accident.

[*Harris v. Allwood* (1892) 57 J. P. 7; *Lane v. Rendall*, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8; and *London County Council v. Payne*, 1904, 1 K. B. 194; 2 L. G. R. 184; 73 L. J. K. B. 192, were cited in the course of the argument.]

LORD ALVERSTONE C.J. This case has been very well argued on both sides, particularly by Mr. Eustace Hills, and I confess I have tried

throughout to see some ground upon which we could support the conviction, because I am satisfied that this practice of selling articles and paper does, in the case of the ordinary poor purchaser, very often inflict a considerable amount of injustice. I quite agree with Mr. Hills that there may be difficulties in protecting those purchasers by means of purchases made by inspectors, but, at the same time, that is a matter with which the Legislature must deal. We are not justified in straining an Act of Parliament which seems to me to have a clear purpose for curing another evil. The matter has, to a certain extent, been dealt with by certain branches of law, and it is by no means clear, to my mind, that a person who sells paper and sugar, when he is asked for sugar, and does not inform the purchaser, may not bring himself within the criminal law. But what we have to concern ourselves with is whether this conviction can be upheld under section 26 of the Weights and Measures Act, 1878. Section 26 follows on a section which deals with scales which are unjust in themselves, and the possession of such scales, and it refers to fraud wilfully committed in using a weight, measure, scale, or balance. It points to tricks in the course of weighing. And I think it is not unfair to test Mr. Hills' argument by pointing out that the fraud is not perpetrated—I might almost say, that no step in the fraud is taken—by weighing in a particular manner; because *non constat* that the paper and the sugar will not be sold by somebody who announces that what he is selling is paper and sugar, and not sugar only. The real fraud here, as my brother Kennedy J. has pointed out, is handing over the counter that which is represented in weight by sugar and paper in response to an application for sugar. If that is an evil of sufficient magnitude to deal with by legislation, it ought to be dealt with. I come to the conclusion that for the purpose of an offence under section 26 of the Weights and Measures Act, 1878, there must be some fraud in connection with the using of the scale, and, in my opinion, the scale being just, and the use of the scale being for the purpose of weighing accurately what is weighed, it does not make it an offence under that section, afterwards to take a weighed product and use it in a way which is dishonourable or dishonest. I desire, only for myself, to say that I am not much pressed by the statement made in paragraph 9 that the appellant had no intention of concealing the fact that the sugar was weighed with the paper, and that in so weighing it he had no intention to defraud the purchaser. If that means that in so weighing it he had no intention that these packages should be sold under this particular description, or in answer to this particular invitation, then I think it is material, because it negatives the idea that there is any fraud; but if I had come to the conclusion that what was done was within the section, I should not be impressed by the finding that the

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appellant had not intended to defraud the particular purchaser. On the whole, I think, however desirable it may be to safeguard transactions of this kind, it cannot be done by taking proceedings under section 26, unless there is evidence of an improper use of the scales in the act of weighing. I think, therefore, this appeal must be allowed.

KENNEDY J. I have come to the same conclusion. On the facts of this case it does not seem to me that any other conclusion is possible. The offence under section 26 is committed "where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine," whether in the defendant's own shop or wherever it is done. In this case the appellant, or his shopman, put upon the machine a certain quantity of sugar and paper, which together did weigh a pound, and that was indicated by the machine. No fraud was committed by him in the using of the machine, and he has not with that machine committed any fraud upon anybody else. What he has done is to represent to a buyer in his shop that to be a pound of sugar which was not a pound of sugar but something else, namely, sugar *plus* the weight of the bag in which it is carried.

Reference has been made to other cases, which I do not think really help our decision in this case. There was no fault to be found with the machine which was used, so as to bring it under section 25, and the prosecution being under section 26, the question is whether there was any fraud committed in the using of the machine. No machine was used before the purchaser at all. A fraud, in my opinion, in one sense was committed, in spite of the finding in paragraph 9. No doubt section 26 requires fraud to be wilfully committed. I have no doubt what paragraph 9 of the case means, and it is only just that it should be stated. I suppose the appellant justifies himself in doing what he does by the fact, which appears by another paragraph, that a great many other persons do the same thing. To my mind that does not make the thing any better, but still it does not mean that he was knowingly doing or that he expressly concealed it, although I think myself very often a person may more effectually do so by saying nothing about it at all, and when asked for a pound of sugar giving something which is not a pound of sugar, but a pound of sugar and paper. That seems to me very little different from concealment. I should not have much difficulty under the section in dealing with the law if the thing which was done in this case, by which the party buying was injured, had been done in the using of the weight, measure, scale, balance, steelyard, or other weighing machine. It seems to me that the whole of this case fails entirely upon that point. The wrong, or mischief, to use a milder word, that was done by giving to the buyer something that was not sugar, is not because the thing was untruly weighed, because

it had been truly weighed, but it was in the giving or handing of it over to the purchaser without telling him what it really was.

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RIDLEY J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for the appellant—Neve, Beck, and Kirby.

Solicitor for the respondent—Richard Nicholson.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

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High Court of Justice.

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Nov. 3, 18.

KING'S BENCH DIVISION.

IMPERIAL AND GRAND HOTELS COMPANY, LIMITED v. CHRISTCHURCH UNION.

Poor rate—Appeal—Quarter sessions—Time—Next practicable sessions—Repayment of excess—Poor Relief Act, 1743 (17 Geo. II. c. 38), s. 4—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1—Poor Rate Act, 1801 (41 Geo. III. c. 23), s. 8.

Where an objection to the valuation list is made within the period for which a poor rate based on that list is made, and is not unreasonably delayed, an appeal against that rate to quarter sessions by the person objecting is not out of time if made to the next practicable sessions after the objection is determined, although it appear that if the appellant had taken his objection to the valuation list with greater promptitude after the making of the rate his objection would have been determined in time to have allowed of his appealing to earlier sessions.

Where a court of quarter sessions on appeal against a poor rate payable by instalments, of which one instalment has been paid, reduce the rateable value of the premises, the court is bound under section 8 of the Poor Rate Act, 1801, to order the repayment of the excess paid in respect of the first instalment, and cannot limit the effect of the reduction to subsequent instalments.

N.B.—Throughout the report the expressions "appellants" and "respondents" are used with reference to the position of the parties at quarter sessions.

CASE stated by the Recorder of Bournemouth as follows:—

1. At a court of quarter sessions held in and for the borough of Bournemouth upon January 2, 1904, the Imperial and Grand Hotels Company, Limited, appealed against a rate made by the overseers of the parish of Bournemouth, in the Christchurch Union, upon April 21, 1903, the appellants having objected to the valuation list before a meeting of the assessment committee of the respondent union held upon November 12, 1903, and failed to obtain relief thereat, as required by section 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39).

2. When the said appeal was called on for hearing counsel for the respondents objected that I had no jurisdiction to hear the appeal, inasmuch as the appellants had not appealed to the next quarter sessions for the borough as required by section 4 of the Poor Relief Act, 1743 (17 Geo. II. c. 38).

3. The following admitted facts were relied upon by counsel for the respondents in support of this objection :—

The rate appealed against was made April 21, 1903, to provide for expenses to be incurred before March 31, 1904, payable by two equal instalments, the first payable on May 1, 1903, and the second on November 1, 1903.

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The assessment committee of the respondent union held meetings for the purpose of hearing objections to the valuation list, of which due notice was given, upon May 15, August 13, and November 12, 1903.

The appellants first gave notice of objection to the valuation list, on which the said rate was based in October 26, 1903, and the said objection was heard by the assessment committee at their meeting held November 12, 1903.

The appellants on December 5, 1903, gave due notice of appeal to the quarter sessions to be holden January 2, 1904.

The appellants had paid the first instalment of the rate, which became payable May 1, 1903, in the month of August, 1903, before they gave the said notice of objection to the valuation list.

4. I overruled the objection, being of opinion that in the circumstances above stated the appeal was made to the next quarter sessions for the borough, within the meaning of the Poor Relief Act, 1743, s. 4, and the Union Assessment Committee Amendment Act, 1864, s. 1.

5. Having heard the appeal on the merits on January 2, 1904, I delivered judgment therein on April 12, 1904, in favour of the appellants with costs, and ordered that the gross estimated rental of the Imperial Hotel be reduced from £1,500 to £1,325, and that of the Grand Hotel from £2,050 to £1,530, but inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, I ordered that the alteration of the assessment should only operate in respect of the second instalment of the rate, and refused to order that the excess paid by the appellants in respect of the first instalment should be refunded to them or allowed off the second instalment.

6. Counsel for the appellants contended that I was bound to order that the excess paid by the appellants in respect of the first instalments should be refunded. I, however, refused to vary my order.

The questions for the Court are :—

(1.) Whether I was right in holding that the appellants were not out of time in bringing their appeal, and that I had jurisdiction to hear their said appeal.

(2.) If the answer to the first question be in the affirmative, whether I was right in ordering that the alteration made by me in the said rate should only apply to the second instalment thereof.

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If the answer to the first question be in the negative, the appeal against the said rate is to be dismissed and judgment is to be entered for the respondents.

If the answer to the second question be in the affirmative, my order is to stand, if in the negative my order is to be reversed, and the Court is to make such order herein as the Court shall think fit.

Section 4 of the Poor Relief Act, 1743 (17 Geo. II. c. 38), provides as follows :—

In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor . . . it shall and may be lawful for such person or persons . . . giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies . . .

Section 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), is as follows :—

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union : Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just ; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

Section 8 of the Poor Rate Act, 1801 (41 Geo. III. c. 23), provides as follows :—

If upon the hearing of any appeal from any rate or assessment for the relief of the poor, the court of general or quarter sessions of the peace shall order the name or names of any person or persons to be struck out of such rate or assessment, or the sum or sums rated or assessed on any person or persons to be decreased or lowered : and if it shall be made to appear to the said court, that such person or persons hath or have, previously to the hearing of such appeal, paid any sum or sums of money, in consequence of such rate or assessment, which he, she, or they ought not to have paid or been charged with, then and in every such case the said court shall order all and every such sum and sums of money to be repaid and returned, by the said churchwardens and overseers of the poor, to the person or persons having paid the same respectively, together with all reasonable costs, charges, and expenses, occasioned by such person or persons having paid or been required to pay the same . . .

Ryde and P. M. Francke for the assessment committee. The appeal

to quarter sessions was too late. If the learned recorder was right in holding that it was not too late, and that, no matter when an appellant goes before the assessment committee with his objection to the valuation list, time only runs against him from the moment the committee give their decision against him, the result would be that a ratepayer might appeal against a rate ten years after it had been made. Section 4 of the Poor Relief Act, 1743, requires the appellant to go to the next quarter sessions, which has been held to mean the next practicable sessions. By the Union Assessment Committee Amendment Act, 1864, s. 1, the ratepayer is required to go in the first place before the assessment committee, that is to say, on his way to quarter sessions, and get an adverse decision from them before he can proceed with his appeal. This Act made no alteration in the Act of 1743, and an appellant is as much bound as ever to go to the next practicable quarter sessions. Due diligence on the part of the appellant is as much required with reference to his objection before the assessment committee, as with reference to his appeal to quarter sessions. When the Poor Law Relief Act, 1743, was passed there was no assessment committee and no valuation list. Then came the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), which created assessment committees and provided for the preparation of valuation lists. Under section 18 of that Act a ratepayer might, and still may, object before the assessment committee to a valuation list in course of preparation within a limited time after the deposit of the list. But the ratepayer was not by that Act given any opportunity of objecting to a valuation list after it had been finally approved and had come into force. On the other hand the ratepayer's right of appeal against the rate to quarter sessions was left untouched. Accordingly under this Act a ratepayer might neglect his opportunity of objecting against the valuation list, and then appeal direct to quarter sessions against a rate based on the list. The Act of 1864 was passed to remedy this evil. It did not repeal the provision in the Act of 1743 requiring the appeal to be to the next quarter sessions. And the two Acts should be read together. In other words the ratepayer must still go to the next practicable quarter sessions after the making of the rate, that is to say to the first quarter sessions to which he can get if he is diligent at every step in the proceedings.

[He referred to *Reg. v. Great Western Railway* (1874) 38 J. P. 822 ; *Reg. v. Biggleswade Union* (1869) 21 L. T. 494 ; *Liverpool United Gas Light Co. v. Everton Overseers* (1871) L. R. 6 C. P. 414, 40 L. J. C. P. 201 ; *Reg. v. Wiltshire Justices* (1879) 4 Q. B. D. 326 ; 48 L. J. M. C. 142 ; and *Reg. v. Yorkshire (W. R.) Justices* (1858) E. B. & E. 713 ; 27 L. J. M. C. 269].

Salter, K.C., and *Haydon* for the Imperial and Grand Hotels

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Company. It is remarkable that this point is raised for the first time forty years after the passing of the Act of 1864. In the present case all the steps that should have been taken were taken during the period of the rate. When the Poor Relief Act, 1743, was passed the grievance arose immediately the rate was made. Then came the Union Assessment Committee Act, 1862, which gave the ratepayer a right to go before the assessment committee and object within a limited period to a valuation list in course of preparation.

Between that Act and the Act of 1864 there was an intermediate period during which the ratepayer might go to the assessment committee to get his assessment reduced in respect of future rates when the premises were valued for the first time, or were revalued, but had still to go by appeal to quarter sessions for a reduction of the current rate. Then came section 1 of the Act of 1864. The first part of the section deals with procedure only, but by the second part the right of appeal is enlarged as to time, although modified in scope; and the ratepayer was deprived of his right to appeal in the first instance to quarter sessions. It is submitted therefore that the ratepayer's duty is to appeal to the first quarter sessions after he has sustained a grievance by the adverse decision of the assessment committee. And this has been done in the present case. The ratepayer must go to the next sessions after he has the right to appeal, and that is after the decision of the assessment committee. It does not follow that the period for appealing is unlimited. Though section 1 of the Act of 1864 enables the ratepayer to object against the valuation list "at any time," it is clear from the fact that the committee can only require the alteration of the "current" rate, that the condition precedent to an appeal against a rate introduced by the section is an objection to the valuation list taken during, or at any rate not after, the currency of the rate. It is submitted that, taking the Acts of 1743 and 1864 together, the matter stands thus. The ratepayer who desires to appeal against the rate must go before the assessment committee before the period of the rate has expired; then he must appeal to the next practicable sessions after the assessment committee have decided his objection; but he is not obliged to object before the assessment committee at their first practicable meeting after the making of the rate.

As to the second point in the case, it is submitted that, upon the true construction of section 8 of the Poor Rate Act, 1801, the learned recorder had no power to refuse an order against the overseers to refund a due proportion of the instalment paid by the hotel company.

Ryde in reply referred to *Rex v. Sussex Justices* (1812) 15 East 206, and *Reg. v. Surrey Justices* (1880) 6 Q. B. D. 100, at p. 111; 50 L. J. M. C. 10.

Cur. adv. vult.

November 18. LORD ALVERSTONE C.J. read the judgment of the Court (consisting of himself and Kennedy and Ridley JJ.), as follows:—This is an appeal on a case stated from a decision of Mr. Kinglake, the recorder of Bournemouth, and raises a question of some difficulty under the Poor Relief Act, 1743, and the Union Assessment Committee Acts, 1862 and 1864. The rate appealed against was made on the 21st April, 1903, to provide for expenses up to the 31st March, 1904, and was payable by two instalments, one on the 1st May and the second on the 1st November, 1903. Meetings of the assessment committee were held on the 15th May, the 13th August, and the 12th November. Courts of quarter sessions were held on the 27th June and the 27th October. The first notice of objection was given by the appellants to the assessment committee on the 26th October; the objection was heard and determined on the 12th November, and the notice of appeal to the sessions held on the 2nd January, 1904, was given on the 5th December, 1903. The appellants in the month of August, 1903, paid the first instalment due on the 1st May. Objection was taken to the jurisdiction of the recorder upon the ground that the appeal to the January quarter sessions was too late, not having been brought to the next quarter sessions within the meaning of section 4 of the Poor Relief Act, 1743 (17 Geo. II. c. 38).

It is clear from authority, and, in fact, it is not disputed, that up to the passing of the Union Assessment Committee Amendment Act, 1864, the appeal would have been too late. There are numerous authorities which establish that an appeal against a rate must be brought at the next practicable sessions at which an effectual appeal can be lodged: *Rex v. Sussex Justices* (1812) 15 East 206; *Reg. v. Yorkshire (W. R.) Justices* (1858) E. B. & E. 713, 27 L. J. M. C. 269, and numerous other cases. Section 1 of the Union Assessment Committee Amendment Act, 1864, provides that no person shall be allowed to appeal against a poor rate unless he shall have given to the assessment committee notice of objection against the valuation list, and shall have failed to obtain such relief in the matter as he deems just. And the section further provides that: "After notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear [such objections] with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." It was contended on behalf of the respondents that the proviso to this section which makes it a condition precedent to an

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appeal, that an appellant shall have given notice of objection to the assessment committee, and shall have failed to obtain relief, had not affected the duty of the appellant under section 4 of the Act of 1743, of bringing his appeal to the next practicable sessions after the publication of the rate, and that inasmuch as the appellants had taken no steps until October 26, and had allowed the meetings of the assessment committee of May and August to go by, and that no explanation was given to account for the delay, the appellants had failed to comply with the provisions of the Act of 1743. It was further contended that, inasmuch as the recorder had found that the appellants had not taken steps which they might have taken to object to the rate at an earlier date, he had, in effect, decided that the delay in going to the assessment committee and the consequent postponement of the appeal showed that the appellants had not brought the appeal to the next practicable sessions. There is a great deal of force in this contention, and there is no doubt that the language in some of the judgments which have been given shows that an appellant ought to be prompt in raising objections. For instance, Bovill C.J., in *Reg. v. Biggleswade Union* (1869) 21 L. T. 494, in deciding in favour of an appellant, said that there was nothing to show that the appellant took more than a reasonable time before taking any step. But we are dealing with the question of jurisdiction. Whatever the true view may be in a case in which it could be proved that, as a matter of fact, the appellants had unreasonably delayed going before the assessment committee, and had thereby exceeded the time allowed for appealing, we are unable to say that the recorder had no jurisdiction to entertain this appeal. The Act of 1743 provided that the appellant should appeal to the next general or quarter sessions. These words, as we have already said, have been construed to mean the next practicable sessions. Section 1 of the Act of 1864 contains no similar direction or limitation. Reliance was placed by the appellants, the Imperial and Grand Hotels Company, upon the words in section 1 of the Act of 1864, "at any time," following the words "after notice given," but we doubt whether that argument is entitled to much weight because those words were undoubtedly necessary in order to extend the limit of 28 days during which, under section 18 of the Union Assessment Committee Act, 1862, a person could object to the valuation list, and also to give the committee power to alter the list notwithstanding approval under the same Act. But, apart from this argument, the section contains no direction or limitation similar to that contained in the Act of 1743, that the appellant shall lodge his objection before the next, or any particular meeting of the assessment committee; and, looking to the practical working of the matter, we think it quite possible

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that the Legislature recognised that these objections could not be dealt with as speedily as appeals against poor rates under the old law, especially having regard to the extended powers of objection which were conferred by the Union Assessment Committee Acts of 1862 and 1864. Further, the power of the committee to alter a current rate would seem indirectly to limit the time within which objections can be effectively taken. We express no opinion as to what may be the true view to be taken in a case in which the whole period for which the rate was made was allowed to go by, or where, as we have said, persons have been guilty of unreasonable delay in giving notice of their objections. But we are unable to say, in this case, in which the objection was lodged and determined and the appeal brought within the period of the current rate, that the jurisdiction of the court of quarter sessions was ousted because the appellant might have lodged his objection at one of two earlier meetings of the assessment committee. Upon the whole, therefore, we are of opinion that the recorder was right in hearing the appeal, and in declining to give effect to the preliminary objection.

The other point raised in the case must, in our opinion, be answered in favour of the Imperial and Grand Hotels Company. The recorder, having reduced the rateable value from £1,500 to £1,325 in the one case and from £2,050 to £1,530 in the other, ordered that the order for the repayment of the excess should only operate in respect of the second instalment of the rate, and should not apply to the first instalment which the Imperial and Grand Hotels Company had paid in August. Assuming that he could entertain the appeal as we have already decided, he was bound, having regard to the provisions of section 8 of the Poor Rate Act, 1801 (41 Geo. III. c. 23), to order repayment in respect of the whole rate. We therefore think that the appeal of the assessment committee must be dismissed, with costs, and the order varied as above directed, and the appeal of the Imperial and Grand Hotels Company should be allowed, with costs.

Judgment accordingly.

Solicitor for the Grand and Imperial Hotels Company—C. T. Ingram, for Charles J. Lacey, Bournemouth.

Solicitors for the Christchurch Union—Lovell, Son, and Pitfield, for Druitt and Druitt, Christchurch.

Reported by Gilbert Metcalfe, Esq., Barrister-at-Law.

Note.

On November 25, 1904, the Court, on the motion of the assessment committee, gave leave to appeal against the decision in the above case.

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COURT OF APPEAL.

WESTMINSTER CITY COUNCIL *v.* JOHNSON.WESTMINSTER CITY COUNCIL *v.* FULLER.

Sanitary conveniences—Public conveniences—Conveniences in sub-soil of street—Land tax—Land Tax Act, 1797 (38 Geo. III. c. 5), s. 4—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 44, 45.

A permanent public underground convenience, constructed under a public street in London by a local authority under section 44 of the Public Health (London) Act, 1891, is an hereditament had or held by the authority within the meaning of section 4 of the Land Tax Act, 1797, and is consequently chargeable to land tax.

So held by the majority of the Court (Collins M.R. and Stirling L.J., Mathew L.J. dissenting), reversing the decision of Wright J. reported 1904, 1 K. B. 19; 2 L. G. R. 193; 73 L. J. K. B. 8.

APPEAL from a decision of Wright J., sitting without a jury, in two actions tried together before him upon agreed facts without pleadings.

In the first action the plaintiffs claimed against the defendant Johnson, as collector of land tax for the Regent Ward, No. 1, of the parish of St. James, Westminster, (a) a declaration that the property known as the underground convenience, situate in Piccadilly Circus, W., in the City of Westminster, was exempt from the land tax; and (b) an injunction to restrain the defendant, his servants and agents, from distraining on the plaintiffs' property for the land tax demanded by the defendant in respect of the said underground convenience.

In the second action there was a similar claim against the defendant Fuller relating to two other underground conveniences, namely, one in Broad Street, W., and the other in Great Marlborough Street, W., both in the City of Westminster.

The agreed facts are fully stated in the report of the case in the Court below, 2 L. G. R. 193. For the purposes of the present report the following short statement will suffice:—

The underground convenience in Piccadilly Circus was constructed and subsequently enlarged by the Vestry of St. James, Westminster, at a total cost of about £5,000. It was a substantially built structure, with brick walls faced with tiles, and was wholly underground, being partly under the carriageway and partly under an island in the roadway, and was entered by two staircases opening from the island. It was constructed partly under land formerly occupied by houses, which was thrown into the roadway by way of street improvement under the

Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. ccxxv.), and partly under land that was already part of the street before that Act. The land tax on one of the houses in question had been redeemed.

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The City Council placed attendants in charge of the convenience to keep order, &c.; and charges were made of 1d. for the use of a water-closet and 2d. for the use of the lavatories. These charges were made for the purpose of aiding in meeting the expenditure on public conveniences and lavatories in the city, and with the object of placing some check on too indiscriminate a public user.

This convenience was originally constructed before the Public Health (London) Act, 1891; but was enlarged after that Act. The case was, however, argued throughout as if it had been entirely provided under that Act.

The conveniences in question in the second action were of similar character; but had been constructed since the Act of 1891 under ancient roadways. The land tax on some of the houses adjoining the roadway opposite these conveniences had been redeemed.

The income from the Piccadilly Circus convenience was in excess of the expenditure in respect of it; but it was the only one of the Council's conveniences in which this was the case. Each of the other conveniences of the Council, and the whole of the conveniences of the Council taken together, were a source of expense.

In December, 1900, the City Council were assessed to land tax in respect of the Piccadilly Circus convenience in the sum of £250, and in respect of the conveniences in question in the second action in the sum of £80 each.

No previous assessment to land tax had ever been made in respect of any of the conveniences.

The questions which the parties agreed to be the questions to be decided between them in the actions were whether land tax could be assessed in respect of the convenience in Piccadilly Circus, and whether it could be assessed in respect of either of the conveniences in Great Marlborough Street and Broad Street.

Wright J. gave judgment for the plaintiffs. His decision is reported, 1904, 1 K. B. 19; 2 L. G. R. 193; 73 L. J. K. B. 8.

Section 4 of the Land Tax Act, 1797 (38 Geo. III. c. 5), provides as follows:—

And to the end the full and entire sum by this Act charged . . . may be fully and completely raised, and paid to His Majesty's use; be it further enacted . . . that all and every manors, messuages, lands, and tenements . . . and all hereditaments, of what nature or kind soever may be . . . and all and any person and persons, bodies politic and corporate . . . having or holding any such manors,

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messuages, lands, tenements, or hereditaments . . . shall be charged with as much equality and indifference as is possible, by a pound-rate, for or towards the said several and respective sums by this Act set or imposed . . .

The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), contains the following provisions :—

Section 44.—(1) Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required . . .

(2) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority.

Section 45.—(1) Where a sanitary authority provide and maintain any public lavatories, ashpits, or sanitary conveniences, such authority may—

(a) make regulations with respect to the management thereof, and bye-laws as to the decent conduct of persons using the same; and

(b) let the same for any term not exceeding three years at such rent and subject to such conditions as they may think fit; and

(c) charge such fees for the use of any lavatories or water-closets provided by them as they may think proper.

Macmorran, K.C., and Rowlatt for the appellants. It is submitted that Wright J. was wrong, and that the plaintiffs have or hold the conveniences as tenements or hereditaments within the meaning of section 4 of the Land Tax Act, 1797, so as to be liable to land tax. The conveniences are constructed under the powers of section 44 of the Public Health (London) Act, 1891, by which the subsoil is "vested" in the plaintiffs for that purpose: see *London and North-Western Railway v. Westminster City Council*, 1904, 1 Ch. 759; 2 L. G. R. 638; 73 L. J. Ch. 386. And under section 45 they have powers with reference to the conveniences inconsistent with anything short of ownership sufficient to involve liability to land tax. The case is at least as strong as *Metropolitan Railway v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553, and is really governed by that case. There the railway company were authorised to appropriate and use—not to acquire in the ordinary way—land under a highway for the purposes of a tunnel, and it was held that they were liable to land tax in respect of the tunnel.

The plaintiffs rely on the cases dealing with the vesting of streets in the local authority—*Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451; *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128; *Rolls v. St. George-the-Martyr, Southwark, Vestry* (1880) 14 Ch. D. 785; 49 L. J. Ch. 691; *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q. B. D. 904; 53 L. J. Q. B. 449—and contend that these cases show that the statutory vesting of a street in the local authority does not make them owners of the street in such a sense as could involve liability to a charge like the land

tax. But the cases show that the statutory vesting does pass a right of property; and certainly do not show that when the vesting is of a subject matter capable of producing profit, and is accompanied with such powers as those conferred by section 45 of the Act of 1891, the local authority have not the full ownership of what is vested in them, or at least sufficiently complete ownership to carry liability to land tax.

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[They also cited *Holywell Union v. Halkyn District Mines Drainage Co.*, 1895, A. C. 117; 64 L. J. M. C. 113; *Attorney-General v. Conduit Colliery Co.*, 1895, 1 Q. B. 301; 64 L. J. Q. B. 207.]

Danckwerts, K.C., and *Sylvain Mayer* for the respondents. The plaintiffs do not "have or hold" these conveniences as "hereditaments" within the meaning of section 4 of the Land Tax Act. Their rights of property in them extend only to such rights as are strictly necessary in order to enable them to carry out the duties imposed by statute. The true nature of their qualified property in them is apparent from the judgment of James L.J. in *Rolls v. St. George-the-Martyr, Southwark, Vestry* (1880) 14 Ch. D. 785, at p. 796; 49 L. J. Ch. 691. The conveniences are built in the subsoil of a street, and a street is not liable to rates, or charges of like nature, because it is not the subject of beneficial occupation: *Hare v. Putney Overseers* (1881) 7 Q. B. D. 223; 50 L. J. M. C. 81. Although the charges made may or may not meet the expenses, these conveniences are nevertheless *extra commercium*, and are on the same footing as a public bridge, a park, or a museum: *Lambeth Overseers v. London County Council*, 1897, A. C. 625; 66 L. J. Q. B. 806; *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399. The vesting of the subsoil in the plaintiffs merely invests them, like the vesting of streets, with strictly limited powers: see in addition to the cases cited for the defendants, *St. Mary, Battersea, Vestry v. County of London Electric Lighting Co.*, 1899, 1 Ch. 474; 68 L. J. Ch. 238; *Finchley Electric Light Co. v. Finchley Urban District Council*, 1903, 1 Ch. 437; 1 L. G. R. 244; 72 L. J. Ch. 297; and *Sydney Municipal Council v. Young*, 1898, A. C. 457. Sewers are vested in the local authority, but their ownership of the sewers would not render them liable to land tax: per Willes J. in *Hinde v. Chorlton* (1866) L. R. 2 C. P. 104, at p. 116; 36 L. J. C. P. 79; *Bradford v. Eastbourne Corporation*, 1896, 2 Q. B. 205, 211; 65 L. J. Q. B. 571. The case of *Metropolitan Railway v. Fowler* does not apply for the reasons given by Wright J. in his judgment.

Rowlatt in reply. In deciding cases like the present, it should be assumed that all land is liable to land tax unless the tax has been redeemed. The owners of the surface of the road would be liable

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therefore to pay tax were it not that owing to the nature of the property the tax cannot be claimed from them. But their exemption from liability does not render the owners of the subsoil of the road free if the property is of value; and here these conveniences are of some value to the persons in whom they are vested, and, coming within the definition of a "hereditament," they are liable to land tax.

Cur. adv. vult.

July 21. The following written judgments were delivered:—

COLLINS M.R. The question in this appeal is whether the appellants, who are the collectors of land tax in the parish of St. James, Westminster, are entitled to demand land tax from the respondents, who are the sanitary authority of Westminster, in respect of certain lavatories and conveniences erected and controlled by them under their statutory powers.

By section 44, subsection (1), of the Public Health (London) Act, 1891, the sanitary authority may provide public conveniences, and by subsection (2) the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority. By section 45, where the sanitary authority provide and maintain lavatories or conveniences they may make regulations for the management thereof and may let them for any term not exceeding three years at such rent and subject to such conditions as they may think fit, and charge such fees for the use of any lavatories or water-closets provided by them as they may think proper.

In the first of the two cases before us, Johnson's case, the sanitary authority have made such a convenience containing a lavatory, &c., at Piccadilly Circus, and have settled a scale of fees for the use thereof. The convenience is described in the written statement of agreed facts. It is a walled and roofed structure covering a considerable area, and is open to the public from 7 a.m. to 1 a.m., when it is shut up. Male and female attendants are in charge while it is open; the cost of erection was about £5,000. The fees received at this convenience produce an income in excess of the expenses. All the other conveniences are worked at a loss.

Can the respondents be said to "have or hold land" or a "hereditament or tenement" in the case of this particular convenience within the meaning of the Land Tax Act, 1797 (38 Geo. III. c. 5), s. 4?

Wright J. has held that they cannot, on the ground that "having or holding" in the Land Tax Act, 1797, must *primâ facie* import "ordinary unqualified rights of property," and are not satisfied by "a restricted and qualified property" which the sanitary authority in his view possessed in this case. No doubt the tendency of modern decisions has been to limit the meaning of the word "vest" in the

Public Health Acts in connection with a street to vesting "in the urban authority such property, and such property only, as is necessary for the control, protection, and maintenance of the street as a highway for public use," as stated by Lord Herschell in the passage cited by Wright J. from *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451. But no case has gone so far as to hold that actual property as distinguished from an easement only was not passed to the authority by that word. *Coverdale v. Charlton* (1878) 4 Q. B. D. 104; 48 L. J. Q. B. 128, decided that it conferred the right to demise the right of pasturage. In *Rolls v. St. George-the-Martyr, Southwark, Vestry* (1880) 14 Ch. D. 785; 49 L. J. Ch. 491, Jessel M.R. treated the former case as deciding that the soil of the street vested in the vestry so as to entitle them to sell it on the closing of the street. This decision was qualified on appeal by the Court of Appeal, who held that the property of the vestry in the highway was determined as soon as the highway ceased to be a highway. In *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q. B. D. 904; 53 L. J. Q. B. 449, Brett M.R. reviewed these decisions, and, adhering to his opinion in *Coverdale v. Charlton*, pointed out that the case of *Rolls v. St. George-the-Martyr, Southwark, Vestry*, dealt only with the duration, not the extent, of the right conferred.

When the authority has used the powers vested in it for that purpose and has brought into existence a building out of which a profit is made, a building vested in it which it has statutory powers to let, it seems to me difficult to contend that the authority does not come within the words of the Act as "having or holding" a "tenement or hereditament." I think it is impossible to deny that what they hold is an interest in land. In fact, this is a stronger case than *Metropolitan Railway v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553, for here the site is actually vested in the local authority, and it could not be suggested here, as it was there, that what they took was an easement only. Here, as there, the persons acquiring the interest are a corporation and acquire it in fee. If it be possible that the respondents might at some time have to abandon and close the convenience, and that in such case their statutory interest in the subsoil might cease, so also, as Lord Watson points out in *Metropolitan Railway v. Fowler* (at p. 426), might the Metropolitan Railway lose their interest in the site of their tunnel. Unless, then, the fact that the convenience is held subject to the statutory obligation to admit the public at such times as by their regulations they deem fit exempts from rateability, the statutory conditions are fulfilled. We are not, however, dealing with the poor rate or the paving rate, neither is there any statutory exemption, though the statute does make some exemptions, and this is not Crown land. The objection really goes to quantum, not to rateability, and in the

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present case, if the convenience is a tenement or hereditament, and the corporation "have" or "hold" it, it is undoubtedly being turned to profitable use and has some value. With respect to the convenience in Fuller's case, the same reasoning applies, though the fact that the expenses exceed the income will presumably be taken into account in assessing the value. This is not the tribunal for determining that question, which would have to be decided as provided in the Act: see section 8. If and so far as the land tax has been redeemed in respect of any part of the site, a proper allowance must, of course, be made. I am of opinion that the appeal must be allowed.

STIRLING L.J. In each of these cases the parties have agreed to submit to the Court the question whether land tax can be assessed in respect of certain conveniences recently constructed by the plaintiffs or their predecessors under a public street, in exercise of the powers conferred by the Public Health (London) Act, 1891. ss. 44 and 45. Land tax was first imposed for one year only by 4 Wm. & M. c. 1 (1692). In every subsequent year down to and including 38 Geo. III. (1797) a similar Act was passed. The last of these annual Acts was 38 Geo. III. c. 5, which was made perpetual by another Act of the same Session, 38 Geo. III. c. 60, which contained provisions for the redemption and purchase of the tax. Most of the enactments of the last-mentioned statute have been repealed, but re-enacted with variations by 42 Geo. III. c. 116. The nature of the existing tax has been considered and explained in two cases: *Reg. v. Land Tax Commissioners* (1853) 2 E. & B. 694; 22 L. J. Q. B. 386, and *Lord Colchester v. Kewney* (1866-7) L. R. 1 Ex. 368, 2 Ex. 253; 35 L. J. Ex. 204, 36 L. J. Ex. 172. The whole of England is for the purpose of this taxation divided into districts, and a fixed annual sum is required to be raised from the land in each of them. The sum to be so raised is assessed yearly by assessors chosen by and acting under the direction of Commissioners appointed for the purpose in each district: 38 Geo. III. c. 5, s. 8. The assessment is to be "charged with as much equality and indifference as is possible by a pound rate" (section 4), or, as it is afterwards more briefly expressed (section 8), "by an equal pound rate" upon all manors, lands, hereditaments, and other premises within the district. There are, however, certain exceptions from this taxation. First, land in the occupation of the Crown at the date when the Act became perpetual is exempt: *Attorney-General v. Hill* (1836) 2 M. & W. 160; 6 L. J. Ex. 105; but land which is Crown property, but not in the occupation of the Crown, is not free: *Lord Colchester v. Kewney* (1866-7) L. R. 1 Ex. 368, at p. 380; 2 Ex. 253, at p. 258; 35 L. J. Ex. 204, 36 L. J. Ex. 172. Secondly, lands belonging to any colleges, hospitals, and other institutions specified in section 25 are thereby made exempt; this exemption

extends only to lands held by such institutions at the date when the tax was made perpetual: *Lord Colchester v. Kewney*; but continues as regards such lands even after they have been sold by the institution to which they belonged: *Cox v. Rabbitts* (1878) 3 App. Cas. 473; 47 L. J. Q. B. 385. Thirdly, lands as to which the land tax has been redeemed are, of course, exempt; but it is provided that the amount of tax so redeemed is to be deducted from the total amount leviable within the district, and the remainder only levied on the lands remaining charged with the tax, as if these had formed an entire district: 38 Geo. III. c. 60, s. 74; 42 Geo. III. c. 116, s. 180. The broad result is that all land which was chargeable with the tax at the time when it was made perpetual remains chargeable therewith, unless in the meantime the tax in respect thereof has been redeemed. But, as was pointed out by Channell B. in delivering the judgment of the Court of Exchequer in *Lord Colchester v. Kewney* (1866) L. R. 1 Ex. 368, at pp. 378, 379; 35 L. J. Ex. 204, the amount for which any particular piece of land is assessed may vary from year to year, according as its value decreases or increases relatively to the rest of the land in the district. It may even happen that the value may become nominal, in which case the property would in practice not be included in the assessment, and thus would in a sense cease to be assessable. Whether this has taken place or not is a matter for the determination of the Commissioners for the assessment; it is not one on which this Court can be asked to express an opinion, and I do not understand the questions submitted to the Court in these cases to relate to anything of this kind, but to be in substance whether the plaintiffs have or hold any messuages, lands, tenements, or hereditaments capable of being assessed to land tax.

Objection is taken on behalf of the plaintiffs to the taxation of these conveniences in question on two grounds—first, the use to which they are applied, and, secondly, the nature of the interest which the plaintiffs have in them. As to the former of these objections, the point is that the conveniences are for the benefit of the public, and that the public cannot be excluded from them. The conveniences have been erected under the authority of the Public Health (London) Act, 1891, which authorises the sanitary authority to provide and maintain them “in situations where they deem the same to be required.” The sanitary authority has power to make them in the subsoil of a road, but there appears to be nothing to prevent the authority from erecting buildings for the purpose above ground. If the plaintiffs had erected such a building on a piece of land acquired for the purpose, and subject at the time of its acquisition to land tax, would land tax cease to be payable merely by reason of the use to which the erection is applied? I

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fail to see why it should be. The case would not fall within any of the exceptions which I have pointed out. By the statute the tax is, in my opinion, made payable by reason of ownership, not by reason of occupation, and still less by reason of the nature of the occupation. The *Brockwell Park* case. *Lambeth Overseers v. London County Council*, 1897, A. C. 625; 66 L. J. Q. B. 806, was referred to in this connection. There, however, the liability to poor rate was in question, and fell to be decided in reference to statutes expressed in very different terms from those with which we are here concerned. But even as regards liability to poor rates it does not seem to me clear that the *Brockwell Park* case would govern. Lord Herschell, in advising the House of Lords, contrasts that case with *London County Council v. Erith Overseers*, 1893, A. C. 562; 63 L. J. M. C. 9, in which the London County Council was held to be rateable to poor rates in respect of a station and works for pumping sewage. His Lordship said: "The land on which the pumping-stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. The London County Council could place their pumping-stations where they pleased; they could remove them elsewhere at any time they thought fit, or dispense with them altogether, if they adopted some other method of dealing with their sewage, and could sell or let the land to a tenant, whose use of it would be unrestricted. About the rateability of the land there could be no real controversy." Some of those observations would apply to the hypothetical case which I have put of a building erected on land acquired for the purpose. That, of course, is not the actual case under consideration; but if, as I think, the land which I have supposed to be acquired would not be freed from land tax by reason of the use to which it was put, it seems to me that neither can the existing conveniences be exempted solely by reason of the nature of their use. It remains, then, to consider whether the plaintiffs have or hold a messuage, land, tenement, or hereditament within the meaning of 38 Geo. III. c. 5, s. 4. The Public Health (London) Act, 1891, s. 44 (2), provides that "for the purpose of such provision"—that is, the provision of such a convenience—"the subsoil of any road . . . shall be vested in the sanitary authority." Section 45 provides that where a sanitary authority provide and maintain public lavatories or sanitary conveniences, such authority may (a) make regulations and bye-laws with respect to the management and user thereof; (b) let the convenience "for any term not exceeding three years at such rent and subject to such conditions as they may think fit"; and (c) charge such fees for the use of any lavatories provided by them as they may think proper. It seems to me that the powers conferred by this section enable the sanitary authority, having made proper regula-

tions and bye-laws and fixed reasonable fees for the use of the conveniences specified, to hand over to others the administrative part of their duties in connection therewith, and with that view to let the same for terms not exceeding three years. I think that, when letting is spoken of, the term is used in the ordinary sense. The estate vested in the sanitary authority by section 44 (2) is not defined; but it seems to me that what is to vest is not a mere easement, but such an estate or interest as will enable the authority to perform the duties imposed and to exercise the powers conferred by the Act, including the power of letting. This appears to me to be in accordance with what is laid down in *Metropolitan Railway v. Fowler*, 1893, A. C. 416; 62 L. J. Q. B. 553, and *Tunbridge Wells Corporation v. Baird*, 1896, A. C. 434; 65 L. J. Q. B. 451. This being so, in my opinion the conveniences in question fall under one or other, or even more than one, of the designations of messuages, lands, tenements, or hereditaments held by the sanitary authority within the meaning of 38 Geo. III. c. 5, s. 4. It appears that the site of the convenience, which is the subject of the first of these actions, was formerly occupied partly by street and partly by houses; the land tax had been redeemed in respect of one of these houses, but not of the others. The houses were bought by the plaintiffs' predecessors for the purpose of street improvements and thrown into the street. Since that time no land tax has been paid in respect of the site, the reason being, I presume, that the Commissioners regarded the value as nominal merely. It is for the Commissioners and not for this Court to determine whether the structure erected by the plaintiffs (so far as the site consists of land the tax on which has not been redeemed) is or is not of nominal value merely. Similar remarks apply to the conveniences which are the subject of the second action. In my judgment, therefore, the appeal ought to be allowed.

MATHEW L. J. In these cases I agree with my brother Wright, and am of opinion that his judgment should be affirmed. The Land Tax Act, 1797, s. 4, seems to me to deal with estates known to the common law, which might be held in perpetuity, and the tenure of which was subject to no restrictions. It was contended for the appellants that the word "vested" in the Public Health (London) Act, 1891, s. 44 (2), indicated an intention to create an ownership in the plaintiffs. But the sense in which the term is used with respect to the rights granted to local authorities is explained in the cases referred to in the judgment of Wright J. Whether it be the street or the subsoil mentioned in the Act, the position of the plaintiffs seems to me to be the same. They have no property in the ordinary sense. They are not owners or occupiers. They have control as custodians only, and are granted by implication in that capacity such property and authority as will enable them to

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protect and preserve the rights of the public. In support of the appeal the main reliance was placed on subsection (1) of section 45 of the Public Health (London) Act, 1891. It was urged that the provisions of that subsection showed that the plaintiffs were owners in fee of the structures in question. They are empowered to charge for their use, and what was received, it was said, was in the nature of rent. They were further entitled to let them for any term not exceeding three years. It was contended that the plaintiffs therefore possessed the ordinary rights of the landlord. But the charges made to the public are described in the statute as "fees," and, as appears from the agreed facts, they are not made for purposes of profit, but with the object of aiding in meeting the necessary expenditure incurred in the interests of the public, and in order to place some check on a too indiscriminate public user. The fees which are paid are no more rents than the small sums paid for the use of chairs in the public parks. Further, with reference to the power of letting, any demise must be subject to the obligations of the plaintiffs. Provision must be made that the premises should be maintained for the purposes indicated in the statute. What would be received by the tenant would be the difference between the fees paid and necessary outgoings, which, as I have already said, would not be a return in the nature of rent. Further, it must be borne in mind that the right to receive payments from the public and the right to let are both statutory. They do not spring from ownership, and would not exist without the sanction of Parliament. The appellants argued that, if the building in Johnson's case was assessable, the other similar structures would be subject to the tax, because of the power which the plaintiffs possessed to make such charges for their use as they thought proper. But this reasoning would seem to involve the consequence that the enclosures provided for similar purposes on the surface of the street would become hereditaments liable to land tax. The case seems to me not to be distinguishable in principle from the *Brockwell Park* case, *Lambeth Overseers v. London County Council*, 1897, A. C. 625; 66 L. J. Q. B. 806, and the *Tooting Common* case, *London County Council v. Wandsworth Borough Council*, 1903, 1 K. B. 797; 1 L. G. R. 462; 72 L. J. K. B. 399. I see no reason in the absence of express enactment for imposing on the ratepayers the additional burden of the land tax. For these reasons it seem to me the appeal should be dismissed.

Appeal allowed.

Solicitors for the plaintiffs—Caprons, Hitchins, Brabant, and Hitchins.

Solicitors for the defendants—S. F. Miller, Vardon, and Miller.

Reported by Erskine Reid, Esq., Barrister-at-Law.

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ACCOUNTS.

Audit—Inspection of accounts—Mandamus—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247.

The Court will not grant a mandamus requiring a district council to permit the inspection of accounts which have already been audited for some considerable time, at the instance of a person who was entitled, under section 247 (4) of the Public Health Act, 1875, as a person interested, to inspect such accounts when deposited for inspection prior to audit, but who was at that time wrongfully refused access to the accounts, where it does not appear that the applicant has any reason for supposing that by investigation of the accounts he would discover any right which he could enforce or any wrong in respect of which he could claim redress.

Rex v. Fleetwood Urban District Council 1209

ACT OF PARLIAMENT.

Relation of general to special Acts.

See Buildings (11) 356

ADJUSTMENTS.

(1) Education—Transfer of property, &c., to local education authorities—Different appointed days for different parts of one school district—Adjustment between school board and local education authority.

See Education (5) 821

(2) Loss of profitable area—Formation of new urban district—"Income"—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 62—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 54, 68.

Neither section 62 of the Local Government Act, 1888, nor section 68 of the Local Government Act, 1894, contemplates the payment of compensation as between two areas one of which is placed in a less and the other in a more advantageous financial position in consequence of an alteration of boundaries under those Acts.

Consequently no claim to compensation arises under either of the sections in question in respect of the loss occasioned to a rural district council by the conversion under the Acts into an urban district of a parish in the rural district the contributions from which towards the expenses of the council exceed the expenditure of the council attributable to the parish.

Decision of the Court of Appeal, 1903, 1 K. B. 554; 1 L. G. R. 311; 72 L. J. K. B. 279 reversed.

Re Rochdale Union and Haslingden Union, 1899, 1 Q. B. 540; 68 L. J. Q. B. 531, and Re Buckinghamshire County Council and Hertfordshire County Council, 1899, 1 Q. B. 515; 68 L. J. Q. B. 417 overruled.

Caterham Urban District Council v. Godstone Rural District Council ... 596

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ADOPTIVE ACTS.**Transfer of powers—County borough.**

See Areas 763

ADULTERATION.**(1) Margarine—Marking cases—"Package"—Margarine retailed from open tubs—Margarine Act, 1887 (50 & 51 Vict. c. 29) s. 6.**

An open tub in the shop of a dealer in margarine, out of which he scoops margarine which he retails to his customers, is a "package" containing margarine within section 6 of the Margarine Act, 1887, and must be marked "Margarine," pursuant to that section accordingly.

McNair v. Horan 1239

(2) Prosecution—Time for proceeding—"Institution" of proceedings—Summons issued within 28 days, but served after the expiry of that period—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19.

It is sufficient in cases where section 19 (1) of the Sale of Food and Drugs Act, 1899, requires the prosecution to be instituted within 28 days of the purchase of the article, if the information is laid and the summons issued within that period though the summons is not served until after the expiration of the 28 days.

Beardsley v. Giddings 719

(3) Prosecution—Time for proceeding—"Institution" of prosecution—Information laid within 28 days—Summons issued after that time—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 19.

It is sufficient in cases where section 19 (1) of the Sale of Food and Drugs Act, 1899, requires a prosecution in respect of an article bought for test purposes to be instituted within 28 days of the purchase, if the information be laid within that period, although the summons be not issued until after the 28 days.

So long as the dismissal of a first summons issued upon an information is upon a technicality, and not upon its merits, a fresh summons may be issued upon the same information.

Brooks v. Bagshaw 1007

(4) Sale of food mixed with injurious ingredient—Nature of offence—Bottled peas coloured with sulphate of copper—Analyst's certificate—Certificate not stating that article is injurious to health—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 3, 18, 20, 21, Schedule.

To justify a conviction under section 3 of the Sale of Food and Drugs Act, 1875, in respect of the sale of an article of food with which a foreign ingredient has been mixed, it must be found that the article of food has been rendered injurious to health by the admixture of the ingredient; a finding that the added ingredient is in itself injurious to health is insufficient.

It is not, however, necessary that the analyst's certificate on which the proceedings under the section are founded should state that the article is injurious to health.

Hull v. Horsnell 1280

(5) Sale to prejudice of purchaser—Preserved peas—Sulphate of copper used as colouring matter—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.

An information under section 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser, as preserved peas, an article not of the nature, substance, and quality demanded, was dismissed by the justices,

ADULTERATION—Continued.

on the ground that there had been no sale to the prejudice of the purchaser, subject to a case finding as facts that the purchaser asked for preserved peas, that he was supplied with preserved peas containing, as added colouring matter, sulphate of copper in a quantity insufficient to be injurious to health, and that preserved peas are habitually sold with added colouring matter.

Held, that the justices were justified in point of law in dismissing the information.

Friend v. Mapp 1317

(6) Warranty—Milk—Addition of preservative by retailer—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.

A retailer of milk, who, after he has received milk from the wholesale dealer under a contract containing a warranty, adds boric acid to it, cannot, upon proceedings taken against him under section 6 of the Sale of Food and Drugs Act, 1875, for selling milk deficient in fat and containing added water, set up his vendor's warranty as a defence under section 25. Having added boric acid he cannot be heard to say that the milk when he sold it was in the same condition as when he purchased it.

Hennen v. Long 437

(7) Warranty—Notice of intention to rely on warranty—Copy of warranty—Copy containing words added to original warranty after delivery of goods—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20.

The appellant bought butter under a verbal contract, one of the terms of which was that the vendor should give upon the invoice a full warranty of the purity of the butter. The invoice sent by the vendor to the appellant with the first instalment of butter delivered under the contract bore the words "we guarantee all butters sold by us to be absolutely pure." The appellant not being satisfied with the terms of this warranty, requested the vendor, after the whole of the butter had been delivered, to strengthen the warranty. The vendor then added upon the original invoice the words "guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887." A sample of some of the butter in question was bought of the appellant for analysis, and found to be adulterated; and a summons under section 6 of the Sale of Food and Drugs Act, 1875, was served on the appellant. The appellant gave notice to the prosecutor and to the vendor that he had bought the butter with a warranty of which the following was a copy:—"We guarantee all butters sold by us to be absolutely pure guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887." Under these circumstances, the justices held that the appellant was precluded from relying on the defence that he had bought the butter with a warranty, because he had not complied with the provisions of section 20 of the Sale of Food and Drugs Act, 1899, whereby a warranty or invoice is not available as a defence in proceedings under the Sale of Food and Drugs Acts, unless the defendant has sent a copy of such warranty or invoice to the purchaser and to the person giving the warranty. ...

Held, that under the particular circumstances, the justices were wrong in refusing to hear the defence set up by the appellant on the merits.

Farthing v. Parkinson 989

AREAS.

"Urban district"—County borough—Adoptive Acts—Transfer of powers—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21, 25, 62.

A county borough is an "urban district" within the meaning of section 62 of the Local Government Act, 1894, and the borough council are accordingly entitled to exercise the powers conferred by that section upon the council of

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AREAS—Continued.

an urban district of transferring to themselves the functions of authorities under the adoptive Acts.

So held: first, on the ground that the provisions of section 21 of the Act, that urban sanitary authorities shall be called urban district councils and their districts urban districts, operate as a definition of urban district, which, except for the purposes of Part II. of the Act (sections 20-35) extends to county boroughs, notwithstanding that by section 35 that Part of the Act is not to apply to a county borough save as specially provided; and, secondly, if section 21 ought not to be read as having this effect, then, on the ground that the expression "urban district" in sections of the Act not comprised in Part II. extends to county boroughs by virtue of the provisions in section 75 (1), under which expressions in the Act have in general the same meaning as in the Local Government Act, 1888, where the expression urban district is used to include the districts of all urban authorities.

Kirkdale Burial Board v. Liverpool Corporation 763

ASSESSMENT COMMITTEE.

Appearance as respondents on appeal against poor rate—Consent of guardians.

See Poor rate (1) 288

ASSISTANT OVERSEER.

Recovery of poor rate—Illegal distress by assistant overseer—Responsibility of overseers.

See Poor Law (6) 1155

ATTORNEY-GENERAL.

(1) Action by, for injunction—Statutory obligation—Statutory penalty—Building line—Projection in part of front main wall of adjoining house.

See Streets (5) 826

(2) Non-joinder—Post erected by local authority to protect public footpath—Post pulled down in assertion of public right of way—Action by local authority.

See Highways (2) 744

AUDIT.

See Accounts.

BAKEHOUSES.

(1) Underground bakehouse—Certificate of suitability—Structural alterations—Expenses—Landlord and tenant—Tenant's covenant to pay outgoings.

See Landlord and tenant (6) 879

(2) Underground bakehouse—Certificate of suitability—Structural alterations—Expenses—Landlord and tenant—Tenant's covenant to pay outgoings—Place "let as a bakehouse."

See Landlord and tenant (7) 1171

(3) Underground bakehouse in use before 1901 continued after January 1, 1904—Necessity for certificate of district council—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 101 (1), (2).

Section 101 of the Factory and Workshop Act, 1901, absolutely prohibits the use of underground bakehouses after January 1, 1904, unless certified as structurally suitable for the purpose by the local authority

Evans v. Gallon 1004

BATHING.**(1) Bye-laws—Charge for bathing machine—Charge for costumes and towels.**

See Bye-laws (12) 608

(2) Right to cross foreshore.

See Foreshore 1057

BOUNDARIES.**(1) Extension of borough—Limitation on “rates” in added area—Whether limitation applicable to water rate.**

See Water (8) 473

(2) Formation of new urban district—Adjustment—Loss of profitable area.

See Adjustments (2) 596

(3) Intercepting sewer constructed under local Acts to serve certain districts—Extension of one of such districts Drainage of added area into intercepting sewer—Brighton Intercepting and Outfall Sewers Act, 1870 (38 & 34 Vict. c. c.), ss. 4, 35, 36, 37, 91—Hove Commissioners Act, 1873 (36 & 37 Vict. c. xcv.), ss. 3, 5, 6, 15, 61—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 59, 125—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 42.

An intercepting sewer was made under the Brighton Intercepting and Outfall Sewers Act, 1870, which provided for the making of intercepting and outfall sewers for Brighton, and two adjoining Improvement Act districts in the parish of Hove, and for the vesting of the sewers in the appellants Sewers Board. Section 91 of the Act provided that if, after the passing of the Act, any local board or body of commissioners should be constituted for any district in which any part of the sewers authorised would be situate, having powers with respect to sewerage, and to levy rates within such district, such local board or commissioners should be at liberty, by notice to the Sewers Board, to participate in the benefits and liabilities of the Act, and should thenceforth be a local authority within the Act. By the Hove Commissioners Act, 1873, a body of Improvement Commissioners was constituted for the whole parish of Hove, and those Commissioners were given the benefits and liabilities of the former Commissioners for the two parts of Hove under the Act of 1870. By an order made by the county councils of East and West Sussex in 1893, under the Local Government Act, 1888, it was provided that the area of the parish of Aldrington should be transferred to and form part of the urban sanitary district of Hove, and that the “district” in the Act of 1873 should mean the parishes of Hove and Aldrington instead of the parish of Hove. The district of Hove thus extended was subsequently formed into a borough, and the respondent Corporation became the successors of the Hove Commissioners. The respondents claimed to be entitled under these circumstances to send the sewage of Aldrington as well as of the rest of the borough into the intercepting sewer.

Held, affirming the decision of the Court of Appeal, 1 L. G. R. 355, that they were so entitled.

Brighton Intercepting and Outfall Sewers Board v. Hove Corporation 1255

(4) Pauper settlement—Parish divided by Local Government Act, 1894—Subsequent alteration of boundaries by Provisional Order—Saving in Provisional Order for effect of previous residence.

See Poor law (9) 1077

(5) Pauper Settlement—Part of one parish added to another—Effect on settlement acquired in latter Parish.

See Poor law (8) 301

BUILDINGS.

(1) **Building line—Metropolis—Advertisement cases fixed to front of premises.**

See Streets (3) 905

(2) **Building line—Metropolis—Length of street to be considered in defining general line of buildings—Tribunal of appeal.**

See Streets (4) 1265

(3) **Building line—Statutory penalty—Continuing offence—Penalty inflicted—Subsequent action by Attorney-General—Injunction.**

See Streets (5) 826

(4) **Bye-laws—Application of bye-laws to floors of warehouse buildings—General clause to secure adequate strength.**

See Bye-laws (1) 942

(5) **Bye-laws—Erection in contravention of bye-laws—Notice of infringement—Sufficiency of notice.**

See Bye-laws (2) 1199

(6) **Bye-laws—Exempted buildings—Building not “adapted to be used . . . as a place of habitual employment for any person in manufacture, trade, or business.”**

See Bye-laws (3) 372

(7) **Bye-laws—Local Act—Deposit of plans—Plans null and void if work not commenced within three years—Repeal of bye-laws subject to saving for work commenced or of which plans have been approved—Plan for several houses—Some houses built and others not.**

See Bye-laws (4) 525

(8) **Deposit of plans—Plan comprising several houses—Deviation from plans—Decision on information in respect of one house—Subsequent information in respect of another house.**

See Bye-laws (5) 330

(9) **Metropolis—Dwellings on low-lying land—Land situate so as not to “admit of being drained by gravitation into an existing sewer”—Sewer incapable of receiving drainage in time of flood—Penalties—Limitation of time—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), ss. 122, 200 (9).**

Low-lying land does not come within the prohibition in section 122 of the London Building Act, 1894, against the erection, on land in London of which the surface is below high-water mark, and which is situate “so as not to admit of being drained by gravitation into an existing sewer” of the London County Council, of any building to be used as a dwelling-house, except with the permission of that Council, merely because the existing sewer of the Council into which the drainage of the land ordinarily passes by gravitation is on a substantial number of days in each year so surcharged with flood water that the drainage cannot pass into it.

Proceedings for the offence of erecting a building in contravention of section 122 are in time, within the provisions of section 200 (9) of the Act imposing a penalty on any person who “erects . . . or commences to erect” a building in contravention of section 122, if they are taken within six months of the erection of the building, though more than six months after the commencement of the erection.

Ellis v. London County Council 147

BUILDINGS—Continued.

(10) Metropolis—Dwelling-house “to be inhabited or adapted to be inhabited by persons of the working class”—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), s. 18 (5).

The proviso to subsection (5) of section 13 of the London Building Act, 1894, under which in certain cases “a dwelling-house to be inhabited or adapted to be inhabited by persons of the working class” must be built at a greater distance from the centre of a street than would be necessary in the case of other buildings, refers to two distinct cases, first, that of a house adapted to be inhabited by persons of the working class; and secondly, that of a house “to be inhabited” by persons of that class.

The expression “adapted to be inhabited” refers to adaptation in point of construction. The expression “to be inhabited” means intended to be inhabited.

A house so constructed and situate as to render it practically certain, at the time when it is built, that it will be inhabited by persons of the working class, is a house “to be inhabited” by such persons within the meaning of the section.

Crow v. Davis 1034

(11) Relation of general Act to special Act—Inconsistency—Implied repeal—Buildings erected under general powers in dock company's Act—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76—Surrey Commercial Dock Act, 1894 (57 & 58 Vict. c. lxxvii.), s. 4.

By a special Act of 1894 the appellants company were empowered to execute certain specified works within the limits of the dock undertaking carried on by them in London under a special Act of 1864, by which the company were constituted, and, in connection therewith, to make and maintain, inter alia, all necessary and proper buildings and other works and conveniences within certain limits of deviation.

Under these powers the appellants erected, within the limits of their undertaking, and within the limits of deviation, certain buildings not specially authorised by the Act of 1894, but in substitution for buildings removed in the course of the execution of the specially authorised works.

Held, that the appellants were under no obligation before laying the foundation of such buildings to give notice to the local authority under section 76 of the Metropolis Management Act, 1855 (which requires a person before beginning to lay the foundation of a new building in London, and before laying any drain to communicate with a sewer of the local authority, to give notice to that authority, and gives that authority certain powers of control over such foundations and drains), on the ground that the interference and control involved in the section was inconsistent with the statutory powers conferred on the appellants.

The principle laid down in *City and South London Railway Company v. London County Council*, 1891, 2 Q. B. 513; 60 L. J. M. C. 149, approved and extended.

Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe (1903) 1 L. G. R. 551; 88 L. T. 772, distinguished.

Surrey Commercial Docks v. Bermondsey Borough Council 356

BURIAL BOARD.

Transfer of powers of—County borough.

See Areas 763

BYE-LAWS.

(1) Buildings—Application of bye-laws to floors of warehouse buildings—General clause to secure adequate strength.

Where the bye-laws of an urban authority lay down rules as to the strength

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of timbers for floors of certain kinds, and do not provide in detail for all possible modes of construction, but contain a general clause requiring suitable materials and edequate strength, a floor constructed partly of timber and partly of steel is subject to such general clause, and not to the rules applicable to floors constructed wholly of timber.

Towers v. Brown 942

(2) Buildings—Erection in contravention of bye-laws—Notice of infringement—Sufficiency of notice.

No. 53 of a series of bye-laws as to new streets and buildings contained provisions, in the model form, requiring the provision of an open space of given dimensions and, with certain exceptions, free from erections, in connection with any new domestic building, and prohibiting the diminution of the space or other contravention of the bye-law in the case of a subsequent alteration of or addition to the building.

No. 96 of the same bye-laws contained provisions of the usual character and in model form requiring the giving of notice and deposit of plans by persons intending to erect new buildings.

No. 98 of the same series contained provisions, also in model form, to the effect that where a person who erects a new building, or executes other work to which the bye-laws relating to new streets and buildings may apply, receives from the surveyor to the local authority a notice "specifying any matters in respect of which the erection of such building, or the execution of such work may be in contravention of" any of the bye-laws, and requiring the person to cause any thing done contrary to any such bye-law to be amended, such person shall comply with the requirements of the notice.

Held, that proceedings under bye-law 98 might be founded on a notice stating that a wooden shed had been erected in the back yard of the defendant's property "contrary to Nos. 53 and 96 of the bye-laws relating to new streets and buildings in force in his district," and requiring the removal of the shed, but giving no further particulars as to the nature of the breach of bye-law 53 complained of.

Dickenson v. Forsyth 1199

(3) Buildings—Exempted buildings—Building not "adapted to be used . . . as a place of habitual employment for any person in manufacture, trade, or business"—Stable for horses used in business.

A stable in which horses belonging to a builder are kept and in which they are fed and groomed is not a building "adapted to be used . . . as a place of habitual employment for any person in any manufacture, trade or business" within the meaning of a clause in the model form exempting from building bye-laws any building which shall not exceed certain dimensions, and shall not, inter alia, be "constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment for any person in any manufacture, trade, or business," and shall be at a certain distance from other buildings and property. Such a stable, fulfilling the necessary conditions as to dimensions, &c., is therefore exempt from bye-laws containing the exemption in question.

Linzell v. Felixstowe and Walton Urban District Council 372

(4) Buildings—Deposit of plans—Local Act—Plans null and void if work not commenced within three years—Repeal of bye-laws subject to saving for work commenced or of which plans have been approved—Plan for several houses held null and void as to houses not commenced within three years—Harrogate Corporation Act, 1893 (56 & 57 Vict. c. cclx.), s. 27.

Where the bye-laws of an urban authority require every person intending to erect a new building to deposit plans of every floor of the building, a plan

comprising a number of proposed houses constitutes a separate and independent plan of each house for the purposes of a provision in a local Act enacting that the deposit of a plan of any building shall be null and void if the work specified in such plan is not commenced within a certain period.

Consequently, after the expiry of the period named in the Act, the deposit of the plan, as regards houses not already commenced, becomes ineffective, and a fresh deposit is required before the erection of such houses; and, if new bye-laws are made rescinding the previous bye-laws subject to a saving for work already commenced, or of which plans have been approved, such houses must be erected in accordance with the new bye-laws.

Decision of Wright J., reported 1 L. G. R. 275, affirmed.

Harrogate Corporation v. Dickinson 525

(5) Deposit of plans—Plan comprising several houses—Deviation from plans—Decision on information in respect of one house—Subsequent information in respect of another house.

A plan deposited with a local authority by a builder, under bye-laws requiring every person who erects a building to deposit plans thereof, comprising more than one house, constitutes a separate and independent plan of each house. If the builder deviates from the plans, and separate informations are preferred against the builder for failing to deposit plans before building in respect of several houses, it is not competent to justices who have dismissed the first summons that came before them, because they considered the deviations unimportant, to adopt the same course with regard to the subsequent informations on the ground that the matter is *res judicata*. It is their duty to hear evidence in each case, and deal with each information upon its merits.

Balby-with-Hethorpe Urban District Council v. Millard 330

(6) Drains—Extension of bye-laws to drains “in” existing building—Meaning of “in”—London County Council drainage bye-laws, 1901, Nos. 5 and 21.

No. 21 of the series of bye-laws as to the construction, &c., of drains made by the London County Council under section 202 of the Metropolis Management Act, 1855, provides that the bye-laws shall apply, so far as practicable, to any person who shall construct or reconstruct a drain, &c., “in” any existing building as if the same were being constructed “in” a new building.

Held, that the word “in” in this bye-law does not mean “inside” but has the sense of “in connection with.”

Kingsland v. Haben 470

(7) Drains—Water-closets—“Construction of water-closet”—Ventilation of trap of water-closet—Extension of bye-laws to existing buildings—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39.

A series of bye-laws were made by the London County Council under the provisions of section 202 of the Metropolis Management Act, 1855, giving power to make bye-laws for regulating the dimensions, mode of construction, &c., of “the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith.”

No. 17 of these bye-laws provided that every person who should “construct any water-closet,” of which the soil pipe fulfilled certain conditions, should cause the trap of the water-closet to be ventilated in a particular manner.

No. 21 of the bye-laws was as follows: “These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected.”

BYE-LAWS—Continued.

The appellants, who were owners of a building erected before the confirmation of the bye-laws, reconstructed and replaced the pans and traps of several water-closets in the building, which had been broken in the course of alterations they were carrying out in the drains connecting the soil pipes of the closets with the sewer, or in the course of ordinary wear and tear. The soil pipes of the water-closets were of the character contemplated by bye-law 17.

Held—1. That the bye-laws were neither ultra vires nor unreasonable.

2. That the work done by the appellants was not the construction of water-closets within bye-law 17; and that bye-law 21 did not impose on a person who constructed or reconstructed the pan or trap of a water-closet, but did not construct a water-closet, the obligation of complying with bye-law 17 as to the ventilation of the trap.

Semble, that a bye-law imposing that obligation in such a case would be intra vires, and not unreasonable.

Metropolitan Industrial Dwellings Co. v. Long ... 233

(8) Lavatories in new buildings—Provision as to trapping of waste water pipes—Waste water carried off by means other than pipe—Series of lavatory basins in one room—Construction of bye-laws—London County Council drainage bye-laws, 1901, No. 10.

No. 10 of a series of bye-laws as to drainage made by the London County Council under section 202 of the Metropolis Management Act, 1855, requires, inter alia, that a person who erects a new building shall cause every pipe in the building for carrying off waste water from every lavatory or sink (with certain exceptions) to a sewer to be constructed of certain materials, and to be trapped in a certain manner immediately beneath such lavatory or sink.

Held (assuming that each of a series of lavatory basins in a room is itself a lavatory within the bye-law, as to which quære), that the bye-law did not prohibit the carrying off of the waste water from a lavatory by means other than a pipe, and therefore that there was no infringement of the bye-law where the waste water from each of a series of lavatory basins was discharged by a short straight pipe into an open trough which in turn communicated with a pipe, properly trapped, leading to a sewer.

Treasure v. Bermondsey Borough Council ... 488

(9) Reasonableness—Good rule and government—Frequenting streets for selling newspapers devoted to giving information as to probable result of races, &c.—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16.

A bye-law for the good rule and government of a county made under section 23 of the Municipal Corporations Act, 1882, as extended by section 16 of the Local Government Act, 1888, providing that no person shall frequent or use any street or public place for selling or distributing any paper devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions, is unreasonable and bad.

So held by Lord Alverstone C.J., and Kennedy J., Phillimore J dissenting.

Scott v. Pilliner ... 1018

(10) Reasonableness—Lodging-houses—Cleansing in first week in April—Duty imposed on landlord—Want of provision for notices—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94.

A bye-law under section 94 of the Public Health (London) Act, 1891, with regard to lodging-houses and houses occupied by members of more than one family, imposing on the "landlord" (within a definition including a person receiving or entitled to receive the rack rent of the premises, or a definition including a person receiving or who, if the premises were let at a rack rent, would receive, the profits arising from the letting of the lodgings) an obliga-

BYE-LAWS—Continued.

tion to cause the premises to be cleansed in the first week of April in every year, but containing no provision entitling the landlord to notice before he becomes liable to a penalty for its breach, is unreasonable and bad.

Such a bye-law is not unreasonable because it fixes a particular week in the year for the cleansing, though Easter frequently falls in the particular week fixed, when the occurrence of holidays renders it particularly difficult to get work done. So held by Lord Alverstone C.J. and Kennedy J., Wills J. dissenting.

Stiles v. Gallinsky; Nokes and Another v. Islington Borough Council
(No. 2) 341

(11) Reasonableness—Metropolis—Water-closet accommodation—Lodging-houses—Bye-law requiring owner of house let in lodgings to provide water-closet accommodation—Want of provision for notice to owner before commencement of proceedings—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 38, 39, 94.

Section 39 of the Public Health (London) Act, 1891, which gives the London County Council power to make bye-laws "with respect to water-closets . . . and the proper accessories thereof in connection with buildings" authorises the making of a bye-law prescribing the amount of water-closet accommodation that must be provided in any particular class of building, such as a building let in lodgings.

But, having regard to the provisions of section 37 of the Act empowering the sanitary authority to give notice to the owner of any house requiring him to provide sufficient water-closet accommodation, and imposing penalties for failure to comply with the notice, a bye-law under section 39 requiring the "owner," within the definition in the Act, of a house let in lodgings to provide a given amount of water-closet accommodation, and imposing a penalty for default, without requiring any notice to be given to him before the penalty is incurred, is unreasonable and bad.

Nokes v. Islington Borough Council (No. 1) 334

(12) Sea bathing—Charge for bathing machine—Charge for costumes and towels—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69.

A bye-law as to bathing made by an urban authority under section 69 of the Town Police Clauses Act, 1847, substantially in the model form, fixed the maximum charges for the use of bathing machines stationed on any stand, and provided that the prescribed charges should include charges for the use of towels and a bathing costume.

The appellants, who were the proprietors of bathing machines used within the district, charged a bather, in addition to the maximum charge for the use of the machine fixed by the bye-law, the sum of 3d. for the use of a costume and towels, and were convicted of a breach of the bye-law in respect of the charge of 3d. thus made. The bather had not demanded the use of a costume and towels without extra charge.

Held, that the conviction must be quashed,

by Lord Alverstone C.J. and Wills J., on the ground that the bye-law in so far as it purported to restrict the charges that could be made for the use of a costume and towels was ultra vires and bad;

by Channell J. on the ground that if the bye-law prohibited an extra charge for a costume and towels absolutely it was ultra vires and bad; and that if it merely required the bathing machine proprietor to provide such requisites as were necessary for decency without extra charge, leaving him free to make an extra charge for articles of superior quality, in which case it might be a good bye-law, no breach of the bye-law had been shown.

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See Officers (1) 581

CONTRACT.

(1) **City of London—Members of corporation “directly or indirectly interested or concerned in” contract—Avoidance of contract—Electric lighting—Novation—City of London Sewers Act, 1848 (11 & 12 Vict. c. clix.), ss. 33–42, 116—City of London Sewers Act, 1851 (14 & 15 Vict. c. xcl.), s. 53.**

Section 42 of the City of London Sewers Act, 1848, which contains provisions rendering null and void contracts made by or on behalf of the Commissioners of Sewers of the City in which any Commissioner or member of the Court of Aldermen or Common Council of the City is interested, is not, on the true construction of that Act, confined to any particular class of contract, and the section accordingly avoids a contract for the electric lighting of the City made by the Commissioners with a company in which, at the date of the contract, any Commissioner or member of the Court of Aldermen or Common Council was a shareholder. But a contract with the Commissioners, valid at its inception, is not rendered void by the section merely because the contract has, with the consent of the Commissioners, been transferred to a company in which Commissioners or members of the Court of Aldermen or Common Council were shareholders at the time of the transfer.

City of London Electric Lighting Co. v. London Corporation ... 93

(2) **Construction—Supply of horses and carts, &c.—Obligation to supply on requirement—Supply not required.**

The plaintiff contracted with the defendants to supply horses, carts, &c., for scavenging at fixed prices for a year. The horses, carts, &c., were to be supplied in accordance with the requirements of the defendant's engineer;

CONTRACT—Continued.

and there was a clause reserving to the defendants the right to obtain horses and carts for scavenging from other persons.

Held, on the construction of the contract, that there was no implied obligation on the defendants' part to continue to obtain the supply of horses, carts, &c., necessary for scavenging from the plaintiff throughout the year.

Churchward v. Reg. (1865) L. R. 1 Q. B. 173, explained.

Moon v. Camberwell Borough Council 309

(8) Guardians—Building contract—Breach—Reference to arbitration—Limitation of time for commencement of proceedings.

See Poor Law (1) 1229

COSTS.

Tribunal of appeal under London Building Act—Award of lump sum for costs.

See Streets (4) 1265

COUNTY BOROUGH.

"Urban district" includes for certain purposes.

See Areas 763

CROWN.

Exemption from rates—Occupation partly for Crown purposes and partly for other purposes—Premises of volunteer corps—Premises let for profit.

See Poor Rate (3) 533

DANGEROUS BUILDINGS.

Hoarding erected by local authority—Recovery of expenses—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 75—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 160, 257—Practice—Costs of special case where respondent does not appear.

The second paragraph of section 257 of the Public Health Act, 1875, which provides that where expenses for which the owner of premises is liable as in that section mentioned have been settled and apportioned by the surveyor to the local authority, the apportionment shall be binding and conclusive on the owner unless he disputes the same within the time thereby limited, has no application where the local authority are seeking, in accordance with section 75 of the Towns Improvement Clauses Act, 1847, to recover from the owner of a dangerous building expenses incurred by them in erecting a hoarding.

Although as a general practice the High Court does not grant costs against a respondent to a special case who does not appear, there is no rule which fetters the discretion of the Court in the matter, and the Court will in a proper case give costs against a respondent who raises an untenable point and fails to appear to sustain it.

Usk Urban District Council v. Mortimer 135

DISQUALIFICATIONS.

Nomination of disqualified candidate—Throwing away of votes—Claim of seat.

See Elections (2) 7

B B B B B

DISTRESS.

(1) Poor rate—Costs of levy.

See Poor Rate (5) 381

(8) Poor rate—Illegal distress by assistant overseer—Responsibility of overseers.

See Poor Law (6) 1155

DRAINS.

(1) Bye-laws—Extension of bye-laws to drains “in” existing building—Meaning of “in”—London County Council drainage byelaws, 1901, Nos. 5, 21.

See Bye-laws (6) 470

(2) Bye-laws—Lavatories in new buildings—Trapping of waste water pipes—Waste water carried off by means other than pipe—Series of lavatory basins in one room—Construction of bye-laws—London County Council drainage bye-laws.

See Bye-laws (8) 488

(3, 4, 5) “Drain” or “sewer.”

See Sewers (1, 2, 3) 19, 672, 974

(6) Landlord and tenant—Tenant’s agreement to pay outgoings, &c.—Expenses incurred by landlord in reconstruction of drains.

See Landlord and Tenant (2) 1

(7) Metropolis—Drain requiring alteration or amendment—Notice of sanitary authority—Specification of works—Notice going beyond resolution of sanitary authority—Appeal to London County Council—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 82, 85, 211—Metropolis Management Amendment Act, 1864 (25 & 26 Vict. c. 102), s. 64.

A metropolitan borough council purporting to act under section 85 of the Metropolis Management Act, 1855, passed a resolution that notice under the Act be served upon an owner of premises requiring him to execute such works as might be necessary for the amendment of a certain drain in bad order and condition, and that in the event of non-compliance proceedings be taken against him for penalties. The resolution did not specify the works to be done. Notice was subsequently, without any further authority from the council than the resolution above mentioned, served upon the owner requiring him to execute a number of specified works to the drainage system of his premises.

Held, that the notice was invalid, and that the owner had not incurred penalties for failure to comply with it.

Quære, whether a metropolitan sanitary authority have power in a notice under section 85 of the Metropolis Management Act, 1855, to specify the works to be executed.

Swinbourn v. Hammersmith Borough Council 280

(8) Metropolis—Requirements of sanitary authority—Removal of disused drains—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 76, 83.

The appellant school board laid an entirely new system of drainage for certain buildings belonging to them, leaving in the ground certain old drains which were disused.

Before the work was done certain regulations had been framed by the respondents’ predecessors and approved by the respondents, expressed to be with respect to “drainage of houses and buildings and the construction of water-closets, &c.,” and headed with a reference to, amongst other enactments, sections 73-79 and 82-85 of the Metropolis Management Act, 1855.

DRAINS—Continued.

One of these regulations, which was called to the attention of the school board, required disused drains to be taken up and destroyed. Plans of their proposals submitted by the school board were approved by a committee of the respondent council, subject to the drains being taken up; and the school board by their agents undertook that the drains should be taken up. Subsequently the respondent council passed a resolution expressly requiring the disused drains at the appellants' buildings to be taken up.

Held, that under these circumstances, the appellant school board in failing to remove the disused drains were liable in penalties under section 83 of the Metropolis Management Act, 1855, which provides that if any drain is found on inspection not to have been made according to the directions and regulations of the local authority, every person so offending shall be liable to a penalty.

London School Board v. Fulham Borough Council ... 409

(9) Nuisance—Abatement under compulsion—Metropolis—Intimation to owner of premises—Drain discovered to be a sewer—Recovery of expenses from local authority.

See Nuisance (2) ... 617

(10) Nuisance—"Drain" serving two houses—Houses held of same landlord—Leases containing covenant by lessee to contribute to cost of repairing drain—Drain repaired by one lessee under nuisance order—Implied contract—Metropolis—Contribution between parties responsible for nuisance—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 117, 120.

The fact that the lessees of two adjoining houses held of the same landlord, and drained by a common drain not vested in or repairable by the local authority, are each bound by the terms of his lease to contribute towards the expenses of repairing the drain, does not give rise to any implied contract between the lessees under which one of them who has been compelled under a nuisance order made pursuant to the Public Health (London) Act, 1891, to repair the drain can recover a contribution from the other.

The rights of the parties in such a case under section 120 of the Act considered.

Nathan v. Rouse ... 1304

(11, 12) "Single private drain"—Pipe in private ground draining houses belonging to different owners.

See Sewers (4, 6) ... 556, 1098

(13) "Single private drain"—Pipe draining several houses belonging to one owner and discharging into single private drain taking also drainage of houses belonging to another owner.

See Sewers (5) ... 545

(14) Waterclosets—"Construction of waterclosets"—Ventilation of trap of watercloset—Extension of bye-law to existing buildings.

See Bye-laws (7) ... 233

EDUCATION.

(1) Endowment—Bequest of annuity for support of national schools—Trust deed—Gift over if funds necessary for carrying on schools should be raised under powers of any Act of Parliament—Perpetuity—Education Act, 1902 (2 Edw. VII. c. 42).

A testatrix, who died in 1900, by her will dated in 1891 bequeathed to her trustees a sum sufficient when invested to produce a yearly sum of £20, and she directed them to pay such yearly sum to the treasurer for the time being

B B B B B 2

EDUCATION—Continued.

of certain National Schools so long as they should be carried on under the conditions contained in a deed of trust dated in 1873 and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect but should be null and void in certain events—inter alia, if the funds necessary for carrying on the schools should be raised under powers for that purpose contained in any then present or future Act of Parliament, and that upon the happening of such event the payment of the yearly sum should cease, and the fund purchased should fall into her residuary estate. By the deed of 1873 it was declared that the schools should be conducted according to the principles and designs of the National Society. Subject to certain superintendence by the principal officiating minister of the parish, the control and management of the schools and premises and the funds and endowments thereof were vested in and exercised by a committee consisting of such minister and certain other persons, being communicants.

Held, (1) that on the coming into operation of the Education Act, 1902, the schools ceased to be any longer carried on under the conditions contained in the trust deed of 1873;

(2) that as regarded the gift over, no question arose as to infringement of the rule against perpetuities, because on the happening of the condition in the will the property by law would fall into residue, without express gift; and that the Court was entitled to look at the will in order to ascertain whether the event had happened on which the yearly sum was to cease and determine; and that on the coming into operation of the Act of 1902 the event contemplated by the testatrix had happened, and the fund producing the yearly sum fell into residue accordingly.

In re Randell; Randell v. Dixon (1888) 38 Ch. D. 213; 57 L. J. Ch. 899, followed.

Blunt's Trusts, Re; Wigan v. Clinch 1295

(2) Endowment—Bequest to voluntary school—Gift over on school ceasing to be supported by voluntary subscriptions or becoming subject to control of school board—Local education authority—Education Act, 1902 (2 Edw. VII. c. 42), ss. 1, 5, 6, 7, 10, 11, 13, 23, and 25.

A testator, who died in 1891, bequeathed certain bank shares, producing about £115 a year, to the managers for the time being of a voluntary school on trust to apply the income towards the annual expenses of the school so long as it should be "supported by voluntary subscriptions as now and heretofore . . . in addition to the Government grant," but in the event of its "ceasing to be so supported or becoming subject to the control of a school board," then to the vicar and churchwardens of the parish for the fabric of the church. Up to the testator's death the school had been supported mainly by the testator, but partly also by voluntary subscriptions from other persons, in addition to the parliamentary grant and an endowment of £15 a year. Since his death there had been no voluntary subscriptions, the endowment, together with the £115 and the Government grants, being substantially sufficient for carrying on the school. There was, however, an overdraft at the bank of about £60, for which the managers were personally liable to the bankers.

Held, (1) upon the construction of the will, that the school had not ceased to be supported by voluntary subscriptions, inasmuch as the managers must be regarded as subscribers to the extent of the overdraft for which they were liable; and

(2) That the local education authority under the Education Act, 1902, was not the same as the school board, inasmuch as it was differently constituted, and was elected by a different constituency.

Held, therefore, that the gift over had not taken effect.

Re Beard's Trusts; Butlin v. Harris 320

EDUCATION—Continued.**(3) Land acquired by school board for pupil teacher's centre—Ultra vires—Rights of parties.**

See Land (3) 116

(4) Local education authority—Education committee—Scheme—Provision empowering local education authority to determine order of retirement of members—Resolution determining order—Subsequent resolution varying order—Validity—Education Act, 1902 (2 Edw. VII. c. 42), ss. 17 (1), 21 (3).

An urban district council, as the local education authority under section 1 of the Education Act, 1902, made a scheme for the establishment of an education committee under section 17 (1) of the Act, which was duly approved by the Board of Education. The scheme provided (inter alia) that the council should determine the order of retirement of the members of the committee. The council passed a resolution determining the order. They subsequently passed a second resolution by which they purported to vary the order of retirement.

Held, that the council, having by the first resolution determined the order of retirement, were functi officio, and that the subsequent resolution purporting to alter that order was therefore ultra vires and invalid.

Milward v. Barry Urban District Council 1222

(5) Local education authority—Transfer of property, &c.—Adjustment—Different appointed days for different parts of one school district—Adjustment between school board and local education authority—Education Act, 1902 (2 Edw. VII. c. 42), Sched. II. (1, 22)—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 68.

Where a school district under a school board extends into two or more areas for which by the Education Act, 1902, different local education authorities are established, and different appointed days are fixed for the coming into operation of the Act as regards these local education authorities, so that there is an interval during which the school board continues in existence, but the control of elementary education in part of its district has passed to a local education authority, the local education authority are entitled to an immediate adjustment of property, &c., between them and the school board, under section 68 of the Local Government Act, 1894, as incorporated with the Education Act, 1902, by Sched. II. (22) of that Act.

Hebburn Urban District Council v. Hedworth, Monkton, and Jarrow

United District School Board 821

(6) Local education authority—Transfer of property—Stock standing in bank books in name of school board—National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 18, 22—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 30—National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 4—Education Act, 1902 (2 Edw. VII. c. 42), ss. 1, 5, 25, Sched. II. clause 1.

The effect of the provision in section 5 of the Education Act, 1902, that school boards "shall be abolished" is that, upon the day fixed as the "appointed day" for the purposes of the section in relation to any school board, that school board is dissolved, and ceases to exist for all purposes.

The effect of the provision in Sched. II. (1) to the Act that the property, powers, rights, and liabilities of any school board existing at the appointed day "shall be transferred" to the council exercising the powers of the school board, is, that on the appointed day all the property, powers, rights, and liabilities of the school board ipso facto, by operation of the Act, vest in the council in question without the aid of any additional instrument of any sort or kind. Consequently Consols standing in the name of a school board in the books of the Bank of England on the appointed day, immediately vest, by virtue of the provision in question, in the council exercising the powers of the

EDUCATION—Continued.

school board, and that council are entitled to be entered in the bank books as owners thereof.

Oldham Corporation v. Bank of England 1324

ELECTIONS.

(1) "Bill, placard, or poster"—Name of printer and publisher—Circular relating to pending election of mayor of metropolitan borough—Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 14.

Circulars despatched, in sealed envelopes marked "private," and in some instances initialled by the sender, to the clerk and certain members of a metropolitan borough council, in August, relative to the then generally understood candidature of one of the councillors for the office of mayor in the following November, are bills having reference to a municipal election within the meaning of section 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884; and if they fail to bear upon the face of them the name and address of the printers and publishers, are in contravention of the section.

Alcott v. Emden 1313

(2) Municipal election—Disqualification—Nomination of disqualified candidate—Throwing away of votes—Petition—Claim of seat—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12 (1, c), 56, 87 (1, c), 93 (4).

The disqualification of one of two candidates for election to a single vacancy among the councillors of a borough, on the ground of interest in a contract with the Corporation, of which the electors have no notice, does not invalidate his nomination so as to entitle the other candidate to the seat as the only candidate validly nominated; nor does it cause the votes given for the disqualified candidate to be thrown away so as to entitle the other candidate who has the minority of the votes actually given to claim the seat on the ground that he has the majority of lawful votes.

On an election petition in such a case the election will be declared void; and a fresh election must be held.

Hobbs v. Morey 7

ELECTRIC LIGHTING.

(1, 2) Electric lighting works—Nuisance—Noise—Vibration—Injunction.

See Nuisance (4, 5) 390, 518

(3) Sale of undertaking to local authority—Action for specific performance—Failure of local authority to obtain necessary sanction for raising purchase-money by loan—Promotion of Bill in Parliament to obtain borrowing powers—Extension of time for completion—Terms on which granted—Form of order.

A metropolitan borough council obtained a special Act by which they became bound to purchase the undertaking of an electric supply company in their borough. Notice to treat was duly given, but the parties being unable to agree on the amount of the compensation to be paid, the matter was referred to arbitration. The arbitrators having disagreed, the umpire by his award adjudged that the sum of £1,212,000 should be paid by the council to the company as compensation. As this would involve the levying of a rate of 20s. in the £1, the council applied to the London County Council for liberty to raise this sum by a loan, but this application was refused. The council then resolved to appeal to the Local Government Board against this decision. Before this appeal could be heard, an order was made on August 7, 1903, against the council for specific performance of the contract created by

the Act, the notice to treat, and the award. The order fixed December 31, 1903, for the completion of the contract, but gave liberty to the council to apply for an extension of time in the event of their being unable to find the necessary money. Subsequently to the order the council applied to the Local Government Board by way of appeal and also to the Board of Trade, but both applications were refused. As a last resource the council proposed to promote a Bill in Parliament to obtain the necessary borrowing powers. To do this an extension of time was necessary in order to enable them to obtain the consent of the parochial electors under the Borough Funds Acts to the promotion of the Bill.

Under these circumstances the Court extended the time till February 29, 1904, upon terms, including payment by the council to the company of the bulk of the capital expenditure they had incurred in carrying on the undertaking since the date of the contract. And, the consent of the parochial electors having been obtained, and the Bill read a second time in the meantime, the Court afterwards further extended the time upon terms including a further payment by the council to the company towards capital expenditure.

Metropolitan Electric Supply Co. v. St. Marylebone Borough Council 419

ESTOPPEL.

(1) **Judgment in rem—Adjudication of pauper settlement—Order of justices appealed against—Appeal dismissed on technicality.**

See Poot Law (11) 969

(2) **Private street works—Decision that street is highway repairable by inhabitants at large.**

See Streets (18) 270

EXPRESSIONS.

"Abolished."—See Education (6) 1324

"Abutting on or adjoining."—See Streets (1) 215

"Adapted to be inhabited by persons of the working class."

See Buildings (10) 1034

"Admit of being drained by gravitation."—See Buildings (9) ... 147

"Belonging to different owners."—See Sewers (6) 556

"Bill, placard, or poster."—See Elections (1) 1313

"Borough business."—See Municipal corporation 749

"Borough fund or rate."—See Police (1) 494

"Building or structure."—See Streets (3) 905

"Buildings works materials and things belonging to" sewer.

See Nuisance (1) 222

"Business."—See Water (4) 567

"Chimney."—See Nuisance (14) 1213

"Construct any water-closet."—See Bye-laws (7) 233

"Continuance of injury or damage."—See Limitation of time (3) ... 219

"Court of summary jurisdiction."—See Jury lists 965

"Curtilage."—See Sewers (3); Factories and workshops (4) 809, 974

"Daily."—See Gas (3) 161

"Directly or indirectly interested or concerned" in contract.

See Contract (1) 93

EXPRESSIONS—Continued.

"Domestic purposes."—See Water (4)	567
"Drains."—See Sewers (1, 2, 3, 12)	19, 174, 672, 974
"Dwelling-house."—See Water (4)	567
"Excessive weight."—See Highways (4)	1084
"Extraordinary traffic."—See Highways (4, 5)	652, 1084
"False or unjust."—See Weights and measures (2)	184
"False trade description."—See Weights and measures (5)	1000
"In."—See Bye-laws (6)	470
"Income."—See Adjustments (2)	596
"Incurred."—See Highways (7)	986
"Institution" of prosecution.—See Adulteration (2, 3)	719, 1007
"Lavatory."—See Bye-laws (8)	488
"Leading into."—See Streets (23)	1286
"Let as a bakehouse."—See Landlord and tenant (7)	1171
"Liability exceeding fifty pounds."—See Officers (3)	429
"Necessary legal assistance."—See Vaccination (3)	1260
"Office or offices."—See Police (3)	917
"Outgoings."	
See Landlord and tenant (1, 2, 3, 6, 7); Streets (16)	
	1, 529, 879, 959, 1171, 1190
"Owner."—See Mine; Streets (13, 14)	456, 1124, 1144
"Package."—See Adulteration (1)	1239
"Particular work extending over long period."—See Highways (5)	652
"Penalty."—See Water (9)	32
"Police force."—See Police (1)	494
"Private dwelling-house."—See Nuisance (15)	143
"Proper and convenient situation."—See Sanitary conveniences (3)	127
"Rate."—See Water (8)	473
"Sewer."—See Nuisance (1); Sewers (1, 2, 3, 12)	19, 174, 222, 672, 974
"Shall be transferred to."—See Education (6)	1324
"Shall be transferred to and vested in."—See Poor Law (7)	734
"Single private drain."—See Sewers (4, 5, 6)	545, 556, 1098
"Street."—See Streets (8, 21)	835, 1065
"Subject to the control of a school board."—See Education (2)	320
"Sufficient evidence."—See Police (2)	1161
"Supported by voluntary contributions."—See Education (2)	320
"Taken to."—See Streets (17)	376
"Tenement factory."—See Factories and workshops (4)	809
"Term not exceeding three months."—See Poor rate (7)	817
"To be inhabited . . . by persons of the working class."	
See Buildings (10)	1034
"Trifling" offence.—See Vaccination (1)	1277
"Urban district."—See Areas	763

EXTRAORDINARY TRAFFIC.

See Highways; extraordinary traffic.

FACTORIES AND WORKSHOPS.

(1, 2) **Bakehouses—Underground bakehouse—Certificate of suitability—Structural alterations—Landlord and tenant—Tenant's covenant to pay outgoings.**

See Landlord and Tenant (6, 7) 879, 1171

(3) **Bakehouses—Underground bakehouse in use before 1901 continued after January 1, 1904—Necessity for certificate of district council.**

See Bakehouses (3) 1004

(4) **Means of escape from fire—Building containing separate factories belonging to one owner—"Tenement factory"—Buildings within the same "curtilage"—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), ss. 14 (2, 3, 7), 140.**

Two or more factories comprised in the same building, in each of which the occupier produces his own power, do not together constitute a "tenement factory" within the meaning of the Factory and Workshop Act, 1901, although the whole building belongs to one owner. To constitute a "tenement factory" within the definition in section 149 of that Act, the power supplied to different occupiers of different parts of the same building must be derived by them from a source of supply external to themselves. Consequently, the owner of a building comprising two or more factories, in each of which the occupier produces his own power, cannot be compelled to provide means of escape from fire from the building on the footing that it is a tenement factory.

Toller v. Spiers and Pond, 1903, 1 Ch. 362; 1 L. G. R. 193; 72 L. J. Ch. 191, approved.

Semble, that two factories with separate entrances and no internal means of communication with each other are not necessarily within the same "curtilage" for the purpose of the definition of "tenement factory," merely because the one to some extent overlaps the other.

Brass v. London County Council 809

(5) **Means of escape in case of fire—Expense of complying with requirements of local authority—Landlord and tenant—Tenant's covenant to pay outgoings—Jurisdiction of county court.**

See Landlord and tenant (3) 1190

FINANCE COMMITTEE.

Metropolitan borough council—Officers—Power of committee to remunerate for temporary assistance.

See Officers (3) 429

FIRE.

(1) **Extinguishing—Water—Charge for supply.**

See Water (5) 805

(2, 3) **Means of escape from—Factories and workshops.**

See Factories and Workshops (4); Landlord and tenant (3) ... 809, 1190

FOOD.

Unsound meat—Meat intended for the food of man—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117.

A butcher at the close of business on a Saturday placed his unsold meat, which was then all sound, in a safe. In the ordinary course of business the

FOOD—Continued.

safe would have been opened after the shop had been cleansed on the succeeding Monday morning, and not earlier, and the meat would then have been examined and any found unsound destroyed or removed. Some of the meat in the safe which had become decomposed since the Saturday night was found in that state by an inspector of the local authority, who examined the safe on the Monday morning before the ordinary time for opening it arrived.

Held, on a case stated by justices setting out these facts, that there was no evidence that the decomposed meat was intended for the food of man.

Mallinson v. Carr, 1891, 1 Q. B. 48; 60 L. J. M. C. 34, distinguished.
Weiland v. Butler-Hogan 1074

See also Adulteration.

FOOTWAY.

See Highways.

FORESHORE.**Private owner—Right of public to bathe.**

The plaintiff C. was the lord of the manor of Minster. The defendant claimed a right in the public at common law to go upon the foreshore at Joss Bay, part of the manor, for the purpose of bathing in the sea from it.

Held, that there was no such common law right.

The judgment of the majority of the Court in *Blundell v. Catterall* (1821) 5 B. & Ald. 268, followed.

Decision of Buckley J., reported 2 L. G. R. 258; 73 L. J. Ch. 160, affirmed.

Brinckman v. Matley 1057

GAS.

(1) Recovery of gas rent—Arrears due from outgoing tenant—Rights of company against incoming tenant—Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16—Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 39—Gaslight and Coke Company's Act, 1872 (35 & 36 Vict. c. xxiii.), s. 18.

Section 18 of the Gaslight and Coke Company's Act, 1872, which provides that where a consumer leaves premises where gas is supplied to him by the company, without paying the rate due from him, the company shall not require payment of the arrears from the incoming tenant except in certain special excepted cases, but shall, notwithstanding such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant on request as required by the Act, does not enable the company to recover payment of arrears from the incoming tenant in the special excepted cases, but merely enables the company in these cases to refuse to supply the incoming tenant with gas until the arrears are paid.

Decision of the Court of Appeal, 1903, 1 K. B. 593; 72 L. J. K. B. 308, reversed.

Gas Light and Coke Co. v. Mead (1876) 45 L. J. M. C. 71, approved and followed.

Cannon Brewery Co. v. Gas Light and Coke Co. 949

(2) Street lighting—Lamp fixed by local authority in private passage—Objection by owner of passage to laying of gas pipe—Proceedings by local authority against gas company.

See Streets (7) 1182

GAS—Continued.

(3) Testing on Sundays—Metropolis—"Daily"—Right of County Council to sue—Gaslight and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. cxxxii.), ss. 7, 9, 15.

The London County Council, as successors of the Metropolitan Board of Works, were empowered by a series of Acts of Parliament, commencing in 1869, to appoint gas examiners to make "daily" testings of the defendant company's gas in respect of illuminating power and purity. There was no express exclusion of or reference to Sundays in any one of the Acts, but it appeared that throughout the period from 1868 to 1903, when the London County Council first claimed the right to test on Sundays, the practice had been to test on week days only.

Held, that the *prima facie* meaning of "daily" is "every day of the week," and that no artificial meaning for the word had in the circumstances of this case been created by the practice which had hitherto obtained.

Yewens v. Noakes (1880) 50 L. J. Q. B. 132, distinguished.

Held also, that an action lay by the London County Council as plaintiffs to enforce the right of the gas examiners to test on Sundays.

Decision of *Joyce J.*, 1903, 2 Ch. 532; 1 L. G. R. 501; 72 L. J. Ch. 536, affirmed.

London County Council v. South Metropolitan Gas Co. 161

GENERAL DISTRICT RATE.

Assessment on higher or lower scale—Sporting rights.

See Rates (2) 507

GUARDIANS.

Appeal against poor rate—Consent of guardians to appearance of assessment committee.

See Poor Rate (1) 288

HIGHWAYS.

(1) Dedication—Cul-de-sac—Presumption—Evidence.

A cul-de-sac may be a highway, but where there is no evidence that it has ever been paved, cleansed, or lighted by the parish or other public authority, the Court will not, merely because the entrance to the cul-de-sac has not been separated from the public highway by a bar, presume dedication to the public.

Attorney-General v. Richmond Corporation 628

(2) Dedication—Footway appointed under inclosure award—Subsequent use for wheeled traffic—Nuisance caused by wheeled traffic—Post erected by local authority pulled down in assertion of right of way—Action by local authority—Non-joinder of Attorney-General—Local Government Act, 1894 (56 & 57 Vict. c. 78), s. 26.

The plaintiff council, with the object of preventing the use of a narrow passage between buildings in their district, which they alleged was a highway for foot-passengers only, from being used by horses and wheeled vehicles, erected a post in the passage. The defendant, who contended that the way was a highway for all kinds of traffic, pulled down the post, whereupon the plaintiff council brought an action claiming a declaration that the passage was a highway for foot-passengers only, an injunction, and damages.

The passage was originally appointed as a public footpath of the width of 6 feet by an inclosure award of 1811. It was subsequently encroached on in places by buildings, and so reduced to 4 ft. 4 in. in width at the narrowest point. There was evidence that for the past forty years it had been used to

HIGHWAYS—Continued.

a considerable extent by fishermen with small carts drawn by ponies and donkeys; and that the lord of the manor in whom the soil was vested had long regarded it as a highway for all kinds of traffic.

Held—1. That the action being in substance an action for interference with the plaintiffs' property was maintainable, though the Attorney-General was not joined.

2. That the use of the passage for wheeled traffic had all along been a public nuisance in view of the obstruction caused to foot-passengers; and that there could not, therefore, have been any dedication of the way as a highway for wheeled traffic, and that it remained a highway for foot-passengers only.

Sheringham Urban District Council v. Holsey 744

(3) Diversion—Proceedings—Request to justices to view—Refusal of justices to certify—Certificate subsequently given by other justices—Resolution of District Council—Notices affixed at ends of highway—Period for which they must remain affixed—Highway Act, 1835 (5 & 6 Will. IV. c. 50), ss. 84, 85.

It is essential to the validity of a certificate of justices for the diversion of a highway, under section 85 of the Highway Act, 1835, that the notice of the proposed diversion, required by the section to be affixed at each end of the highway, should be posted up at a date which will leave a clear period of four weeks or twenty-eight full days between the date of the posting up of the notices and the date of the issue of the justices' certificate.

Where a district council have by resolution under section 84 directed their surveyor to apply to two justices to view a highway proposed to be diverted, and the justices have refused to certify that the diversion will render the highway more commodious to the public, the resolution is not exhausted; and a second pair of justices to whom the surveyor may subsequently apply to view the highway have jurisdiction to issue their certificate notwithstanding the fact that the council have passed no fresh resolution on the matter.

Where justices certify that upon such a view they find the diverted highway will, for certain reasons then apparent, be more commodious, the fact that they go on to state additional reasons disclosed by inquiries from third persons to the same effect will not invalidate their certificate.

It is not necessary that the fact that the owner's consent to the making of the substituted highway should be stated on the certificate.

Rex v. Kent Justices 886

NOTE.—This decision was reversed in the Court of Appeal, sub nom. Tonbridge Urban District Council v. Tonbridge Rural District Council, Dec. 3, 1904. A report of the case in the Court of Appeal will appear in due course.

(4) Extraordinary traffic—Excessive weight—Pressure per square inch—Contributory negligence—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12.

It is not a complete defence to an action by a highway authority, under section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12 of the Locomotives Act, 1898, to recover expenses of highway repairs occasioned by extraordinary traffic or excessive weight, to show that the highway authority have been guilty of negligence in not keeping the road in proper repair to bear ordinary traffic, for the doctrine of contributory negligence has no application to such an action. The circumstance that the highway authority have failed to keep the road in a proper state is, however, material in estimating the amount of the expenses that are properly attributable to the extraordinary traffic or excessive weight.

The question whether particular traffic is extraordinary is to be determined by comparison not merely with the other traffic on the road during the particular year, but with the traffic which by the time in question has become

HIGHWAYS—Continued.

the ordinary traffic of the road. The standard of what is ordinary traffic for this purpose may vary from time to time.

The bearing of evidence as to pressure per square inch on the question of excessive weight considered.

Hemsworth Rural District Council v. Micklethwaite 1084

(5) **"Extraordinary traffic"—Haulage of timber—Limitation of time—"Particular . . . work extending over a long period"—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1, b).**

Haulage by timber merchants of timber over roads adapted for ordinary agricultural traffic in a district where there is no systematic cultivation of timber, under such circumstances that, having regard to the total weight carried within a given period, and to the means whereby the haulage is done, the traffic is unusual and does unusual damage to the roads, thereby occasioning unusual expense to the road authority, constitutes "extraordinary traffic" within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, for the expenses occasioned by which the timber merchants are accordingly responsible.

Where such haulage is carried out during a lengthened period under a series of separate contracts made between the timber merchants and the owners of an estate who are selling timber, the damage done is not the consequence of a "particular . . . work extending over a long period" within section 12 (1, b) of the Locomotives Act, 1898. And an action for the recovery of the expenses though brought within six months after the last haulage was done, is, under that subsection, out of time as regards expenses caused by damage done more than twelve months before the issue of the writ.

Norfolk County Council v. Green 652

(6) **Extraordinary traffic—Recovery of expenses—Action against local authority—Limitation of time.**

See Limitation of time (1) 1094

(7) **Extraordinary traffic—Recovery of expenses—Action commenced before repair effected—Expenses "incurred"—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1).**

An action under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover expenses of highway repairs occasioned by extraordinary traffic or excessive weight, brought before the repairs have been executed, is premature and must be dismissed.

Little Hulton Urban District Council v. Jackson 986

(8) **Extraordinary traffic—Recovery of expenses—Costs of action in High Court—Less than £250 recovered—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1, a).**

A highway authority brought an action in the High Court to recover expenses incurred by reason of extraordinary traffic. The claim, which was in accordance with the surveyor's certificate, was for more than £250, but the verdict of the jury was for £60, and judgment was entered for that amount with costs.

Held, that under section 12 (1, a) of the Locomotives Act, 1898 (which provides that such expenses "may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court"), the action, inasmuch as the plaintiffs' right to bring it was based on their surveyor's certificate, was rightly brought in the High Court, and that the plaintiffs were entitled to have their costs taxed on the High Court scale.

Chesterfield Rural District Council v. Newton 45

HIGHWAYS—Continued.

(9) Locomotives—Motor car driven at a speed or in a manner dangerous to the public—Conviction in the alternative—Dupliety—Motor Car Act, 1903 (3 Edw. VII. c. 36), s. 1 (1).

The provisions of section 1 (1) of the Motor Car Act, 1903, prohibiting the driving of a motor car "at a speed or in a manner which is dangerous to the public" create two distinct offences; and a conviction for driving a motor car "at a speed or in a manner which was dangerous to the public" is therefore bad for duplicity.

Rex v. Wells 913

(10) Locomotives—Nuisance—Interim Injunction—Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 13—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6.

In an action by the Attorney-General on the relation of a local authority liable for the maintenance of a highway for an injunction to restrain the user of a locomotive on the highway in such a way as to cause a public nuisance, it is no defence, if a public nuisance has in fact been caused, to prove that there has been no contravention of the Locomotives Acts or of any bye-laws made thereunder, or to show that the local authority have failed to keep the highway in proper repair.

Section 13 of the Locomotive Act, 1861, which provides that nothing in that Act shall authorise the use of a locomotive on a highway so as to cause a nuisance is not impliedly repealed by the Locomotives Act, 1898.

Attorney-General v. Scott (No. 1) 461

(11) Locomotives—Nuisance—Injunction—Repair—Standard of maintenance—Nuisance primarily due to default of road authority.

The defendant conducted traffic throughout a considerable period by means of a traction-engine over a main road repairable by the plaintiff council, and the road got into a condition so bad as to amount to a nuisance. The condition of the road was not caused primarily by the defendant's traffic, but, though that traffic with other traffic and the state of the weather were contributory causes, primarily by the failure of the plaintiff council to maintain the road in a fit state to bear the traffic over it, including the defendant's traction traffic, which was not more unusual or onerous than the council ought to have expected to come on it. The plaintiff council ultimately reconstructed the road in such a way that there was no appreciable risk, if ordinary care were exercised by the council, that in the future the defendant's traffic would cut up the road or reduce it to a condition such as to constitute a nuisance.

Held, that, under these circumstances, an injunction ought not to be granted, in an action brought by the Attorney-General on the relation of the plaintiff council and by the plaintiff council, to restrain the defendant from conducting traffic upon the road in such a way as to cause a public nuisance.

Attorney-General v. Scott (No. 2) 1113

(12) Negligence—Retaining wall built by local authority—Flood caused by wrongful act of third party—Liability of local authority.

The plaintiffs were the owners of a house adjoining the Y. Road, within the district of the defendants. There was a channel at the side of this road for the purpose of carrying off surface water from the road. On a certain occasion, after a heavy rain, the water coming down this channel broke through it, and forced its way into the cellar of the plaintiffs' house, thereby doing damage. The plaintiffs alleged that the damage occurred owing to a retaining wall which the defendants had built on the Y. Road when raising the level of another street running into it, their contention being that it might have been anticipated that on occasions water would be diverted on to their land by the way in which the wall was placed. On the facts found by the judge at the trial the wall in no way interfered with the ordinary flow of water

HIGHWAYS—Continued.

down the channel, even when caused by heavy rain, but the flood on the day in question was caused by water running into the channel owing to the wrongful act of the owners of adjoining land in allowing a conduit on their land to become blocked.

Held, affirming the decision of Bruce J., that the defendants were not liable for the damage to the plaintiffs' house, there being no negligence on their part in not building their retaining wall in such a way as to prevent its interfering with an unusual flow of water caused by the wrongful act of other persons.

Ely Brewery Co. v. Pontypridd Urban District Council 40

(13) Restoration of highway after laying sewer—Liability of local authority—Highway made temporarily fit for traffic—Negligence—Action for damages—Remote consequences of negligence—Accident due to negligent restoration of highway in conjunction with obstruction of highway by stranger—Non-feasance—Misfeasance.

The metropolitan vestry of S., the predecessors of the appellant council, being both highway authority and sewer authority, laid a sewer in a highway and negligently filled in the trench in such a way that, though made temporarily fit for traffic, the part of the highway where the trench had been dug became dangerous in a few days. A cab driver, driving along the side of the road which had thus become dangerous, which was his near side, crossed to his off side in order to avoid the danger, and drove against a heap of soil which had been placed on the latter side of the highway, without the knowledge or consent of the vestry, but of the existence of which they were, by their officers, aware, and the cab overturned, causing injury to the respondent who was being driven in the cab.

Held, that the appellants were liable for the injury.

Judgment of the Court of Appeal, 1 L. G. R. 81, affirmed.

Shoreditch Borough Council v. Bull 756

HOSPITAL.

(1) Maintenance of patients not paupers—Children—Liability of parents or persons in loco parentis—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 132.

There is no statutory liability cast, by section 132 of the Public Health Act, 1875, upon persons in loco parentis to pay for the maintenance of children, not paupers, maintained in a hospital by a local authority.

Hull Corporation v. Maclaren, Loc. Govt. Chron., 1898, 585, approved and followed.

Isle of Thanet Joint Hospital Board v. Farquhar 1310

(2) Nuisance—Smallpox hospital—Apprehended danger—Aerial convection.

See Nuisance (13) 698

INCLOSURE AWARD.

Footway—User for wheeled traffic—Nuisance—Dedication.

See Highways (2) 744

INCOME TAX.

Deduction of income tax from interest on loans—Accountability of borrower—Loan charged on lands of local authority—Lands occupied by local authority—Interest exceeding value of lands.

See Revenue (1) 1130

INFECTIOUS DISEASE.

Destruction of clothing—Compensation—Powers of medical officer of health—Sanction of local authority—Public Health Act, 1875 (38 & 39 Viet. c. 55), ss. 120, 121, 308.

The power given to the local authority by section 121 of the Public Health Act, 1875, to direct the destruction of articles which have been exposed to infection is not exercisable by the medical officer of health on his own initiative. Consequently, where such articles have been destroyed by the direction of the medical officer of health, given without the sanction of the local authority, the owner of the articles cannot, at all events in the absence of evidence of ratification of the medical officer's action by the local authority, claim compensation in respect of their destruction under section 308 of the Act.

Garlick v. Knottingley Urban District Council 1345

INJUNCTION.

Action by Attorney-General—Statutory obligation—Statutory penalty—Building line—Projection beyond front main wall of adjoining house.

See Streets (5) 826

JURY LISTS.

Revision Justices in special petty sessions—Court of summary Jurisdiction—Power to state case—Juries Act, 1825 (6 Geo. IV. c. 50), s. 10—Juries Act, 1862 (25 & 26 Viet. c. 107), s. 8—Summary Jurisdiction Act, 1857 (20 & 21 Viet. c. 43), s. 2—Summary Jurisdiction Act, 1879 (42 & 43 Viet. c. 49), s. 33—Interpretation Act, 1889 (52 & 53 Viet. c. 63), s. 13 (1).

Justices sitting in special petty sessions, appointed to be held by section 10 of the County Juries Act, 1825, for the purpose of revising jury lists, do not form a court of summary jurisdiction within the definition contained in section 13 (1) of the Interpretation Act, 1889, and have no power to state a case for the opinion of the High Court.

Hagmaier v. Willesden Overseers 965

JUSTICES.

See Summary Jurisdiction.

LAND.

(1) Acquisition—Compensation—Interest in land—Exclusive licence and right to sell refreshments at theatre—Lands Clauses Consolidation Act, 1845 (8 & 9 Viet. c. 18), s. 68.

By an agreement in writing the lessee of a theatre granted and let to the plaintiffs the free and exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment rooms and bars, cloak rooms, and wine cellars, together with the right of free access for the plaintiffs and their servants to and from all parts of the premises as might be necessary and usual for exercising the rights thereby granted, and also the free and exclusive right to supply to the visitors refreshments and of providing cloak rooms, and the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak rooms and on all programmes.

Held, that the agreement did not confer on the plaintiffs any interest in land which could be a subject matter for compensation under section 68 of the Lands Clauses Consolidation Act, 1845.

Decision of Wright J. affirmed.

Edwardes v. Barrington (1901) 85 L. T. 650, followed.

Frank Warr & Co. v. London County Council 723

(2) Acquisition—Tramways—Power under local Act to construct apparatus in street—Erection of standard on foot pavement.

See Tramways (1) 779

(3) Acquisition—Ultra vires—Land sought to be acquired compulsorily for ultra vires purpose—Land entered upon and used—Conveyance not executed—Rights of parties—Education School board—Pupil teachers' centre—Lands Clauses Consolidation Act, 1845 (3 & 9 Vict. c. 18), s. 85—Education Board Provisional Order Confirmation (London) Act, 1900 (63 & 64 Vict., c. cxvii.), s. 4.

A school board proposed to provide at the cost of the school fund buildings for a purpose (i.e., that of a pupil teachers' centre) upon which, as was subsequently held, a school board has no power to expend that fund: *Dyer v. London School Board*, 1902, 2 Ch. 768; 72 L. J. Ch. 10.

With this object the board acquired the leasehold interest in certain premises under a lease containing covenants for the maintenance of the existing buildings with a proviso for re-entry on breach. The board then obtained compulsory powers for the acquisition of the land, served notice to treat for the freehold, and made a deposit and gave a bond under section 85 of the Lands Clauses Consolidation Act, 1845, so that, had the purposes for which they proposed to acquire the land been legitimate, they would have been entitled to enter upon and use the land; but the freehold interest was never conveyed to them. The board took possession of the premises, pulled down the existing buildings, and disregarded a notice from the freeholders, under the Conveyancing and Law of Property Act, 1881, complaining of the pulling down of the buildings as a breach of the covenants in the lease.

Held—1. That, as the object for which the board were endeavouring to acquire the land was ultra vires, they had not obtained any right to possession of the land by their proceedings under section 85 of the Lands Clauses Consolidation Act, 1845, and, the lease being forfeited for breach of covenant, the freeholders were entitled to possession of the premises. The board were not, even on the supposition that the proceedings were a mistake on their part, entitled to treat the land as superfluous land acquired under the Lands Clauses Acts. Nor was the fact that their property was, under the Education (London) Act, 1903, about to be transferred to a body who would have power to provide a pupil teachers' centre material.

2. That, although the purposes for which the leasehold interest was acquired were ultra vires, the board were bound by the covenants in the lease, and were liable in damages for the breach thereof.

Tiverton Railway v. Loosemore (1884) 9 App. Cas. 480; 53 L. J. Ch. 812, distinguished. *Ayers v. South Australian Banking Co.* (1871) L. R. 3 P. C. 548; 40 L. J. P. C. 22, distinguished on the first point and followed on the second.

Batson v. London School Board 116

(4) Sale of surplus land by local authority—Building restrictions—Power to vary—Bye-laws—Rights of purchasers inter se—Highways—Cul-de-sac—Presumption of dedication—Evidence.

The defendant corporation offered surplus land for sale by auction in lots subject to certain conditions of sale and building restrictions, but reserved power to vary the latter. Each purchaser was to submit for approval plans complying with the corporation's bye-laws, and to covenant in his conveyance (which was to be in common form for all the purchasers) to build according to his approved plans. The size of the lots only admitted of the erection thereon, consistently with the bye-laws, of buildings of a certain height. The plaintiff company and the defendants G. & Sons became the purchasers of adjoining lots, obtained the approval of their respective plans, and took their conveyances, respectively covenanting to build according to the approved plans. Subsequently, G. & Sons acquired other land not included in the sale but adjoining their two lots. The larger area of the combined sites admitted

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LAND—Continued.

of the erection of buildings of much greater height and dimensions than was possible on the two lots alone. Fresh plans for larger buildings were submitted to and approved by the corporation. In an action by the plaintiff company to restrain the erection of buildings in accordance with these plans in breach of the alleged building scheme,

Held, that having regard to the reservation of power to vary the plans, no one purchaser acquired as against any other purchaser, either at the auction or after the execution of the conveyances to the various purchasers, a right to insist that the latter's buildings should be of any particular height or dimension.

A cul-de-sac may be a highway, but where there is no evidence that it has ever been paved, cleansed, or lighted by the parish or other public authority, the Court will not, merely because the entrance to the cul-de-sac has not been separated from the public highway by a bar, presume dedication to the public.

Attorney-General v. Richmond Corporation 628

LANDLORD AND TENANT.

(1) Tenant's covenant to pay outgoings—Abatement of nuisance—Reconstruction of drains—Tenancy for three years at £55 a year.

A tenant of a house for the term of three years, and thenceforth from year to year, at a rent of £55 a year, agreed to pay all "taxes rates assessments and outgoings."

Held, that he was liable to repay to his landlord expenses amounting to £83 10s. incurred in repairs to and reconstruction of drains in pursuance of a notice under the Public Health Act, 1875.

Decision of Wright J., reported 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, affirmed.

Stockdale v. Ascherberg 529

(2) Tenant's covenant to pay outgoings—Abatement of nuisance on intimation from sanitary inspector—Reconstruction of drains—Tenant holding over after expiry of three years' agreement—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 3, 4.

A tenant of a house for the term of three years, at £70 a year, who had covenanted to pay "all rates, taxes, assessments, and outgoings," held over, after the expiration of the three years, paying rent.

Held, that he was not liable to repay to his landlord expenses amounting to £70 1s. 6d. incurred by the landlord in repairs to and reconstruction of drains pursuant to an intimation given to him by a sanitary inspector under section 3 of the Public Health (London) Act, 1891, on the grounds, first, that it could not have been in the contemplation of the parties that such expenses should be borne by the tenant; secondly, that the intimation, not being followed by notice under section 4 of the Act, imposed no legal liability on the landlord.

Valpy v. St. Leonard's Wharf Co. (1903) 1 L. G. R. 305, followed. Stockdale v. Ascherberg, 1903, 1 K. B. 873; 1 L. G. R. 548; 72 L. J. K. B. 492, distinguished.

Harris v. Hickman 1

(3) Tenant's covenant to pay outgoings—Factory—Means of escape in case of fire—Expense of complying with requirements of local authority—Jurisdiction of county court—Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 14.

The lessor of a factory, who has, in compliance with the requirements of the local authority, under section 7 of the Factory and Workshop Act, 1891

LANDLORD AND TENANT—Continued.

(now replaced by the provisions of section 14 of the Factory and Workshop Act, 1901), incurred expenses of structural alteration in providing means of escape in case of fire, is precluded from suing in the High Court to recover the amount so expended by him from his lessee under a covenant by the latter to pay "outgoings" by the provisions of section 7 (2) of the Act of 1891 (now section 14 (4) of the Act of 1901), providing that an owner put to expense under the section, may, if he alleges that the occupier ought to bear or contribute to such expense, apply to the county court, and that the county court may make such order as appears just and equitable under all the circumstances of the case.

Monk v. Arnold, 1902, 1 K. B. 761; 71 L. J. K. B. 441, followed.
Shepherd v. Barber (1902) 1 L. G. R. 157, not followed.

Horner v. Franklin 1190

(4) Tenant's covenant to pay outgoings—Paving expenses—Metropolis—Covenant to pay paving charges imposed on frontages—Payment by tenant to local authority of rent due to landlord—Landlord's right to distrain.

See Streets (12) 769

(5) Tenant's covenant to pay outgoings—Private street works executed before date of lease—Apportionment made after commencement of tenancy—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

The share of the expenses of private street works executed under section 150 of the Public Health Act, 1875, for which the owner of any premises is liable, becomes a charge on the premises as from the completion of the works, though it is not payable till the apportionment has been made. Where, therefore, a lease of the premises is granted after the completion of the works, but before the apportionment, the landlord cannot recover the expenses from the tenant under a covenant on his part to pay all rates "taxes and assessments" in respect of the demised premises, whether or not such a covenant is wide enough to include expenses of the character.

Decision of the Divisional Court (1903), 1 L. G. R. 493, affirmed, but on other grounds. Surtees v. Woodhouse, 1903, 1 K. B. 396; 1 L. G. R. 227; 72 L. J. K. B. 302, followed.

Lumby v. Faupel 605

(6) Tenant's covenant to pay outgoings—Underground bakehouse—Certificate of suitability—Structural alterations—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22) s. 101, (2, 8).

The expenses of structural alterations in an underground bakehouse necessary before the certificate of the suitability of the premises for use as a bakehouse required by section 101 of the Factory and Workshop Act, 1901, can be obtained, come within a tenant's covenant to pay impositions and outgoings in respect of the premises.

Where the occupying tenant of an underground bakehouse holds under a lease containing such a covenant it is therefore useless for a court of summary jurisdiction to make an order under section 101 (8) of the Act that any part of the expenses shall be defrayed by the owner; for if the owner did, under such an order, defray such expenses he could recover from the tenant under the covenant. But semble that the court of summary jurisdiction would have power under the subsection, at the request of the tenant, to determine the lease.

Monk v. Arnold, 1902, 1 K. B. 761; 71 L. J. K. B. 441, commented on.

Goldstein v. Hollingsworth 879

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1424 LANDLORD AND TENANT—LIMITATION OF TIME.

LANDLORD AND TENANT—Continued.

(7) **Tenant's covenant to pay outgoings.—Underground bakehouse—Structural alterations—Certificate of suitability—Expenses—Place "let as a bakehouse"—Jurisdiction of court of summary jurisdiction to order contribution by owner—Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 101 (1), (2), (8).**

A covenant by the lessee of an underground bakehouse to pay "outgoings" covers the expenses of structural alterations necessary before the certificate required by section 101 of the Factory and Workshop Act, 1901, can be obtained; and where an underground bakehouse has been let as a bakehouse by a lease containing such a covenant a court of summary jurisdiction has no power under subsection (8) of the section to order the owner to contribute to the expenses of such alterations.

Goldstein v. Hollingsworth, 1904, 2 K. B. 578; 2 L. G. R. 879; 73 L. J. K. B. 826, followed.

Quære, as to the meaning of the expression in the section "let as a bakehouse."

Morris v. Beal 1171

LAND TAX.

Sanitary conveniences.

See Sanitary Conveniences (1) 1378

LAVATORIES.

Bye-laws—Provision as to trapping of waste water pipes—Waste water carried off by means other than pipe—Series of lavatory basins in one room.

See Bye-laws (8) 488

LIMITATION OF TIME.

(1) **Action against local authority—Highways—Action to recover expenses occasioned by extraordinary traffic—Public Authorities Protection Act, 1898 (56 & 57 Viet. c. 61), s. 1 (a)—Locomotives Act, 1898 (61 & 62 Viet. c. 29), s. 12 (1, b).**

The provisions of section 1 of the Public Authorities Protection Act, 1893, limiting to six months the period within which an action for any act done in pursuance of any Act of Parliament, or of any public duty or authority, must be brought, apply to an action against a local authority under section 23 of the Highways and Locomotives (Amendment) Act, 1878, and section 12 of the Locomotives Act, 1898, to recover expenses of road repair occasioned by extraordinary traffic conducted by or in consequence of the orders of such authority, and for the purposes of their powers and duties as local authority.

Kent County Council v. Folkestone Corporation 1094

(2) **Action against public body—Negligence—Personal injuries—Tramways acquired and worked by local authority under statutory power—Public Authorities Protection Act, 1898 (56 & 57 Viet. c. 61), s. 1.**

The provisions of the Public Authorities Protection Act, 1893, limiting to six months the time within which an action brought against any person for any act done in the execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, must be commenced, apply to an action, brought against a local authority carrying on a tramway undertaking under statutory powers, to recover damages in respect of personal injuries occasioned by the negligence of the drivers of their tramway cars.

The Ydun, 1899, P. 236; 68 L. J. P. 101, followed.

Parker v. London County Council 662

LIMITATION OF TIME—Continued.

(3) Action against public body—Personal injuries—“Continuance of injury or damage”—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

The continuance of personal suffering from the effects of an accident is not “continuance of injury or damage” within section 1 (a) of the Public Authorities Protection Act, 1893. Consequently an action, coming within that section, in respect of personal injuries caused by an accident is barred after the lapse of six months from the accident though the personal suffering caused by the accident still continues.

Carey v. Bermondsey Borough Council 219

(4, 5) Adulteration—“Institution” of prosecution within 28 days.

See Adulteration (2, 3) 719, 1007

(6) Contract—Building contract with Board of Guardians—Breach—Reference to arbitration.

See Poor Law (1) 1229

(7) Expenses of highway repair—Extraordinary traffic—“Particular . . . work extending over long period”—Haulage of timber bought under successive contracts.

See Highways (5) 652

(8) Summary jurisdiction—Penalties—Building in contravention of statute.

See Buildings (9) 147

LOANS.

Income tax—Deduction of income tax from interest on loans—Accountability of borrower—Loans charged on lands of local authority—Lands occupied by local authority—Interest exceeding value of lands.

See Revenue (1) 1130

LOCAL GOVERNMENT BOARD.

Production of reports in evidence—Evidence of officials.

See Nuisance (13) 698

LOCOMOTIVES.

See Highways ; locomotives.

LODGING-HOUSES.

(1) Bye-laws—Reasonableness—Cleansing in first week in April—Duty imposed on landlord—Want of provision for notice.

See Bye-laws (10) 341

(2) Bye-laws—Water-closet accommodation—Bye-law requiring owner to provide water-closet accommodation—Want of provision for notice before commencement of proceedings.

See Bye-laws (11) 334

LUNATICS.

County asylum—Weekly charge—Maximum charges—Out-county patients.

See Poor law (2) 1241

MANDAMUS.

(1) Disobedience—Attachment—Service of writ—Return to writ—Sewage scheme—Peremptory mandamus to Corporation—Delay in commencing and carrying out the works ordered—Worcester Extension Act, 1885 (46 & 49 Vict. c. clix.), s. 108.

In July, 1897, a peremptory writ of mandamus, ordering a municipal Corporation to carry out a sewage scheme, was duly served upon 10 members of the City Council, which numbered 48 members, and the original writ was handed to one of the 10 members so served, but was afterwards lost. The Corporation being in default, an order of the Court to return the writ, with an authenticated copy of the original writ attached, was, in March, 1903, served upon each of the then members of the Council.

Held, that there had been such service of the peremptory writ of mandamus upon the whole of the members of the Council as constituted in March, 1903, as to render them individually liable to attachment for disobedience to it.

Held, also, on the facts, that there had been such delay in carrying out the works as amounted to disobedience to the writ.

Rex v. Worcester Corporation 51

2) Inspection of accounts—Accounts deposited before audit.

See Accounts 1209

MARGARINE.

See Adulteration.

MARKET.

Disturbance—Rival market—Accommodation—Intention of seller.

The plaintiff was the lessee of a market enjoying the right every Wednesday to buy and sell horses and all sorts of cattle, tolls being taken from those selling there. The defendant, an auctioneer, who had held sales of cattle and horses in the market, paying tolls to previous lessees, himself on market day in the neighbourhood of the plaintiff's market held a sale of a number of young unbroken horses which had been consigned to him for sale, which sale he invited people in the market to attend. There was evidence that the defendant's object in holding this sale was not to evade payment of the market tolls but that the horses would not have been consigned to him for sale at all if they were to be sold in the plaintiff's market.

Held (reversing Kekewich J.), that the acts of the defendant amounted to a disturbance of the plaintiff's market.

In the case of a mere sale outside the market, the question whether it was the intention of the seller to evade the market tolls is of importance in determining whether there has been a disturbance of the market or not, but where the sale really amounts to the establishment of a new rival market, taking advantage of the concourse of people attending the lawful market, the intention of the seller is irrelevant.

Wilcox v. Steel 105

MAYOR.

Mayor as ex officio justice—Precedence of mayor—County business—Borough business.

See Municipal Corporation 749

MEAT.

See Food.

MEDICAL OFFICER OF HEALTH.

Infectious disease—Destruction of clothing.

See Infectious disease 1345

METROPOLITAN BOROUGH COUNCIL.

Proceedings—Rescission of resolution.

See Officers (1) 581

MILK.

See Adulteration.

MINE.

Abandoned pit shaft used as a public well—Well vested in local authority—Owner's liability to fence shaft for prevention of accidents—Public Health Act, 1875 (38 & 39 Vict. c. 75), s. 64—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 13, 41.

The duty of fencing the shaft of an abandoned mine cast upon the owner of the mine and every other person interested in the minerals by section 13 of the Metalliferous Mines Regulation Act, 1872, which Act by section 41 defines "mine" as including shaft, and "owner" in terms excluding a person who is only owner of the soil and is not interested in the mines, does not extend to a local authority in whom the shaft of an abandoned mine which has filled with water and become a public well is vested by section 64 of the Public Health Act, 1875.

Knuckey v. Redruth Rural District Council 456

MOTOR CARS.

See Highways.

MUNICIPAL CORPORATION.

Mayor—Mayor as ex officio justice—Precedence of mayor—County business—Borough business—Borough without separate commission of the peace—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 155.

The precedence given by subsection (2) of section 155 of the Municipal Corporations Act, 1882, to mayors of boroughs when acting in relation to the business of the borough, is magisterial as well as social.

The hearing of a summons issued by a county justice in respect of an offence committed in a borough, with no separate court of quarter sessions and no separate commission of the peace, is, however, not "business of the borough" within the meaning of the subsection, and the mayor has, therefore, no right to preside at the hearing of the summons, though, semble, it would be otherwise if the summons were issued by the mayor or ex-mayor.

Rex v. Sainsbury (1791) 4 T. R. 451; 2 R. R. 433, applied.

Lawson v. Reynolds 749

NEGLIGENCE.

(1) Action against public body—Limitation of time—Personal injuries—Tramways acquired and worked by local authority under statutory power.

See Limitation of time (2) 662

NEGLIGENCE—Continued.

(2) Cricket ground controlled by London County Council—Injury sustained by player—Upright metal indicators marking pitch—Obvious and apparent danger.

The London County Council permitted cricket to be played on certain open land vested in them for the purpose of recreation. In order to regulate the play, the Council caused the several pitches to be indicated by metal flags on posts. The plaintiff was injured while playing by running against the post indicating the pitch. The post had been removed from its original position on the pitch by one of the players and placed upright elsewhere. The post indicating a pitch was not required by the Council or the groundsmen to remain upright during play, though it was required to be left upright at the close of play.

Held, that there was no evidence of negligence for which the Council were responsible.

Giles v. London County Council 326

(3) Highways—Retaining wall built by local authority—Flood caused by wrongful act of third party.

See Highways (12) 40

(4) Restoration of highway after laying sewer—Highway made temporarily fit for traffic—Accident due to negligent restoration of highway in conjunction with obstruction of highway by stranger—Liability of local authority.

See Highways (13) 756

NON-FEASANCE.

Negligent restoration of highway after laying sewer—Liability of local authority.

See Highways (13) 756

NUISANCE.

(1) Cesspool—Conduit for drainage of several houses terminating in cesspool on private land—"Sewer"—"Buildings works materials and things belonging" to sewer—Undertaking by owner that conduit and cesspool shall be treated as private property—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 12, 94-96.

The appellant, in accordance with plans submitted to the local authority, laid a line of pipes for the conveyance of sewage, 1,200 feet long, under a road, and leading to a large cesspool, which he constructed on land of which he was lessee for a term of years at a nominal rent; and he gave an undertaking to the local authority, expressed to be in consideration of their approval of his plans, whereby he agreed that the line of pipes should for all purposes of the Public Health Acts be a private drain, and that the line of pipes and cesspool should be maintained and cleansed by him or other the owner of the premises for the time being. A number of houses were drained, each by a single pipe, into the line of pipes in question. The appellant failed to cleanse the cesspool with the result that a nuisance was caused. The local authority thereupon took proceedings against him under the nuisance clauses of the Public Health Act, 1875.

Held, on the authority of Meader v. West Cowes Local Board, 1892, 3 Ch. 18; 61 L. J. Ch. 561, that, whether the line of pipes was a "sewer" within the Public Health Act, 1875, or not, the cesspool was not a work or thing belonging thereto within section 13 of that Act, and therefore did not vest in the local authority; and that, on this ground, an order for the abatement of the nuisance was properly made on the appellant.

Per Channell J. The appellant would have been liable even on the

NUISANCE—Continued.

footing that the line of pipes was a "sewer" and the cesspool a thing belonging thereto; for in that case, though the line of pipes and cesspool would have been vested in the local authority, who would have been responsible for their condition as between themselves and third parties, yet as between the local authority and the appellant, the appellant would have been responsible by virtue of his undertaking.

Butt v. Snow 222

(2) Drain discovered to be sewer—Abatement under compulsion—Metropolis—Intimation to owner of premises—Recovery of expenses from local authority—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 3, 4.

The service by a sanitary inspector on an owner of premises of an intimation under section 3 of the Public Health (London) Act, 1891, that a nuisance arising from a drain exists on the premises, is not putting such compulsion upon the owner to execute the necessary work as will entitle him, upon the subsequent discovery that the alleged drain is a sewer, and therefore repairable by the local authority, to recover from that body the expense he has been put to in abating the nuisance, even though the intimation is expressed as requiring the owner to abate the nuisance, and states that if the nuisance is not abated the local authority will commence proceedings against the owner by the service of a statutory notice.

So held, upon the authority of *Thompson and Norris Manufacturing Co. v. Hawes* (1895) 59 J. P. 580; *Proctor v. Islington Borough Council* (1902) 18 Times L. R. 505; and *Harris v. Hickman*, 1904, 1 K. B. 13; 2 L. G. R. 1; 73 L. J. K. B. 31, the Court intimating that their decision would have been otherwise if the matter had been *res integra*.

Per Kennedy J., *North v. Walthamstow Urban District Council* (1898) 67 L. J. Q. B. 972, is not reconcilable with the above-mentioned cases.

Oliver v. Camberwell Borough Council 617

NOTE.—*This case was taken to the Court of Appeal and there settled: see Addenda.*

(3) "Drain" serving two houses—Houses held of same landlord—Leases containing covenant by lessee to contribute to cost of repairing drain—Drain repaired by one lessee under abatement order—Implied contract—Metropolis—Contribution between parties responsible for nuisance.

See *Drains* (10) 1304

(4) Electric lighting works—Noise—Vibration—Smell—Construction of works—Natural and ordinary enjoyment of property—Injunction.

The proprietress of a private school for young ladies complained of nuisance by noise, vibration, and smell arising from the adjoining works of a company supplying electric lighting by arrangement with a municipal corporation which had obtained a Provisional Order confirmed by Act of Parliament. She commenced proceedings before the defendants' works were completed, and in the interval between the date of the writ and the trial of the action the defendants so improved the construction and management of their machinery as to reduce the causes of the alleged nuisance.

Held—(1) that the acts complained of had frequently been such as, having regard to the circumstances and surroundings of the defendants' property, were in excess of the natural and ordinary course of enjoyment of that property; and (2) that such acts had up to the trial materially interfered with the ordinary comfort of existence of the plaintiff and her household, so that the plaintiff was entitled to an injunction.

Knight v. Isle of Wight Electric Light and Power Company ... 390

NUISANCE—Continued.**(5) Electric lighting works—Noise—Vibration—Injury to fabric—Temporary nuisance—Injunction—Suspension.**

A local authority in London, under a Provisional Order containing a clause that the undertakers should not be exonerated from any action for nuisance, began in 1903 to use new electric generating machinery in addition to plant which had been in use since 1894. The owners and occupiers of dwelling-houses and shops near the works complained of nuisance by noise and vibration arising from the works and smell and dust from a dust destructor in an adjoining yard, and after receiving a letter from the defendants stating that the works were not completed, but that when they were there would be no cause of complaint, commenced proceedings.

Held, that the works of the defendants by vibration and otherwise had caused a nuisance in law materially interfering with the comfort of the plaintiffs so as to justify their action, and that the defendants, although a public authority, were not entitled to carry on the works at all unless or until they could do so without occasioning a nuisance to the neighbouring owners of property.

Broder v. Saillard (1876) 2 Ch. D. 692; 45 L. J. Ch. 414, and Bamford v. Turnley (1862) 3 B. & S. 62; 31 L. J. Q. B. 286, applied. Harrison v. Southwark and Vauxhall Water Co., 1891, 2 Ch. 409; 60 L. J. Ch. 630, distinguished.

The operation of the injunction granted was suspended for six months on terms.

Colwell v. St. Pancras Borough Council 518

(6, 7) Highways—Locomotive—Injunction.

See Highways (10, 11) 461, 1113

(8) Highways—Obstruction—Footway used by wheeled traffic.

See Highways (2) 744

(9, 10) Landlord and tenant—Tenant's agreement to pay outgoings—Expenses incurred by landlord in abatement of nuisance.

See Landlord and tenant (1, 2) 1, 529

(11) Open channel for surface water—Pollution by overflow from cesspool.

See Sewers (12) 174

(12) Sanitary convenience erected by local authority.

See Sanitary conveniences (3) 127

(13) Smallpox hospital—Infectious area—Apprehended danger—Aerial convection—Empirical opinions—Evidence—Admissibility—Local Government Board—Production of reports—Evidence of officials.

In a quia timet action to restrain the use of a building as a smallpox hospital, the plaintiffs attempted to establish as a general affirmation the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51 feet. They called expert witnesses to support the theory of aerial convection and to give empirical opinions based upon other cases of smallpox hospitals. The defendants, on the other hand, called a number of expert witnesses to disprove the theory and give opinions opposed to those of the plaintiffs' witnesses.

Held, that the plaintiffs had failed to make out their case inasmuch as, in the circumstances, the theory of aerial convection which, if proved, would have afforded them a strong case as showing a reason why danger should exist, must be considered as not proven, and the inference which they desired to

NUISANCE—Continued.

be drawn from the cases of other hospitals, depended upon a premiss the universality of which the defendants had disproved.

Quære whether the admission of evidence in chief of what had happened in the case of other hospitals, although allowed in deference to the opinions expressed in *Hill v. Metropolitan Asylum District* (1879, 1882) 42 L. T. 212; 47 L. T. 29, is not wrong in principle as raising a number of side issues on which it is impossible for the Court to adjudicate without injury to absent parties.

The attitude of the Local Government Board in respect of the production of their reports, and of the evidence of their inspectors, commented upon.

Attorney-General v. Nottingham Corporation 698

(14) Smoke—Metropolis—“Chimney”—Funnel of steamer—Prohibition order—Specification of works necessary to prevent recurrence—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 5 (4, 5), 23, 24.

The funnel of a steamer is a “chimney” within section 24 (b) of the Public Health (London) Act, 1891, dealing with nuisances caused by black smoke issuing from chimneys.

Where all that is required to prevent the recurrence of a nuisance in London arising from black smoke is careful stoking, it is unnecessary in a prohibition order under section 5 of the Act prohibiting the recurrence of the nuisance to specify any works to be executed, although the defendant may have required that the order should specify the works to be executed.

Tough v. Hopkins 1213

(15) Smoke—Metropolis—Chimney of “private dwelling-house” West End club premises—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 24.

A large West End clubhouse is not a “private dwelling-house” within clause (b) of section 24 of the Public Health (London) Act, 1891, which excepts the chimney of any private dwelling-house from the provisions of the section directed against nuisances arising from chimneys sending forth black smoke.

McNair v. Baker 143

(16) Streets—Obstruction—Metropolis—Costermongers—Right to prosecute—Information laid by officer of metropolitan borough council and expressed to be on behalf of council.

See *Streets* (9) 13

(17) Streets—Obstruction—Reasonable user for business purposes—Willful obstruction.

See *Streets* (10) 502

(18) Summary proceedings—Abatement order—Signature of order—Order signed by one justice alone out of those present—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 96, 251, Sched. IV., Form C.—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14.

An order made under section 96 of the Public Health Act, 1875, by two or more justices sitting in petty sessions requiring a person to abate a nuisance must, when drawn up, be signed by two at least of the justices present. Such an order, signed by one justice alone out of those who formed the court, is invalid.

Wing v. Epsom Urban District Council 714

NUISANCE—Continued.

(19) Summary proceedings—Metropolis—Prohibition of recurrence of nuisance—Proceedings taken without previous proceedings for abatement—Specification of works in prohibition order—Black smoke—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 4, 5, 24, 130.

It is not necessary before notice is served under the Public Health (London) Act, 1891, requiring a person responsible for a nuisance, which for the time has been abated, to take steps to prevent its recurrence, that any previous proceedings should have been taken under the Act to secure the abatement of the nuisance.

On the hearing of a summons under the Act for a prohibition order in respect of a nuisance consisting in the emission of black smoke the prosecution proved the nuisance, but offered no evidence as to what was required to prevent its recurrence. After the close of the case for the prosecution the defendants, who had given evidence that the nuisance might be due to the simultaneous opening of two furnace doors, required, pursuant to section 5 (5), that the order should specify the works to be executed by the defendants. They at the same time objected to the reception of any further evidence on behalf of the prosecution on the ground that their case was closed. Under these circumstances the court made an order requiring the defendants to fit apparatus to prevent the simultaneous opening of furnace doors, for example, a bar pivoted in a particular manner, and to take all other proper steps to prevent the emission of smoke.

Held, that the order was not invalid on the ground that it was made without evidence as to the nature of the necessary works.

Semble, that, careful stoking being all that was in fact necessary, the order would have been good if it had merely required the defendants to refrain from careless stoking.

Central London Railway v. Hammersmith Borough Council ... 446

(20) Tenant for life and remainderman—Expenses of abatement.

See Tenant for life and remainderman ... 1050

OFFICERS.

(1) Compensation—Metropolitan borough—Abolition of office—Salary and emoluments—Resolution of council assessing amount—Rescission of resolution—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 57—Superannuation Act, 1859 (22 Vict. c. 26), ss. 2, 7.—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 120—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81 (7)—London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30.

Where an officer transferred to a metropolitan borough council by section 30 of the London Government Act, 1899, is entitled, under that section and section 120 of the Local Government Act, 1888, as incorporated therewith, to compensation on abolition of office, the maximum compensation that can be granted is determined by the officer's ultimate salary and emoluments and not by an average of his salary and emoluments for the period of five years with reference to which he is required to give particulars by section 120 (2) of the Act of 1888.

It is for the council to decide as a question of fact what the amount of the salary and emoluments is, and if they decide the question honestly and fairly, the Court will not review their decision unless they have proceeded plainly upon a wrong basis.

Where the council have duly considered the officer's claim, and passed a resolution fixing the amount of compensation to be awarded to him, they have no power subsequently to rescind the resolution. Section 57 of the Metropolis Management Act, 1855, which regulates the rescission of previous resolutions by a metropolitan borough council, is restrictive and not enabling.

A resolution of such a council fixing the amount of such compensation at an amount in excess of the statutory limit is not ultra vires, but is good to the extent of the statutory limit, and bad as to the excess.

Semble, that in the case of abolition of office under the London Government Act, 1899, the period of five years with reference to which particulars must be given in a claim for compensation runs to the date of the abolition and not to the passing of the Act.

Livingstone v. Westminster City Council ... 581

(2) Medical officer of health—Infectious disease—Destruction of clothing.

See Infectious disease ... 1345

(3) Metropolitan borough council—"Existing officer"—Additional work—Remuneration—Power of finance committee to remunerate for temporary assistance—London Government Act, 1899 (62 & 63 Vict. c. 14) ss. 8 (3), 30 (1).

The plaintiff who at the time of the coming into operation of the London Government Act, 1899, was accountant to the Hackney Vestry was transferred by that Act as an existing officer to the defendant council. The plaintiff did not enter into any new contract with the council, but continued to perform the duties attaching to his former office, and also, at the request, as he alleged, of the finance committee, did much additional work. He applied to the finance committee for remuneration for extra services, and the committee recommended to the council that he should be paid a sum of £50; but the council refused to adopt the recommendation.

He sued the council on a quantum meruit in respect of the extra services for a sum of £112 10s.

Held (1) that the plaintiff, not having availed himself of the option given to him under section 30 (1) of the Act to relinquish his office on the ground that the duties he was required to perform were "not analogous" or "an unreasonable addition" to his then existing duties, must be taken to have done the additional work without reference to any implied contract that he should be remunerated for so doing.

(2) that the plaintiff's claim was inadmissible by reason of the provision in section 8 (3) of the London Government Act, 1899, that a liability exceeding £50 shall not be incurred by a metropolitan borough council except upon a resolution of the council passed on an estimate submitted by the finance committee.

Gray v. Hackney Borough Council ... 429

(4) Overseers—Assistant overseer—Recovery of poor rate—Illegal distress by assistant overseer—Responsibility of overseers.

See Poor law (6) ... 1155

(5) Vaccination officer—Expenses—Legal assistance.

See Vaccination (3) ... 1260

OVERSEERS.

Assistant overseer—Recovery of poor rate—Illegal distress by assistant overseer—Responsibility of overseers.

See Poor law (6) ... 1155

PENALTY.

Penalty in nature of liquidated damages—Default in delivery of compensation water from waterworks—Recovery of penalties.

See Water (9) ... 3

POLICE.

(1) **Pension—Basis of calculation—Salary—Increase subject to condition that increase should not be reckoned for pension—Resignation—Suspension of pension—Authority to suspend—“Taking service in any police force”—Office remunerated out of “borough rate or fund”—City of London police—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 12, 23, 29, Sched. III.**

In 1901, the salary of the plaintiff, who was the head constable of Liverpool, was increased by the watch committee from £1,400 to £1,650, subject to his agreeing that the amount of the increase should not be taken into account for the purpose of pension. In March, 1902, the plaintiff retired and the watch committee granted him a pension of £933 *bs.* 8*d.*, based on a salary of £1,400 a year. In the same month the plaintiff was appointed commissioner of police of the City of London at a salary of £1,250 a year. In January, 1903, the Liverpool City Council passed a resolution suspending the payment of £483 *bs.* 8*d.*, part of the pension granted to the plaintiff, so long as he remained in the service of the City of London police.

Held—1. That whether the plaintiff did agree, or did not agree, in the sense either that he did not in fact or could not in law agree to the condition, the pension must be calculated on the basis that his salary remained at £1,400;

2. That the “police authority” of Liverpool under the Police Act, 1890, was the watch committee and not the city council, and that there was, therefore, no existing resolution suspending the pension within section 13 (1) of the Act;

3. That three-fourths of the expenses of the City of London police being borne by the rates, the commissionership was an office remunerated out of a borough rate or fund, within section 13 (2), and consequently that the provisions of that subsection as to reduction of pension applied.

Query, whether the City of London police is a “police force” within section 13 (1) of the Act.

Nott Bower v. Liverpool Corporation 494

(2) **Pension—Reckoning of service for pension—Discontinuous service—Certificate of approved service—Conclusiveness of certificate—“Sufficient evidence”—Police Act, 1890 (53 & 54 Vict. c. 45), ss. 1, 4, 5, 10, 21, 26.**

The twenty-five years’ approved service, which will under the Police Act, 1890, entitle a police constable to a pension for life on retirement from a police force, must be continuous service, except in the cases where the Act expressly provides for the reckoning together of separate periods of service.

So held by a majority of the Court (Collins M.R. and Stirling L.J., Mathew L.J. dissenting), upholding the decision of the Divisional Court reported, 1904, 1 K. B. 522; 2 L. G. R. 251; 73 L. J. K. B. 289.

Garbutt v. Durham Joint Committee 1161

(3) **Sessional court-houses—Local Act—Cost of providing court-house for stipendiary magistrate—“Office or offices”—6 & 7 Vict. c. xlii. s. 13—Petty Sessions Act, 1849 (12 & 13 Vict. c. 18).**

A local Act of 1843, authorising the appointment of a stipendiary magistrate for a certain district, empowered the quarter sessions of the county to provide a suitable office or offices for transacting the magisterial business of the district. The magistrate’s salary and the expenses of providing the office or offices were cast upon rates to be levied under the local Act upon the district. Under this Act, in 1845, an office was provided, which was, in fact, used as a court. The limits of the Act of 1843 were extended by a local

POLICE—Continued.

Act of 1868, and again by a local Act of 1894. These Acts expressly referred to the rating powers contained in the Act of 1843, but not to the power given by that Act for the provision of an office or offices.

Held—1. That the power to provide an "office or offices" given by the Act of 1843 extended to the provision of a court for the transaction of judicial business.

2. That the power extended to the provision of different courts in different parts of the district from time to time.

3. That the power was not affected by the Petty Sessions Act, 1849, which authorises the provision of petty sessional court-houses in every county at the expense of the county generally.

4. That the expense of providing new courts for parts of the district within the limits of the Act of 1843 as extended was consequently properly charged upon the district, and not upon the county generally.

Decision of the Divisional Court, reported 1 L. G. R. 810, reversed.

Rex v. Hunton, ex parte Glamorganshire County Council ... 917

POOR LAW.

(1) Guardians—Building contract—Breach—Damages—Reference to arbitration—"Neglect or default in the execution of any public duty"—Limitation of time for commencement of proceedings—"Debt claim or demand incurred or become due"—Public Authorities Protection Act, 1893 (56 & 57 Viet. c. 61), s. 1 (a)—Poor Law (Payment of Debts) Act, 1859 (22 & 23 Viet. c. 40), ss. 1 and 4.

The defendant guardians entered into a building contract with the plaintiff for the execution of certain works required by them in the execution of their public duties. The contract contained the usual arbitration clause. The plaintiff completed the contract in May, 1901. In addition to the sum paid to him by the defendants, the plaintiff claimed a further sum for expenses incurred, as he alleged, through the acts negligence or defaults of the defendants, and delivered particulars of this claim in September, 1902. The claim was referred to arbitration, but the defendants took objection to the proceedings on the ground that they had not been commenced within the six months limited by section 1 (a) of the Public Authorities Protection Act, 1893, and also on the ground that inasmuch as the claim had not been paid within the time limited by section 1 of the Poor Law (Payment of Debts) Act, 1859, the defendants could not now pay it.

Held, (1) that a breach of a private contract entered into by guardians in execution of their public duties was not "a neglect or default" in the execution "of any public duty or authority" within section 1 of the Public Authorities Protection Act, 1893, and consequently the limit of six months prescribed by section 1 (a) for the commencement of proceedings did not apply to a reference to arbitration in respect of such breach:

(2) that the demand for a reference to arbitration was not a commencement of proceedings within the meaning of section 4 of the Poor Law (Payment of Debts) Act, 1859:

(3) that the claim for damages for breach of contract would not constitute "a debt claim or demand lawfully incurred or become due" within the meaning of section 1 of the Poor Law (Payment of Debts) Act, 1859, until the amount of the damages had been ascertained either by the award of an arbitrator or in some other manner provided by law.

Sharpington v. Fulham Guardians ... 1229

(2) Lunatics—County asylum—Weekly charge—Maximum charge—Out-county patients—Lunacy Act, 1890 (53 & 54 Viet. c. 5), s. 283.

Section 283 (3) of the Lunacy Act, 1890, does not enable the visiting committee of a pauper lunatic asylum to fix a charge in respect of pauper lunatics sent from or settled in parishes and places outside the county or borough to which the asylum belongs exceeding fourteen shillings in all. The special

POOR LAW—Continued.

powers of the subsection are consequently available only where the charge fixed under subsection (1) of the section is less than fourteen shillings a week.

Fitch v. Bermondsey Guardians 1241

(3) Maintenance—Infant pauper—Guardians' right to recover—Necessaries—Common law right—Six years' arrears—Statutory right—Legacy—Poor Law (Amendment) Act, 1849 (12 & 13 Viet. c. 103), s. 16.

The common law principle which implies an obligation on the part of a person who by means of disability cannot himself contract, to pay out of his own property for necessaries supplied to him, extends to the case of an infant pauper who becomes entitled to property, and the guardians of the poor who have maintained him can recover to the extent of six years' arrears of maintenance.

Section 16 of the Poor Law (Amendment) Act, 1849, which enables Poor Law guardians to appropriate or recover out of property belonging to a pauper the expense incurred by them in maintaining him during the previous twelve months, while leaving unaffected their common law right of recovering in respect of expenditure necessarily incurred for his benefit, gives them an additional security upon any property belonging to him for the amount expended by them during the period specified in the section, with power to recover the same in a summary manner.

Clabbon, Re 1292

(4) Maintenance—Pauper refusing to maintain himself—Refusal of work offered at labour colony—Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 3.

Upon the prosecution of an able-bodied pauper, under section 3 of the Vagrancy Act, 1824, as a person able wholly or in part to maintain himself and neglecting or refusing so to do, because he has refused work offered outside the workhouse for which he would receive board, lodging, and a small weekly wage, the Court must take into consideration the conditions upon which such work has been offered, and whether the pauper's refusal to accept it was or was not reasonable.

Poplar Union v. Martin 1012

(5) Maintenance of relatives—Running away and leaving children chargeable—Failure to remove children from workhouse after expiration of sentence for previous offence—Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4.

A parent who has been convicted under section 4 of the Vagrancy Act, 1824, of running away and leaving his children, whereby they became chargeable, and who has in consequence undergone a sentence of imprisonment, may be again convicted under the section of running away and leaving such children chargeable, if on the expiration of his sentence he fails to remove them from the workhouse and absconds.

Bannister v. Sullivan 874

(6) Officers—Overseers—Assistant overseers—Poor rate—Recovery—Distress—Illegal distress by assistant overseer—Responsibility of overseers—Poor Relief Act, 1819 (59 Geo. III. c. 12), s. 7.

Overseers of the poor are not liable for illegal acts of an assistant overseer, duly appointed to perform all the duties of an overseer, committed in the execution of a distress warrant for non-payment of rates directed to the overseers and constables.

Baker v. Wicks 1155

POOR LAW—Continued.

(7) School district—Dissolution—Board of Management—Property vested in—Consols—Transfer—Acting managers—Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 42, 43, 44, 45—Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 1—Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), ss. 1, 12—National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 22—Local Government Board—Powers—Validity of orders.

Upon the dissolution of a school district by the Local Government Board under the powers conferred by section 1 of the Metropolitan Poor Amendment Act, 1869, the incorporated board of management of such school district does not ipso facto become dissolved, and section 12 of the Dissolved Boards of Management and Guardians Act, 1870, which provides that upon the dissolution of any district the real and personal estate vested in the managers of such district "shall be transferred to and vested in" the persons who were acting as managers at the time of such dissolution, does not automatically vest the property of the incorporated board of management of the district in the acting managers at the date of such dissolution so as to obviate the necessity of the execution by the incorporated board of formal acts of transfer appropriate to the nature of the property held by it.

Quære, whether the Local Government Board, having once issued an order dissolving a district as from a certain day, have power by subsequent orders to revive it again and postpone the date of dissolution from time to time.

Quære also, whether the Local Government Board have power under section 1 of the Dissolved Boards of Management and Guardians Act, 1870, by their order to authorise acting managers to continue to act after the expiration of twelve months from the date of the dissolution of the district, unless for some definitely expressed special purpose. An order empowering the acting managers "to act in all matters lawfully entrusted to them" would seem not to be for a "special purpose" within the meaning of the section.

Morton v. Bank of England 734

(8) Settlement and removal—Boundaries—Part of one parish added to another—Effect of alteration on settlement acquired in latter parish—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61) ss. 1, 3, 6.

The amalgamation of part of one parish with another parish by Order of the Local Government Board under the Divided Parishes and Poor Law Amendment Act, 1876, and the amending Acts, does not destroy the identity of the latter parish, and therefore does not destroy settlements previously acquired in that parish.

Decision of the Court of Appeal, 1902, 1 K. B. 562; 71 L. J. K. B. 299, affirmed.

Reg. v. Tipton Inhabitants (1842) 3 Q. B. 215; 11 L. J. M. C. 89, and Dorking Union v. St. Saviour's Union, 1898, 1 Q. B. 594; 67 L. J. Q. B. 408, commented on.

West Ham Union v. London County Council 301

(9) Settlement and removal—Boundaries—Parish divided by Local Government Act, 1894—Subsequent alteration of boundaries by Provisional Order—Saving in Provisional Order for effect of previous residence—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 1 (3)—Worthing Extension Order, 1902 (scheduled to 2 Edw. VII. c. cclx.), Art. xxxi.

The parish of B. was divided by the direct operation of the Local Government Act, 1894, into two new parishes, which were named respectively B. and W., with the consequence that a settlement in the original parish of B.

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POOR LAW—Continued.

acquired by residence in the part of that parish that became the parish of W. was destroyed.

A Provisional Order of the Local Government Board of 1902 for the alteration of the boundaries of a borough made incidental alterations in the boundaries of, among other parishes, the new parishes of B. and W., and contained a saving section with reference to settlements, &c., in the parishes affected. The first two clauses of the section preserved existing settlements and status of irremovability, and the remaining clause provided that "for all purposes of settlement and removal residence prior to the commencement of this Order in any part of the existing parishes of B., H., W. T., and W. shall be deemed to have been residence in the parish in which the part is included by this Order."

Held, that this saving did not revive, as a settlement in W., the settlement in the original parish of B. that had been destroyed by the division of that parish in 1894.

East Preston Union v. Lewisham Union... .. 1077

(10) Settlement and removal—Irremovability—Residence of wife—Husband having no settlement—Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1—Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1.

Where the wife of a foreigner with no settlement of his own resides in a parish for part of a year with her husband, and for the remainder of the year in his absence abroad, but the husband has not deserted her and intends to return, she is irremovable from the parish under section 1 of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865, as being a person who has resided in the parish for one year.

Reg. v. St. George-in-the-East Inhabitants (1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90, followed.

Tewkesbury Union v. Birmingham Guardians 864

(11) Settlement—Order of justices effective as a judgment in rem—Abortive appeal—Appeal dismissed on technicality—Estoppel.

An order of two justices, adjudging the settlement of a pauper to be in a particular union, is effective as a judgment in rem and conclusive as to the settlement of the pauper at the time; and an abortive appeal against it does not rob the order of its effect as a judgment in rem, notwithstanding the fact that such appeal has not been heard upon its merits, but has been dismissed merely upon a technical ground.

Uxbridge Union v. Winchester Union 969

(12) Settlement and removal—Residential settlement—Residence wholly under sixteen—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34, 35.

A person who has attained the age of sixteen may, as from that age, have a settlement of his or her own (as distinguished from a derivative settlement) under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, by virtue of residence in a parish with his or her parent, though that residence terminated before he or she attained the age of sixteen.

Decision of the Divisional Court, 1903, 2 K. B. 627; 1 L. G. R. 889; 72 L. J. K. B. 801, affirmed.

Reg. v. Elvet Inhabitants (1859) 2 E. & E. 266; 29 L. J. M. C. 17, and Highworth and Swindon Union v. Westbury-on-Severn Union (1889) 14 App. Cas. 465; 59 L. J. M. C. 29, followed.

West Ham Union v. Holbeach Union 853

POOR RATE.

(1) **Appeal—Appearance of assessment committee as respondents—Consent of guardians—Notice of proposal to give consent—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 2—Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 12.**

Section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which provides that where under the Poor Law Amendment Act, 1834, and the amending Acts, the consent in writing of the majority of the guardians of a union is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians after not less than fourteen days' notice to each guardian, deals with cases where the consent in writing of a majority of the guardians was expressly required, and not with cases where all that was required was the consent of the board of guardians, and where consequently the consent could be effectively given by a resolution of the guardians carried in the ordinary way. The section, therefore, does not apply to the consent of the guardians to the appearance of the assessment committee on rating appeals required by section 2 of the Union Assessment Committee Amendment Act, 1864.

Smith v. Leigh Union 288

(2) **Appeal—Quarter sessions—Time—Next practicable sessions—Repayment of excess—Poor Relief Act, 1743 (17 Geo. II. c. 38), s. 4—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1—Poor Rate Act, 1801 (41 Geo. III. c. 23), s. 3.**

Where an objection to the valuation list is made within the period for which a poor rate based on that list is made, and is not unreasonably delayed, an appeal against that rate to quarter sessions by the person objecting is not out of time if made to the next practicable sessions after the objection is determined, although it appear that if the appellant had taken his objection to the valuation list with greater promptitude after the making of the rate his objection would have been determined in time to have allowed of his appealing to earlier sessions.

Where a court of quarter sessions on appeal against a poor rate payable by instalments, of which one instalment has been paid, reduce the rateable value of the premises, the court is bound under section 8 of the Poor Rate Act, 1801, to order the repayment of the excess paid in respect of the first instalment, and cannot limit the effect of the reduction to subsequent instalments.

Imperial and Grand Hotels Co. v. Christchurch Union 1370

(3) **Exemptions—Property occupied for Crown purposes—Occupation partly for Crown purposes and partly for other purposes—Premises of volunteer corps—Premises let for profit—Occupation—Caretaker—Music and dancing licences in name of caretaker.**

The user for profit for purposes other than Crown purposes (such as concerts and balls) is sufficient to deprive a volunteer drill hall of the exemption from poor rates to which the premises would otherwise be entitled as being occupied for the purposes of the Crown.

The circumstance that music and dancing licences are granted in respect of such premises in the name of the caretaker, a servant of the commanding officer of the volunteer battalion at weekly wages, does not render the caretaker liable to be rated, for the occupation of the servant is that of the master.

Lewis v. Durham Union 533

(4) **Occupation—House to let—Caretaker—House inhabited by servant of owner as caretaker and for the purpose of service—Master's occupation by servant.**

Although, semble, the circumstance that the owner of a house which is otherwise empty puts a caretaker to live in it for the mere purpose of guarding

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POOR RATE—Continued.

it from depredation, does not render the owner rateable as being in rateable occupation of the house by his servant, the owner of a house otherwise empty is rateable in respect of it, as being in occupation by his servant, if he causes his servant to live in the house not only for the purpose of guarding the house but also for the purpose of discharging other duties devolving upon him as such servant.

Bertie v. Walthamstow Overseers 1178

(5) Recovery—Distress—Costs of levy—Distress (Costs) Act, 1817 (57 Geo. III. c. 93)—Distress (Costs) Act, 1827 (7 & 8 Geo. IV. c. 17)—Distress for Rates Act, 1849 (12 Vict. c. 14), s. 1.

The Distress for Rates Act, 1849, by authorising, in connection with the levy of distress for poor rates and certain other rates, the levy of the reasonable charges of taking, keeping, and selling the distress, has removed, as regards these rates, the limitations imposed on such charges, where the amount does not exceed £20, by the Distress (Costs) Acts, 1817 and 1827.

Hill v. Pannifer 381

NOTE.—This decision was overruled by the Court of Appeal in *Headland v. Coster* (December 11, 1904), of which a report will appear in due course.

(6) Recovery—Illegal distress—Responsibility of overseers.

See Poor law (6) 1155

(7) Recovery—Occupier for term not exceeding three months—Weekly tenancy—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 1, 2.

In section 1 of the Poor Rate Assessment and Collection Act, 1869, the words "occupier of any rateable hereditament let to him for a term not exceeding three months" mean an occupier who has not an assured tenancy for more than three months. Accordingly an occupier holding on a tenancy from week to week terminable at a week's notice is entitled to the benefit of section 2 of the Act, and cannot be compelled to pay to the overseers at one time a greater amount of the poor rate than would be due for one quarter of the year, though his weekly tenancy has subsisted for many months, and may continue for an indefinite period.

Hammond v. Farrow 817

(8) Recovery—Period—Apportionment on change of occupation—Title of rate—Retrospective rate—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 14, 16.

The objection that a poor rate, good in point of form, is in fact retrospective, cannot be taken by way of defence to proceedings for the enforcement of the rate, but by appeal against the rate only.

The period of a poor rate, for the purposes of apportionment in cases of change of occupation, commences with the date of the rate, i.e., the date of allowance. Consequently a person who is in occupation at that date cannot claim an apportionment of the rate in his favour on the ground that the rate in fact covers expenses incurred before his occupation commenced.

It is not necessary that the heading of a poor rate should state the commencement of the period for which it is made otherwise than by stating the date when it is made. The form of heading prescribed by the Agricultural Rates Order, 1896, is therefore not open to objection on the ground that it does not sufficiently state the period of the rate.

Cheney v. Tallowin 1338

(9) Recovery—Tender of part of rate—Distress warrant issued for full amount—Commitment—Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2. Sched.

On an application for a distress warrant for the recovery of poor rate the justices have jurisdiction, at their discretion, to issue a distress warrant for

POOR RATE—Continued.

the full amount of the rate, notwithstanding a tender in court of part of it by the ratepayer; and, in default of payment or of sufficient distress for the whole, they have jurisdiction, if they think fit, to issue a warrant of commitment.

Rex v. Gillespie, 1904, 1 K. B. 174; 2 L. G. R. 59; 73 L. J. K. B. 106, explained.

Ex parte Wiles 103

(10) **Recovery—Tender of part of rate—Refusal of justice to issue warrant for the whole amount—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 4—Distress for Rates Act, 1840 (12 & 13 Vict. c. 14), ss. 1, 5, 8, Schedule.**

Where, on the hearing of an application for a distress warrant for the recovery of poor rate, the ratepayer makes a bonâ fide tender of part of the amount due, while declining to pay the balance, the justices may refuse to issue a warrant for more than the balance, though the overseers have not accepted such tender.

Rex v. Gillespie 59

PRIVATE IMPROVEMENT EXPENSES.

(1) **Recovery.**

See Dangerous buildings 135

(2) **Tenant for life and remainderman.**

See Tenant for life and remainderman 668, 1050

PRIVATE STREET WORKS.

See Streets.

PROCEEDINGS.

Metropolitan borough council—Rescission of resolution.

See Officers (1) 581

RATES.

(1) **Exemptions—Special statutory exemption—Exemption whether confined to existing rates—Fixed composition payable “for ever hereafter”—Consolidated rate in City of London—52 Geo. III. c. 49, ss. 3-5-2 & 3 Will. IV. c. 66, ss. 2, 3—City of London Sewers Act, 1848 (11 & 12 Vict. c. clix.), ss. 169, 187.**

The 52 Geo. III. c. 49 extended the time for the exercise of certain statutory powers then vested in the Treasury for the purchase of the “legal quays” (which were at that time private property) in front of the old custom house in Lower Thames Street, in the City of London, and gave the Treasury power for the acquisition of certain premises in Lower Thames Street for the purpose of erecting a new custom house in substitution for the old custom house.

Section 3 of the Act provided that an annual sum of £220 12s. 10½d., which was then paid by the Treasury in respect of the old custom house, and a like sum which was then paid as rates in respect of the legal quays, to the collectors of the parochial and ward rates in the ward of T. and in the parish of A. in the said ward should for ever thereafter be paid out of consolidated customs to the collectors of the rates to whom the sums were then paid and should be considered as part of the produce of such rates. Section 4 of the Act provided for the payment of a contribution in lieu of rates in respect of the premises to be purchased for the site of the new custom house. And section 5 enacted that the old custom house and “the said premises in Lower

RATES—Continued.

Thames Street" should be exempt from all rates and assessments although the same might become private property.

By the 2 & 3 Will. IV. c. 66 provision was made as to the sale of the legal quays and the site of the old custom house. And by sections 2 to 4 of that Act it was provided that the two sums of £220 12s. 10½d. each referred to in section 3 of the 52 Geo. III. c. 49 should after the sale of the property by the Treasury cease to be payable out of the customs and become payable by the proprietors for the time being of the property.

Held—(1) That the legislation had the effect of putting the legal quays in the same position as the site of the old custom house as regards rates.

(2) That the provisions exempting the property in the hands of private individuals from rates, except to the extent of the fixed contribution, were not confined to rates existing at the time of the Acts, but extended to future rates.

Sion College v. London Corporation, 1901, 1 K. B. 617; 70 L. J. K. B. 369, distinguished.

(3) That the privilege attaching to the property was not taken away as regards the consolidated rate by the City of London Sewers Act, 1848, notwithstanding the provisions of that Act declaring that such rate should be levied on property in the City whether the occupiers were liable to poor rate or were not liable to poor rate by reason of the property being situate in any precinct or extra parochial place or otherwise, and that churches, prisons, public buildings, &c., should be rateable to such rate.

Netherlands Steamboat Co. v. London Corporation ... 840

(2) **General district rates—Assessment on higher or lower scale—Sporting rights—Rating Act, 1874 (37 & 38 Vict. c. 54), ss. 3, 6—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (1, b).**

Sporting rights which are severed from the occupation of land and are let are assessable on the full rateable value to general district rates.

Alton Urban District Council v. Spicer ... 507

(3) **Water rate—Unequal water rate—Extension of borough—General rate in added area not to exceed, when added to poor rate, borough rate, and other rates, a given amount in pound.**

See Water (8)... 473

REGISTRATION OF ELECTORS.

(1) **Lodger franchise—Declaration of claimant—Evidence—Notice to claimant to attend—Powers of revising barrister—Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), ss. 42, 65—Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 23, 28 (10), (11), 36.**

A revising barrister cannot by notice, written or verbal, make the personal attendance at the revision court of a claimant, whose claim to a vote is objected to, a condition of the allowance of his vote.

Though in the case of a claim to vote as a lodger the declaration annexed to the notice of claim is, by section 23 of the Parliamentary and Municipal Registration Act, 1878, made *prima facie* evidence of the qualification, the right of the revising barrister to disallow the claim is not confined to the case of such *prima facie* proof of the ground of objection as is described in section 28 (10) of that Act. That subsection does not prevent the revising barrister from considering any proper evidence against the claim, and, if he thinks right, giving effect to it by a decision adverse to the claim.

Jenkins v. Grocott ... 202

(2) **Occupation qualification—Distinction between ordinary occupation and occupation by virtue of office or service—School-master.**

Upon the question whether a claimant who enjoys the use of a dwelling-

REGISTRATION OF ELECTORS—Continued.

house in connection with a post as officer or servant held by him is entitled to have his name inserted in Division I. of the occupiers' list as the full occupier of the dwelling-house, or in Division II. as a person entitled under the service franchise, the test is whether the occupation of the dwelling-house is in fact necessary for the performance of his services, or whether he is permitted but not required to occupy it. Accordingly a schoolmaster permitted to occupy a dwelling-house adjoining the school building, but who might live elsewhere, so long as he attended to his duties in the school during certain hours in the day, is entitled, the other necessary conditions being fulfilled, to have his name inserted in Division I.

Dover v. Prosser 156

(3) Occupation qualification—Occupation as tenant—Husband occupying house owned by his wife as her tenant—Rent paid by husband to wife.

A husband who resides with his wife in a house of which she is the owner, but who has agreed to pay, and does pay, her rent for the house, occupies the house as tenant, and is therefore, the other necessary conditions being fulfilled, entitled to be placed on Division I. of the occupiers' list.

Hall v. Michelmore (1901) 86 L. T. 17; 18 Times L. R. 33, distinguished.

Pearce v. Merriman 139

RES JUDICATA.

(1) Pauper settlement—Adjudication—Order appealed against—Appeal dismissed on technicality.

See Poor law (11) 969

(2) Private street works—Decision of justices that street is a highway repairable by inhabitants at large.

See Streets (18) 270

RESCISSION OF RESOLUTION.

Metropolitan borough council.

See Officers (1) 581

REVENUE.

(1) Income tax—Deduction of income tax from interest on loans—Accountability of borrower—Loan charged on lands of local authority—Lands occupied by local authority—Interest exceeding value of lands—Income Tax Act, 1842 (5 & 6 Viet. c. 35), s. 60, No. IV. rule 10.—Customs and Inland Revenue Act, 1888 (51 & 52 Viet. c. 8), s. 24 (3).

In round figures the London County Council in the year 1900-1 paid £1,371,000 in interest on loans, and in the same year received rents and profits, charged to income tax partly under schedule A, and partly under schedule D, amounting to £837,000, and themselves occupied lands and buildings of which they were themselves the owners of the annual value of £118,000 in respect of which they paid income tax under schedule A.

The Council's loans and the interest thereon were charged on, inter alia, the lands and buildings of the Council, including those in their own occupation, and the rates levied by them.

Held, that under the circumstances, the Council were entitled to retain for their own use, out of the deductions of income tax made by them on paying interest on their loans, the equivalent of the income tax on the lands of the annual value of £118,000 in their own occupation, as well as the equivalent

REVENUE—Continued.

of the income tax paid by them on their revenue of £837,000, and were accountable to the Crown for the residue of the income tax deducted only.

Attorney-General v. London County Council 1130

(2) Stamp duty—Purchase of property under authority of statute—Purchase of specific property authorised by local Act—Production of instrument of conveyance—Default of production—Duty on entire consideration for sale authorised including price of personal chattels—Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12.

The provision in section 12 of the Finance Act, 1895, that where by virtue of any Act any person is authorised to purchase property, such person shall, within a specified time, produce to the Commissioners of Inland Revenue an instrument of conveyance of the property duly stamped with the ad valorem duty payable on a conveyance on sale of the property is not confined to real property, but in the case of a purchase under such statutory authority as is contemplated by the section extends to the whole of the property, personal as well as real, which the purchaser is empowered to purchase.

Held, therefore, that a municipal corporation who were empowered by an Act to purchase the undertaking of a particular electric light company, comprising both real and personal property, and who purchased such undertaking accordingly, were liable under the section for ad valorem stamp duty on the whole consideration, and not only on so much thereof as related to the realty.

Eastbourne Corporation v. Attorney-General 789

RIVER.

Riparian owner—Bed of stream—Island—Ownership of soil—Presumption of "medium flum aquæ"—River running along waste.

By a Commons Act certain common and waste lands were vested in the plaintiffs freed and discharged from manorial rights, but upon the trusts and with the powers declared by the Act for the benefit of the inhabitants of a certain borough. The lands were bounded on one side by a river, and the Municipal Corporation Boundaries Commission Report, 1837, showed a dotted line along the middle of the river as one of the boundaries of the borough. At the locus in quo of this action, the river flowed round a considerable island probably as old as the banks themselves. The plaintiffs were unable to show a documentary title to this island, and it was not proved to be vested in any other person.

In an action against the defendants, the owners of lands on the opposite bank of the river, for an injunction to restrain them from taking gravel from the river-bed at a spot on the island which was on the plaintiffs' side of a line drawn down the middle of the stream and across the island, but was not on the plaintiffs' side of a line drawn down the middle of the arm of the stream flowing on their side.

Held, that the plaintiffs' action failed, as the rule that, where a stream flows between two manors or properties, in the absence of evidence to the contrary the boundary is to be taken to be the medium flum aquæ, should be applied where there is an island by drawing a medium flum as the boundary through each arm of the stream.

Great Torrington Commons Conservators v. Moore Stevens 397

SANITARY CONVENIENCES.

(1) Public conveniences—Conveniences in subsoil of street—Land tax—Land Tax Act, 1797 (38 Geo. III. c. 5), s. 4—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 44, 45.

A permanent public underground convenience, constructed under a public street in London by a local authority under section 44 of the Public Health (London) Act, 1891, is an hereditament had or held by the authority within

SANITARY CONVENIENCES—Continued.

the meaning of section 4 of the Land Tax Act, 1797, and is consequently chargeable to land tax.

So held by the majority of the Court (Collins M.R. and Stirling L.J., Mathew L.J. dissenting), reversing the decision of Wright J., reported, 1904, 1 K. B. 19; 2 L. G. R. 193; 73 L. J. K. B. 8.

Westminster City Council v. Johnson; Westminster City Council v.

Fuller 1378

(2) Public conveniences—Metropolis—Construction of convenience under street—Colourable use of statutory powers—Subway—Trespass—Mandatory injunction—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44

In constructing a sanitary convenience under the powers conferred by the Public Health (London) Act, 1891, s. 44, the sanitary authority may make reasonable and proper approaches under the roadway for the purposes of entry and exit, but may not make approaches of a size and character not required for these purposes, but intended to make the approaches available as a subway for the use of foot passengers in crossing the street; and a mandatory injunction will be granted to remove so much of the works as are in excess of the authority's statutory powers at the suit of a person whose land they have used for the purpose.

Decision of Joyce J., reported 1902, 1 Ch. 269; 71 L. J. Ch. 34, reversed.

Per Vaughan Williams L.J. The meaning of subsection 2 of section 44 of the Public Health (London) Act, 1891, is that, if the sanitary authority use the subsoil of the road for the purposes specified, then ipso facto the subsoil vests in them.

London and North-Western Railway v. Westminster City Council ... 638

(3) Public conveniences—"Proper and convenient situation"—Nuisance—Detriment to adjoining property—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39.

The urban authority of a seaside resort decided to erect a public sanitary convenience, and selected a site, freely given by the owner, on the slope of the cliffs some 30 feet from the plaintiff's good-class private houses, and close to public seats used by residents and visitors for the salubrity of the air and the amenity of the view. The plaintiffs, in a quia timet action, complained of a private nuisance likely to arise from noise and smell, and of a public nuisance in respect of the erection of the convenience on the selected site.

Held, on the facts, that no public or private nuisance was to be apprehended, and that the defendant council had reasonably exercised their powers under section 39 of the Public Health Act, 1875, in resolving to erect a convenience of this kind, and in selecting the site in question.

Mayo v. Seaton Urban District Council 127

SCAVENGING AND CLEANSING.

Cleansing of cesspools—Liability of local authority.

See Sewers (12) 174

SCHOOL.

Water supply—Domestic purposes.

See Water (4) 567

See also Education.

SCHOOL BOARD.

See Education.

SCHOOL DISTRICT.

Dissolution — Property vested in board of management — Transfer.

See Poor Law (7) 734

SETTLEMENT.

See Poor Law, settlement and removal.

SEWERS.

(1) "Drain" or "Sewer"—Conduit leading to no outlet—Conduit laid by trespasser—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

A conduit in order to be a "sewer" within the Public Health Act, 1875, must be, in some form or other, a line of flow by which sewage or other liquid matter of some kind, such as would be conveyed through a sewer, is taken from one point to another point and there discharged. It must have a terminus a quo and a terminus ad quem.

If by way of trespass a conduit such as to fall within the definition of "sewer" has been laid upon land without the knowledge or sanction of the landowner, the landowner upon ascertaining the fact may cause it to be removed, but if he permits it to remain, adopting the act of the trespasser, it will vest as a "sewer" in the local authority.

A conduit is none the less a sewer because at a particular point in its course there is a cesspool which existed before the conduit was laid, and which has been converted into a catchpit, nor because at a particular point in its flow the sewage has been so treated as to have become innocuous.

Pakenham v. Ticehurst Rural District Council 19

(2) "Drain" or "Sewer"—Metropolis—Drainage by combined operation—Plan showing no details approved by local authority—Deviation from original plan—Stack pipe of one house receiving water from roof of adjoining house—Wrongful departure from authorised plan—Rights as between wrongdoer and local authority—Devolution of property—Drain found on inspection to be laid contrary to directions—Offending party—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 74, 76, 83, 250.

Where a plan for the drainage of a group of houses in London by a combined operation showing no details has been approved by the local authority, and the drainage has in fact been carried out in a particular manner under the supervision of the surveyor of the local authority, it may be inferred that the details were left by the local authority to be dealt with by the surveyor. And in that case the pipe conveying the drainage of the houses is a drain, as being a drain for draining the group of houses by a combined operation under an order of the local authority, although the separate drains of the two houses are connected in a manner differing from that indicated on the approved plan.

Greater London Property Co. v. Foot, 1899, 1 Q. B. 972; 68 L. J. Q. B. 628, and Gorringe v. Shoreditch Borough Council (1902) 86 L. T. 592, discussed.

Query whether the fact that a stack pipe of one house in fact conveys to the drain of that house the water from the roof of an adjoining house not ordered by the local authority to be drained in combination with it makes the drain a "sewer" below the point of connection.

Silles v. Fulham Borough Council, 1903, 1 K. B. 829; 1 L. G. R. 643; 72 L. J. K. B. 397, commented on.

Where a pipe for the drainage of two houses is unlawfully laid contrary to the order of the local authority, the wrongdoer himself cannot take advantage of his wrongful act by alleging as between himself and the local authority that the pipe is a sewer and not a drain. And a person claiming under the wrongdoer and owning both the houses is in the same position in this respect as the wrongdoer himself, though, semble, it is otherwise where the two houses have passed to separate owners.

SEWERS—Continued.

Kershaw v. Taylor, 1895, 2 Q. B. 471; 64 L. J. M. C. 245, explained.

The provisions of section 83 of the Metropolis Management Act, 1855, under which where a drain is found on inspection to have been laid contrary to the directions of the local authority the offending party is liable in a penalty, and the local authority may require the person making the drain to reinstate it in accordance with their directions, are available against the original wrongdoer only and not against his successors in title.

Heaver v. Fulham Borough Council 672

(3) "Drain" or "sewer"—Premises within the same curtilage—Group of houses with common access and common accommodation—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

A group of a considerable number of houses are not "premises within the same curtilage" within the meaning of that expression as used in the definition of "drain" in section 4 of the Public Health Act, 1875, though they have a common access by means of a court, and certain accommodation such as ashpits and water-closets in common. A conduit for the drainage of such a group of houses is therefore a "sewer" and not a "drain" within the meaning of that Act.

St. Martin-in-the-Fields Vestry v. Bird, 1895, 1 Q. B. 428; 64 L. J. Q. B. 230, followed.

Harris v. Scurfield 974

(4) Drains—"Single private drain"—Pipe in private ground draining houses belonging to different owners—Proceedings taken against one owner under nuisance clauses of Public Health Act—Work done by owner under protest—Compulsion—Recovery of expenses from local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 41, 94—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.

A local authority, in whose district section 19 of the Public Health Acts Amendment Act, 1890, was in force, served notice in the statutory form of a notice under section 94 of the Public Health Act, 1875, upon the plaintiff, as the owner of three houses, requiring her to abate a nuisance arising from a conduit (described in the notice as a drain) laid wholly in private land and draining those houses, together with another house of the plaintiff's and some twelve others belonging to other owners, into a sewer laid under a road. The plaintiff, who was aware that the conduit drained the houses in question, executed the work under protest and sued the local authority for the expense to which she was put.

Held by Channell J.—1. That, though in the absence of authority he would have decided otherwise, he was bound by **Bradford v. Eastbourne Corporation**, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, to hold that the conduit was a "single private drain" within section 19 of the Act of 1890, and that he must regard **Thompson v. Eccles Corporation**, 1904, 2 K. B. 1; 2 L. G. R. 556; 73 L. J. K. B. 497, as having been decided per incuriam.

2. That the fact that the pipe was a single private drain did not prevent its being a sewer which the local authority were bound to maintain subject to their right in the circumstances contemplated by section 19 of the Act of 1890 to take proceedings under that section to cause it to be repaired at the expense of the owners of all the houses served by it.

3. That the local authority not having taken proceedings under section 19 of the Act of 1890, no liability on the part of the owners had arisen, and that the plaintiff was therefore entitled to recover, on the ground that she had done the work under pressure in the nature of compulsion from the authority who were themselves bound to do it.

North v. Walthamstow Urban District Council (1898) 67 L. J. Q. B. 972, explained and followed.

Haedicke v. Friern Barnet Urban District Council 1098

NOTE.—This decision was reversed in the Court of Appeal: see 8 L. G. R. 20.

SEWERS—Continued.

(5) **Drains**—"Single private drain"—Pipe draining several houses belonging to one owner and discharging into single private drain taking also drainage of houses belonging to another owner—Public Health Act, 1875 (38 & 39 Viet. c. 55) ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Viet. c. 59), s. 19.

Section 19 of the Public Health Acts Amendment Act, 1890, which, under certain circumstances, enables a local authority to cause a "single private drain," by which two or more houses belonging to different owners are connected with a public sewer, to be repaired at the expense of the owners, and defines "drain" as including, for the purposes of that section, a drain used for the drainage of more than one building, does not apply to a drain pipe laid in private property and receiving the drainage of several houses belonging to the same owner which discharges into a pipe which receives also the drainage of houses belonging to other owners, and which is itself a single private drain to which the section applies.

Jackson v. Wimbledon Urban District Council ... 545

NOTE.—An appeal in the above case stands adjourned for further findings of fact.

(6) **Drains**—"Single private drain"—Pipe in private ground draining houses "belonging to different owners"—Structural alteration of pipe—Public Health Act, 1875 (38 & 39 Viet. c. 55), ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Viet. c. 59), s. 19.

Section 19 of the Public Health Acts Amendment Act, 1890, which provides that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain," proceedings may be taken under section 41 of the Public Health Act, 1875, and which defines drain as including, for the purposes of the section, a drain used for the drainage of more than one building, applies only in cases where, apart from the section, the conduit is "private" in the sense of not being a sewer vested in and repairable by the local authority, e.g., where the conduit is a sewer made for "profit" within the meaning of section 13 of the Act of 1875.

Hill v. Hair, 1895, 1 Q. B. 906; 64 L. J. M. C. 164, approved and followed.

Bradford v. Eastbourne Corporation, 1896, 2 Q. B. 205; 65 L. J. Q. B. 571, not followed.

Section 19, however, is not confined to cases where no two of the houses drained by the "private drain" belong to the same owner, for the expression "belonging to different owners" means not all belonging to the same owner.

The power of the local authority under section 41 of the Public Health Act, 1875, to require the necessary works to be done where, on such examination as is mentioned in the section, the drain appears to be in bad order or condition, or to require alteration or amendment, extends to requiring a structural alteration of the drain necessary to abate a nuisance.

Southwold Corporation v. Crowdy (1903) 1 L. G. R. 899, approved.

Thompson v. Eccles Corporation ... 556

NOTE.—This decision was reversed in the Court of Appeal: see 3 L. G. R. 20.

(7) **Intercepting sewer constructed under local Act to serve certain districts**—Extension of one of such districts—Drainage of added area.

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(8) **Low-lying land in Metropolis**—Land capable of being drained into sewer by gravitation.

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(9) **Meaning of "sewer"—Conduit for drainage of several houses terminating in cesspool on private land.**

See Nuisance (1) 222

(10) **Negligent restoration of highway after laying sewer.**

See Highways (13) 756

(11) **Nuisance—Abatement under compulsion—Metropolis—Intimation to owner of premises to abate nuisance from drain—Drain discovered to be a sewer—Recovery of expenses from local authority.**

See Nuisance (2) 617

(12) **Open channel for surface water—"Drain"—"Sewer"—Nuisance—Scavenging and cleansing—Cleansing of cesspools—Liability of local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 19, 21, 42, 43.**

A channel or open drain for surface water was constructed between a road and the adjoining pathway and received the surface water from this road and rain water from adjacent houses. In front of two houses in the road was a cesspool receiving the sewage from these houses from which sewage accidentally overflowed or percolated into the channel and caused a nuisance. The local authority had contracted for the cleansing of cesspools in the district under section 42 of the Public Health Act, 1875.

Held, by Phillimore J., that the local authority having committed the cleansing of this cesspool to a contractor were not liable for their not being properly emptied.

Held also, by Phillimore J. and by the Court of Appeal, that the open channel was a "sewer" within the definition in section 4 of the Public Health Act, which vested in the local authority under section 13, and that they were responsible for its cleansing under section 19.

Kinson Pottery Co. v. Poole Corporation, 1899, 2 Q. B. 41; 68 L. J. Q. B. 819, discussed.

Wilkinson v. Llandaff and Dinas Powis Rural District Council ... 174

SMOKE.

(1) **Metropolis—Chimney of private dwelling-house—West End club premises.**

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(2) **Metropolis—Funnel of steamer—Prohibition order—Specification of works necessary to prevent recurrence.**

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(3) **Metropolis—Prohibition of recurrence of nuisance—Proceedings taken without previous proceedings for abatement—Specification of works.**

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SPORTING RIGHTS.

Rates—General district rate—Assessment on higher or lower scale.

See Rates (2) 507

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Purchase of property under statutory authority—Purchase of specific property authorised by local Act—Personal property.

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43 Eliz. c. 2 (Poor Relief Act, 1601), s. 4.—See Poor rate (10) ...	59
17 Geo. II. c. 38 (Poor Relief Act, 1743), s. 4.—See Poor rate (2) ...	1370
38 Geo. III. c. 5 (Land Tax Act, 1797), s. 4.— See Sanitary Conveniences (1) ...	1378
41 Geo. III. c. 23 (Poor Rate Act, 1801), s. 8.—See Poor rate (2) ...	1370
52 Geo. III. c. 49 (Legal Quays in City of London), ss. 3-5.— See Rates (1) ...	840
57 Geo. III. c. 93 (Distress (Costs) Act, 1817).—See Poor rate (5) ...	381
59 Geo. III. c. 12 (Poor Relief Act, 1819), s. 7.—See Poor law (6) ...	1155
5 Geo. IV. c. 83 (Vagrancy Act, 1824), s. 3.—See Poor law (4) ...	1012
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6 Geo. IV. c. 50 (Juries Act, 1825), s. 10.—See Jury lists ...	965
7 & 8 Geo. IV. c. 17 (Distress (Costs) Act, 1827).—See Poor rate (5) ...	381
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32 & 33 Vict. c. 41 (Poor Rate Assessment and Collection Act, 1869), ss. 1, 2.—See Poor rate (7) ...	817
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1 Edw. VII. c. 22 (Factory and Workshop Act, 1901), s. 14.— See Landlord and tenant (3)	1190
———— ss. 14, 149.—See Factories and Workshops (4)	809
———— s. 101.—See Landlord and tenant (6, 7); Bakehouses (3)	879, 1004, 1171

STATUTES—Continued.

2 Edw. VII. c. 42 (Education Act, 1902).—See Education (1)...	1295
ss. 1, 5, 6, 7, 10, 11, 13, 23, 25.—See Education (2) ...	320
ss. 1, 5, 25, Sched. II. (1).—See Education (6) ...	1324
ss. 17 (1), 21 (3).—See Education (4) ...	1222
sched. II. (1, 22).—See Education (5)...	821
3 Edw. VII. c. 36 (Motor Car Act, 1903), s. 1.—See Highways (9) ...	913

STREETS.

(1) Advertising hoarding—Local Act—Land “abutting on or adjoining” street—Hoarding separated from street by strip of land—Ilfracombe Improvement Act, 1900 (63 & 64 Vlet. c. cxxiii.), s. 87.

By a local Act a penalty was imposed upon anyone who erected a hoarding wholly or partly for advertising purposes, in or abutting on or adjoining any street without the consent of the Council

Held, that a hoarding erected in the centre of a hedge bank, and thus divided from the street by a continuous narrow strip of private land throughout its length, did not abut on or adjoin the street within the meaning of the Act.

Barnett v. Covell 215

(2) Breaking up to lay pipes—Water mains—Reinstatement of street—Metropolis—Expenses—Charge for supervision—Metropolis Management Act, 1855 (18 & 19 Vlet. c. 120), s. 114.

Where a metropolitan local authority employ contractors to reinstate streets broken up by a company in pursuance of statutory powers they may, under section 114 of the Metropolis Management Act, 1855, recover from the company not only the sum actually paid by the authority to their contractors, but also a proper additional sum in respect of supervision over the work actually exercised by the authority's officers; for the expenses of such supervision are within the meaning of the section expenses of filling in the ground and making good the pavement.

New River Co. v. Westminster City Council 1024

NOTE.—An appeal in this case, sub nom. Metropolitan Water Board v. Westminster City Council came on on Dec. 5, 1904; but was adjourned for further findings of fact by the magistrate who stated the case for the High Court.

(3) Building line—Metropolis—Advertisement cases fixed to front of premises—“Building or structure”—London Building Act, 1894 (57 & 58 Vlet. c. cxxiii.), s. 22.

The respondents were charged before a magistrate with a breach of section 22 of the London Building Act, 1894, which in certain cases prohibits the erection, without the consent of the London County Council, of any “building or structure” beyond the general line of building in a street, in respect of certain advertising cases affixed by him to buildings in a street.

These cases were from 2 to 5 feet in width and from 7 to 5 feet in height. They were constructed of sheet iron and supported by strong wrought iron supports securely cut and pinned through the walls of the building. The outer side of each case was covered with a wooden frame carrying canvas or linen lined with advertisements, intended to be illuminated by electric light. They projected some 10 inches beyond the general line of building.

The magistrate refused to convict, and stated a case in which he stated that in his opinion the cases were not structures within the meaning of the Act, and that they were in the nature of mere excrescences which could be removed at will without injury to the fabric, and that they therefore could not be said to be a bringing forward of the main building such as was contemplated by the statute.

EEEEEE 2

STREETS—Continued.

Held, by the majority of the Court (Lord Alverstone C.J. and Kennedy J., Wills J. dissenting), that the magistrate's decision could not be disturbed as it did not appear that he was wrong in law.

Hull v. London County Council, 1901, 1 Q. B. 580; 70 L. J. Q. B. 364, commented on.

London County Council v. Illuminated Advertisements Co. ... 905

(4) Building line—Metropolis—Length of street to be considered in defining general line of buildings—Tribunal of Appeal—Costs—London Building Act, 1894 (57 & 58 Vict. c. cccxiii), ss. 25–27, 183.

It is competent to the Tribunal of Appeal under the London Building Act, 1894, on appeal to them from a certificate of the superintending architect defining the general line of buildings to take into consideration a greater or less length of street than that taken into consideration by the superintending architect in defining such line.

The Tribunal of Appeal have power on an appeal to them to award a party to the appeal a lump sum for costs.

In re London Building Act, 1894, and in re London County Council 1265

(5) Building line—Projection in front of front main wall of adjoining house—Statutory obligation—Statutory penalty—Imposition—Continuing offence—Subsequent action by Attorney-General—Injunction—Mandatory order—Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3.

The statutory penalty prescribed by section 3 of the Public Health (Buildings in Streets) Act, 1888, for offences against the enactment contained in that section, is not the only remedy available in respect of a breach of the statutory obligation thereby imposed. The Act is a public general statute, and where an offence against the section has been committed, the Attorney-General, on behalf of the public, can sue for a mandatory order to pull down the offending building, notwithstanding that the statutory penalty has been already imposed in respect of the same building.

Attorney-General v. Wimbledon House Estate Co. ... 826

(6) Covenant to pay a proportionate share of repairing and maintaining a road until undertaken by local authority—Standard of repair—Reconstruction—Work in excess of covenant—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

The plaintiff, in developing a building estate, granted a lease of one piece of land and conveyed another piece of land to the defendant, the property all abutting on a newly-made and incomplete road. The lease and the conveyance both contained covenants by the defendant, in similar but slightly different language, to pay a proportionate share, to be fixed by the plaintiff's surveyor, of repairing and maintaining the road until undertaken by the local authority. For three years the defendant paid small contributions in common with other frontagers, but when the plaintiff, by arrangement with the local authority, in order that the road might be taken over by them, expended a large sum on extensive works on the road, the defendant declined to pay his apportioned share of the outlay.

Held, that the defendant's covenants did not extend to the work done, which was practically a reconstruction of the road, to which the defendant was not liable to contribute; and that as the plaintiff declined to amend his claim by asking for an inquiry as to what part of the work could be called repairs, the action must be dismissed with costs.

Scott v. Brown ... 441

NOTE. The order of *Joyce J.* in the above case was varied by the Court of Appeal, Dec. 1, 1904. A report of the case in the Court of Appeal will appear in due course.

STREETS—Continued.

(7) Lighting—Lamp fixed by local authority in private passage—Objection by owner of passage to the laying of gas pipe—Proceedings by local authority against gas company—Gasworks Clauses Act, 1847 (10 Vict. c. 15), ss. 6, 7—Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41) ss. 24, 27, 36—Liverpool Improvement Act, 1842 (5 & 6 Vict. c. cvl.), ss. 152, 156—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

Where an urban authority take proceedings for penalties against a gas company, with whose Acts the Gasworks Clauses Acts are incorporated, under section 36 of the Gasworks Clauses Act, 1871, in respect of the failure of the company to supply gas to a public lamp which the urban authority have erected within 50 yards of one of the company's mains, it is a good defence, having regard to section 7 of the Gasworks Clauses Act, 1847, for the company to show that the lamp is in a passage not dedicated to the public use, and that the owners of the passage object to the laying of a pipe in the passage to connect the lamp with the main, notwithstanding that the passage may be a "street" within the Public Health Act, 1875, in which the urban authority could cause means of lighting to be provided under section 150 of that Act.

Quære, whether proceedings under section 36 of the Act of 1871 for refusal to supply gas to a public lamp are available in any case until the lamp has actually been connected with the main.

Bellamy v. Liverpool United Gas Light Co. ... 1182

(8) Meaning of "street"—Forming and laying out of street for foot traffic—Metropolis—Market or bazaar—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), ss. 5, 7, 8.

A court in the Metropolis laid out on ground cleared of ancient buildings, with 55 places of business on one side with 24 independent shops on the other, and having six or seven means of access for persons on foot from the surrounding streets through the buildings, is a street intended for foot traffic within section 7 of the London Building Act, 1894, and requires the sanction of the London County Council to its formation, though the control of the entrances is retained by the owner, who closes the main gates at night and on certain days, and though the court with the places of business and shops is intended to form and does form as a whole a market or bazaar.

London County Council v. Davis ... 1065

(9) Nuisances—Metropolis—Obstruction of street—Costermongers—Right to prosecute—Information laid by officer of metropolitan borough council and expressed to be on behalf of council—Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 60 (7).

A person may be convicted under section 60 (7) of the Metropolitan Police Act, 1839 (which deals with the obstruction of streets by costermongers, &c.), on an information laid by an officer of a metropolitan borough council acting under instructions from the council and expressed to be laid "on behalf of the council"; for there is nothing to restrict the right to prosecute under the enactment to the police and, on the question whether there can be a conviction, it is unnecessary to consider whether the council have power to prosecute, since the words "on behalf of the council" may be rejected as surplusage if necessary.

St. Leonard's, Shoreditch, Vestry v. Franklin (1878) 3 C. P. D. 377;
47 L. J. C. P. 727, distinguished.

Allman v. Hardcastle ... 13

(10) Nuisances—Obstruction—Reasonable user for business purpose—Wilful obstruction—Evidence—Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 64 (6).

The appellant was convicted by a magistrate under section 54 (6) of the Metropolitan Police Act, 1839, of causing wilful obstruction in a street by means of a truck, containing apparatus worked by a petrol motor for cleansing

STREETS—Continued.

houses by what is called the vacuum process, which he caused to stand in the street for some hours while in use for cleaning a house. The truck was of such dimensions and so placed as to leave ample room for vehicles to pass, and there was no evidence that any passenger was prevented from passing along the street or incommoded. The magistrate found that the business purpose and time selected were reasonable, that neither the time nor space occupied was excessive, but that the system of house cleaning in question was not necessary to the ordinary comfort of life, and was still in an experimental stage, and could not be regarded as an incident of every-day life, and that the noise and collection of sightseers might be productive of discomfort to occupants of houses and to people using the street.

Held, upon a case stated setting out the above facts and findings, there was no evidence of wilful obstruction, and that the conviction could not be supported.

Dunn v. Holt 502

(11) Paving expenses—Metropolis—Apportionment of estimated expenses—Apportionment by temporary surveyor—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96.

Order of Kekewich J. (1 L. G. R. 416) discharged on terms by consent.

Kendal v. Lewisham Borough Council 31

(12) Paving expenses—Metropolis—Landlord and tenant—Covenant by tenant to pay charges imposed on frontages—Payment by tenant to local authority of rent due to landlord—Right of landlord to distrain—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96.

The payment made by an occupier of premises of a sum apportioned on the premises in respect of paving expenses under the Metropolis Management Acts, on the demand of the local authority under section 96 of the Metropolis Management Amendment Act, 1862, is not a payment of rent, but a payment of a sum on account of the charges and expenses incurred by the local authority measured by the amount of the rent due from the occupier to his landlord. The occupier is entitled to deduct the amount which he so pays from his rent, provided that he has not entered into any contract with his landlord which prevents him from so doing; but if he has entered into an agreement with his landlord to pay such charges as those in question he is not entitled to make the deduction, and the rent remains due notwithstanding the payment to the local authority, and the landlord can distrain for it.

Skinner v. Hunt 769

(13) Paving expenses—Metropolis—"Owner"—Land subject to statutory incapacity to yield rent under enactment for benefit of individual—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77—Midland Railway Act, 1900 (63 & 64 Vict. c. cxliii.), s. 18.

A provision in a local Act restricting the user of land in such a way as to render it incapable of yielding a rent inserted in the Act for the benefit of individuals does not prevent the persons to whom the land belongs from being "owners" thereof within the meaning of the Metropolis Management Acts, and liable accordingly to contribute to the expenses of paving a new street on which the land abuts, for the statutory restrictions may at any time be removed by agreement between the parties, and the land be thus rendered capable of yielding a rent, without the aid of further legislation.

Hampstead Borough Council v. Midland Railway Co. 1124

STREETS—Continued.

(14) Paving Expenses—Metropolis—"Owner"—Land held for purposes of navigation of river—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management (Amendment) Act, 1862 (25 & 26 Vict. c. 102), s. 77.

The Lee Conservancy Board are a statutory body constituted for the conservation of the river Lee. Under their Acts they derive a revenue from tolls, the sale of water from the river in bulk, and like sources, but their revenue is applicable entirely to the expenses of carrying out their Acts and of the repayment with interest of moneys borrowed by the Board or their predecessors for the purposes of those Acts, and not in any other sense to purposes of profit. They have power to construct docks, wharfs, and other works in connection with the navigation, to acquire land for the purposes of their Acts, and to dispose of superfluous lands.

Held, that the Board were "owners," within the meaning of the Metropolis Management Acts, of land acquired and held by them for the purpose of strengthening the bank of a navigable cut of the river, so as to be liable to contribute to the expenses of paving a new street on which the land abutted.

Decision of Wright J., reported 2 L. G. R. 74, reversed.

Hackney Borough Council v. Lee Conservancy Board ... 1144

(15) Private street works—Apportionment—Arbitration—Jurisdiction of arbitrator—Recovery of expenses—Jurisdiction of justices—Appeal to Local Government Board—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 258.

An objection to an apportionment of expenses of private street works under section 150 of the Public Health Act, 1875, on the ground that it includes, in addition to expenses properly chargeable against the frontagers, expenses not properly so chargeable—e.g., expenses of sewerage where the street is already sewered to the satisfaction of the local authority—cannot be taken either before an arbitrator to whom a dispute as to the apportionment is referred under section 257, or whether the apportionment has been disputed or not, by way of defence to proceedings for the recovery of the amount apportioned. The only remedy of the frontager in such a case is by appeal to the Local Government Board under section 268.

Wake v. Sheffield Corporation (1883) 12 Q. B. D. 142; 53 L. J. M. C. 1, followed.

Hornsey Local Board v. Davis, 1 Q. B. 756; 62 L. J. Q. B. 427, explained.

Re Hanwell Urban District Council and Smith ... 1350

(16) Private street works—Charge on premises—Time when charge commences—Sale of leaseholds—Outgoings until completion—Payment as between vendor and purchaser—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257.

The charge upon premises given by section 257 of the Public Health Act, 1875, for expenses incurred by the local authority in executing private street works under section 150 of the Act, first arises upon completion of the works, and not upon the local authority entering into an agreement with a contractor for their execution.

Where, therefore, as between vendor and purchaser, outgoings in respect of premises to which such a charge attaches are payable by the vendor up to a given date and by the purchaser after that date, the expenses are payable by the purchaser if the works are not completed till after that date, though at that date an agreement for their execution has been entered into by the local authority and the works are in progress.

Decision of Byrne J., 1904, 1 Ch. 493; 2 L. G. R. 512; 73 L. J. Ch. 382, affirmed.

Stock v. Meakin, 1900, 1 Ch. 683; 69 L. J. Ch. 401, followed.

Tubbs v. Wynne, 1897, 1 Q. B. 74; 66 L. J. Q. B. 116, distinguished.

Per Romer L.J. In re Highbett and Bird's Contract, 1903, 1 Ch. 287; 72 L. J. Ch. 220, explained.

Allen and Driscoll's Contract, Re ... 959

STREETS—Continued.

(17) **Private street works—Covenant to maintain road until "taken to" by local authority—Recovery of expenses of private street works executed by local authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 41.**

The defendant in the course of developing certain building land in the year 1888 formed a road on the boundary between his property and land of the plaintiff, and laid a sewer under it. The plaintiff contributed towards the expense, and in consideration of such contribution the defendant covenanted that it should be lawful for the plaintiff and his tenants to use the roadway, and that the plaintiff should not be under any liability "to contribute to the maintenance or repair of the said roadway and sewer" or any works connected therewith, but that the same should be solely maintained by the defendant "until the same should be taken to by the parish or some other local or public authority."

In 1900 the local authority made the road up under section 150 of the Public Health Act, 1875, at the expense of the frontagers, and afterwards declared it a highway repairable by the inhabitants at large.

Held, that the plaintiff was not entitled under the covenant to recover from the defendant the share of the expense of making up the road apportioned on the plaintiff under the section, as the work done by the local authority was not mere maintenance and repair.

Decision of Bigham J. (1 L. G. R. 113) reversed.

Moore v. Todd 376

(18) **Private street works—Decision of justices that street is a highway repairable by inhabitants at large—Res judicata—Estoppel—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150—Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi), ss. 39, 30, 31—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 6, 7, 8.**

A decision of justices upon an objection taken by frontagers to a proposal for the execution of private street works under the Private Street Works Act, 1892 (or a local Act containing similar provisions), that the street is a highway repairable by the inhabitants at large is in the nature of a decision in rem, and is therefore conclusive on the point if the local authority subsequently make a fresh proposal for the execution of private street works in the street under the Act, and the objection is again taken.

Judgment of the Court of Appeal, 1903, 1 K. B. 417; 1 L. G. R. 337; 72 L. J. K. B. 345, affirmed.

Reg. v. Hutchings (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35, distinguished.

Semble (per the Earl of Halsbury L.C.), that justices before whom proceedings are taken for the recovery of expenses of private street works under section 150 of the Public Health Act, 1875, cannot entertain the question whether the street is or is not repairable by the inhabitants at large.

Wakefield Corporation v. Cooke 270

(19) **Private street works—Objections—Grounds of objection—Objection that alleged street is not a "street" within the meaning of the Act—Admissibility of evidence that alleged street is a highway repairable by the inhabitants at large—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 5, 7.**

For the purpose of showing that an alleged street does not come within the definition of "street" in section 5 of the Private Street Works Act, 1892, an owner of premises whose notice of objection is framed under section 7 (a), as an objection that the alleged street is not a street within the meaning of the Act, may give evidence that the alleged street is a highway repairable by the inhabitants at large, as if the notice had been framed under section 7 (b) specifically raising the objection that the street is so repairable.

Quære, whether on the hearing of an objection under the Act the justices can amend the notice of objection so as to let in evidence which would be inadmissible under the notice as drawn.

Carey v. Bexhill Corporation 367

STREETS—Continued.

(20) Private street works—Recovery of expenses—Change of ownership between completion of works and apportionment—Continuing liability of former owner—Public Health Act, 1875 (88 & 89 Vict. c. 55) ss. 150, 257.

Expenses of private street works executed under section 150 of the Public Health Act, 1875, are recoverable from the person who was owner of the premises abutting on the street when the notice requiring the frontagers to execute the works was served and when the work was completed; although he has ceased to be owner of the premises before the expenses are apportioned or demanded.

Decision of Divisional Court, reported 2 L. G. R. 539, reversed.

Dicta of Cockburn C.J. in *Reg. v. Swindon New Town Local Board* (1879) 4 Q. B. D. 305; 48 L. J. M. C. 119, disapproved.

Millard v. Balby-with-Hexthorpe Urban District Council ... 1248

(21) Private street works—"Street"—Passage—Cul-de-sac—Premises abutting thereon without right of access thereto—Public Health Act, 1875 (88 & 89 Vict. c. 55), ss. 4, 150.

A passage forming a cul-de-sac and not dedicated as a highway may be a "street" within section 150 of the Public Health Act, 1875, and the owner of premises abutting thereon will in such case be liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding that he has no right of access to it.

Walthamstow Urban District Council v. Sandell ... 835

(22) Private street works—Tenant's covenant to pay rates, &c.—Works executed before date of lease.

See *Landlord and tenant* (5) ... 605

(23) Street "leading into" another street—London County Council (Improvements) Acts, 1899 (62 & 63 Vict. c. cclxvi), s. 55 (6).

A section of an Act of Parliament dealing with the construction of a new central street, and in particular with the powers of the defendant local authority to move the site of the plaintiffs' premises, provided that the defendants should "maintain a public street of not less than 25 feet in width along the northern boundary of the new site leading into the new central street."

Held, that the obligation on the defendants was to maintain a street leading substantially, though not necessarily mathematically, straight into the new central street.

Metropolitan Electric Supply Co. v. London County Council ... 1286

(24) Subway—Construction of subway by local authority—Colourable use of statutory powers—Trespass.

See *Sanitary conveniences* (2) ... 638

(25) Tramways in—Local Act—Power to construct apparatus in street—Erection of standard on foot pavement—Taking of land—Compensation.

See *Tramways* (1) ... 779

SUMMARY JURISDICTION.

(1) Abatement of nuisance—Signature of order—Order signed by one justice only.

See *Nuisance* (18) ... 714

(2) Conviction—Duplicitv—Conviction for driving at a speed or in a manner dangerous to the public.

See *Highways* (9) ... 913

1462 SUMMARY JURISDICTION—SUPERANNUATION.

SUMMARY JURISDICTION—Continued.

- (3, 4) **Limitation of time—Institution of prosecution.**
 See Adulteration (2, 3) 719, 1007
- (5) **Limitation of time—Moment from which time runs—Building in contravention of statute.**
 See Buildings (9) 147
- (6) **Order to vaccinate signed but not sealed—Validity—Subsequent order purporting to cure defect.**
 See Vaccination (2) 1204
- (7) **Precedence—Mayor of borough—County business—Borough business.**
 See Municipal corporation 749
- (8) **Right to prosecute—Obstruction of street—Metropolis—Costermongers—Information laid by officer of borough council and expressed to be on behalf of council.**
 See Streets (9) 13
- (9) **Statement of ease—Justices sitting to revise jury lists.**
 See Jury lists 965
- (10) **"Trifling" offence—Vaccination—Child not vaccinated—Consentious belief that vaccination would be prejudicial to child's health—Failure to obtain certificate.**
 See Vaccination (1) 1277

SUNDAY.

Testing of gas.

- See Gas (3) 161

SUPERANNUATION.

See Police.

TENANT FOR LIFE AND REMAINDERMAN.

Costs of sanitary works—Notice served on "owner or occupier"—Works carried out by tenant for life under agreement with trustees—Subrogation—Permanent improvements—Charge on corpus—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 4, 5 (9), 11, 121, 141.

Notice was served under the Public Health (London) Act, 1891, upon the trustees of certain settled property as the owners of the premises to do certain sanitary work upon the premises. The plaintiffs, who were the assignees of the life interest of the equitable tenant for life, agreed with the trustees that they would themselves do the work without prejudice to the question who was liable to pay for it, and they carried out the work.

Held, by Kekewich J., distinguishing *In re Lever*, *Cordwell v. Lever*, 1897, 1 Ch. 32; 66 L. J. Ch. 66, that, in the absence of an application by the trustees under the Settled Land Acts, the cost of executing the work could not be declared to be a charge on the capital of the residuary estate.

Held, by the Court of Appeal (reversing the decision of Kekewich J. on grounds not taken before him), that, having regard to the arrangement that had been come to, the plaintiffs were in the circumstances of the case entitled to be subrogated to the rights of the trustees, and to have a declaration of charge on the corpus of the estate for so much of the money expended by them as had been spent upon permanent improvements, and for the costs of the application and of the appeal.

Semble, in determining how the expenses of repairs of this kind ought to be borne as between the tenant for life and the remainderman, the Court is not bound by any hard and fast rule, but has a discretion, and can enquire into the nature of the repairs and the circumstances of the case.

Farnham's Settlement, Re, Law Union and Crown Insurance Co.

- v. Hartopp 668, 1050

TIME, LIMITATION OF.

See Limitation of time.

TRAMWAYS.

(1) **Local Act—Power to construct apparatus in street—Erection of standard on foot pavement—Trespass—Taking of Land—Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 18, 68—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 140—Newport Corporation Act, 1900 (63 & 64 Vict. c. xlii.), s. 51.**

A local Act incorporating the Lands Clauses Acts and authorising the taking of certain scheduled lands gave a municipal corporation (who had constructed tramways in their borough under earlier Acts) powers for the extension of their tramways and for the working of their tramways by mechanical power instead of horses. By section 51 of the Act the corporation were empowered to construct lay down place erect and maintain on in over or under any street or road in which any of their tramways were for the time being laid works and appliances including poles and posts.

Held, that under this section the corporation had power, without the consent of the owner of the subsoil and without any notice to treat, to place on the foot pavement of a street in which one of their tramways was laid an iron pillar, sunk to a depth of some feet into the ground, for the support of an overhead electric cable for the supply of power to the tramcars; and that the remedy of the owner of the subsoil, if his property was injuriously affected, was by obtaining compensation under section 68 of the Lands Clauses Consolidation Act, 1845.

Escott v. Newport Corporation 779

(2) **Negligence—Action against local authority working tramways under statutory power—Limitation of time.**

See Limitation of time (2) 662

(3) **Purchase of undertaking by local authority—Buildings and plant used for purposes of undertaking—Buildings outside district of local authority—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.**

Upon the true construction of section 43 of the Tramways Act, 1870, a local authority who have required the promoters of a tramway to sell so much of their undertaking as is within the local authority's district, upon paying the value of the tramway and all lands buildings works materials and plant of the promoters "suitable to and used by them for the purpose of their undertaking within such district," may be compelled to purchase a tramway depôt of the promoters situate outside the local authority's district, if it be suitable to and used for the purposes of the undertaking; for the words "within such district" in this collocation refer to the undertaking, and not to the buildings, &c.

Re Manchester Carriage and Tramways Co., Limited, and the Swinton and Pendlebury Urban District Council 896

NOTE.—This decision was reversed in the Court of Appeal, on Dec. 3, 1904, on another ground which Channell J. in the Court below thought not open to him. A report of the case in the Court of Appeal will appear in due course.

TRANSFER.

(1) **Property—School district—Dissolution.**

See Poor law (7) 734

(2) **Property—Stock standing in bank books in name of school board—School board succeeded by local education authority.**

See Education (6) 1324

TRESPASS.

(1) **Colourable use of statutory powers—Construction of sanitary convenience under street—Formation of subway.**

See Sanitary conveniences (2) 638

(2) **Cutting off connection with water main—Right of action.**

See Water (3) 80

(3) **Tramways—Local Act—Power to construct apparatus in street—Erection of standard on foot pavement.**

See Tramways (1) 779

TRIBUNAL OF APPEAL.

London Building Act—Building line—Costs.

See Streets (4) 1265

ULTRA VIRES.

Acquisition of land for ultra vires purpose—Rights of parties.

See Land (3) 116

UNSOOUND FOOD.

See Food.

VACCINATION.

(1) **Child not vaccinated—Conscientious belief that vaccination would be prejudicial to child's health—Failure to obtain certificate—"Trifling" offence—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 2 (1)—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16.**

The fact that the parent of a child has repeatedly, within four months of the child's birth, sought without success to obtain a justices' certificate of his conscientious belief that vaccination would be prejudicial to its health, is not sufficient to justify a court of summary jurisdiction in dismissing an information preferred against the parent in respect of the non-vaccination of the child, as being for a "trifling" offence within the meaning of section 16 of the Summary Jurisdiction Act, 1879.

Nisbet v. Lloyd 1277

(2) **Order to vaccinate signed by justice but not sealed—Validity—Subsequent order purporting to cure defect—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 81.**

An order of justices under section 31 of the Vaccination Act, 1867, requiring a parent to cause his child to be vaccinated within a certain time is a nullity unless sealed as well as signed; and where an order for the vaccination of a child within a certain number of weeks from the date thereof is signed but not sealed, the defect is not cured by the drawing up at a later date of a subsequent order, signed and sealed by two of the justices present when first order was verbally made, dated as of the later date, and requiring the vaccination of the child within a like number of weeks from such later date.

Nutter v. Moorhouse 1204

(3) **Proceedings under Vaccination Act—Expenses—Legal assistance obtained by vaccination officer—Vaccination Order, 1898, Article 29.**

Article 29 of the Vaccination Order, 1898, which provides that the guardians shall pay the reasonable costs and expenses incurred by the vaccination officer in proceedings taken by him for enforcing the provisions of the Vaccination Acts, including "the reasonable costs of obtaining any necessary

VACCINATION—Continued.

legal assistance" in connection with such proceedings, does not make the judgment of the vaccination officer as to whether legal assistance is necessary in any particular case conclusive as against the guardians. In case of dispute, accordingly, the question whether the legal assistance was necessary has to be determined as a question of fact in the ordinary way in legal proceedings. But the tribunal before which the question comes, if satisfied that the officer entertained an honest belief that the legal assistance obtained by him was necessary, ought, in all ordinary circumstances, to be guided by the decision to which the officer came.

Hitchcock v. Wandsworth and Clapham Union; *Cheshire v. Same*... 1260

VAGRANCY.

(1) **Pauper refusing to maintain himself—Refusal of work offered at labour colony.**

See Poor law (4) ... 1012

(2) **Running away and leaving children chargeable—Failure to remove children from workhouse after expiration of sentence for previous offence.**

See Poor law (5) ... 874

VENDOR AND PURCHASER.

Outgoings until completion—Charge on premises—Private street works—Time when charge commences.

See Streets (16) ... 959

WATER.

(1) **Breaking up streets—Reinstatement of street—Metropolis—Expenses—Charge for supervision.**

See Streets (2)... 1024

(2) **Public well—Abandoned pit shaft used as public well—Well vested in local authority—Owners liability to fence.**

See Mine ... 456

(3) **Supply—Communication pipes—Cutting off connection with main—Trespass—Refusal to supply—Right of action—Penalties—Damages—Injunction—Waterworks Clauses Act, 1847 (10 & 11 Viet. c. 17), ss. 43, 48, 49, 53.**

If a water company, to whose undertaking the Waterworks Clauses Act, 1847, applies, wrongfully cut a connection lawfully made by the owner of a house between their main and his communication pipe they are guilty of a common law trespass, and the owner may maintain an action for damages and an injunction accordingly, notwithstanding the provisions in section 43 of the Act giving a special remedy when the company wrongfully refuse to supply water.

Gale v. Rhymney and Aber Valleys Gas and Water Co. ... 80

(4) **Supply—"Domestic purposes"—"Dwelling-house"—Work-house school—"Business"—Non-compliance with regulations of water company—Bore of service pipe—Waterworks Clauses Act, 1847 (10 & 11 Viet. c. 17), ss. 35, 48, 50, 53—Waterworks Clauses Act, 1863 (26 & 27 Viet. c. 93), s. 12—Norwood (Middlesex) Water Order, 1878 (scheduled to 41 & 42 Viet. c. lvi.), s. 17.**

A Poor Law school is a dwelling-house within enactments requiring a water company to supply water to dwelling-houses for "domestic purposes" within the meaning of the Waterworks Clauses Acts. And, though the carry-

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ing on of such a school is a business, water used in the school for purposes of a domestic character is used for "domestic purposes" within the meaning of those Acts; for it is the character of the purpose, and not the character of the premises in which the water is used, that is the important factor in determining whether it is used for "domestic purposes" or not.

The words "domestic purposes" in the Waterworks Clauses Acts refer to user not merely for washing, drinking, and flushing closets and the like in a house, but extend to user for the amenities of the house, even where the house is used for business purposes; but the limit of such amenities must be ascertained with due regard to what is reasonable and to what is the ordinary user at the present day. Thus the heating of premises by hot-water pipes is, while the generating of steam for the supply of power is not, a domestic purpose.

Where a water company required to supply water for domestic purposes are empowered to make regulations for preventing the misuse of the water, and to refuse a supply if such regulations are not complied with, a person otherwise entitled to a supply for his domestic purposes cannot demand such supply if the appliances for the use of water in his house do not conform with the regulations.

Where, there being no other prescribed limit, the bore of a service pipe to be laid by the owner or occupier of a house for obtaining water for his domestic purposes is limited by section 50 of the Waterworks Clauses Act, 1847, to half an inch, unless the undertakers consent to the use of a larger pipe, and the company by their regulations fix three-quarters of an inch as the maximum bore, a person entitled to a supply for domestic purposes cannot insist on being supplied by means of a pipe of larger bore, but he is not precluded from insisting on a supply by means of as many small pipes as may be necessary.

Barnard Castle Urban District Council v. Wilson, 1901, 2 Ch. 813; 1902, 2 Ch. 746; 70 L. J. Ch. 859; 71 L. J. Ch. 825, discussed.

South-West Suburban Water Co. v. St. Marylebone Guardians ... 567

(5) Supply—Extinguishing fires—Charge for water—Fire-plug on private premises fixed at consumer's request—Waterworks Clauses Act, 1847 (10 Viet. c. 17), ss. 38, 42.

The obligation on a water company under section 42 of the Waterworks Clauses Act, 1847, to allow all persons at all times to take and use water for extinguishing fires without making compensation for the same is confined to water passing through pipes of the company to which fire-plugs are fixed. And where water is supplied to a consumer through a pipe belonging to him and connected with a main of the company to which no fire-plugs are fixed, the company may charge for water used by the consumer for extinguishing fire on his premises though a fire-plug has been fixed to his private pipe by the company at his request.

Weardale and Consett Water Co. v. Chester-le-Street Co-operative Society ... 805

(6) Supply—Leak in communication pipe—Duty of owner or occupier to repair—Right of water company to cut off water supply—Waterworks Clauses Act, 1847 (10 Viet. c. 17), s. 43—Metropolis Water Act, 1871 (34 & 35 Viet. c. 113), ss. 3, 26–32.

The duty to repair a leak, causing waste of water, in a communication pipe between the main of a metropolitan water company and the consumer's premises, where the company provide a constant supply and the prescribed fittings have been provided pursuant to notice from the company under section 27 of the Metropolis Water Act, 1871, is, by section 28 of that Act, cast upon the owner or occupier of the premises; and an owner or occupier who is in a position to repair the defect without committing any unlawful act, and who, after notice, permits the pipe to remain in its defective condition, has wrongfully failed to prevent waste of water within section 32 of the Act, so

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that the water company are entitled to cut off the water and cease to supply it as long as the injury to the pipe remains unremedied. The fact that the water company could, if so minded, have repaired the pipe after 24 hours' notice under section 29 does not disentitle them from exercising their rights under section 32; and an owner or occupier who under such circumstances will not repair the pipe is not a person entitled to receive a supply of water under section 43 of the Waterworks Clauses Act, 1847.

It is no answer in such a case for the owner or occupier to show that he has no power to break up the street for the purpose of repairing the communication pipe, if the necessary breaking up of the street has been effected by the water company so that the owner or occupier can, in fact, repair the pipe without himself breaking up the street.

Grand Junction Waterworks Co. v. Rodocanachi 689

(7) Water company—Dividends—Prescribed rate—Deficiency in previous years—Deficiency in the years before incorporation of the Waterworks Clauses Act, 1847—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 75.

A water company to whose undertaking section 75 of the Waterworks Clauses Act, 1847 (which limits the profits that may be divided among the shareholders to the prescribed rate, or where no rate is prescribed to ten per cent., unless a larger dividend is necessary to make up the deficiency of any previous dividend applies), cannot apply their surplus profits in making up any deficiency below the prescribed rate, or ten per cent. as the case may be, that occurred in years before the section became applicable to the undertaking.

Decision of the Court of Appeal, 1903, 1 Ch. 575; 72 L. J. Ch. 418, affirmed.

Kent Waterworks Co. v. Lamplough 403

(8) Water rate—Unequal water rate—Extension of borough—General rate in added area not to exceed, when added to poor rate, borough rate, and other rates, a given amount in pound—Whether water rate included in "rates" for purposes of limitation—Northampton Waterworks Act, 1861 (24 & 25 Vict. c. xlvii.), s. 59—Northampton Corporation Waterworks Act, 1884 (47 & 48 Vict. c. cccviii.), s. 86—Northampton (Extension) Order, 1900 (scheduled to 63 & 64 Vict. c. clxxxiii.), Art. XXXVI.

By a local Act of 1884 the powers and undertaking of a waterworks company established by a local Act of 1861 were transferred to the plaintiff corporation.

The Waterworks Clauses Act, 1847, with immaterial exceptions, was incorporated both with the Act of 1861 and with the Act of 1884. By section 36 of the Act of 1884 the corporation were empowered to charge for the supply of water for domestic purposes to any dwelling-house "a sum not exceeding 7½ per centum per annum" on the rateable value of the house; and under section 59 of the Act of 1861 the corporation as successors of the company had power to supply any persons with water, for any purpose for which the supply was required, for such remuneration and upon such terms and conditions as might be agreed upon under a special agreement. Neither the Act of 1861 nor the Act of 1884 contained any express provision requiring equality in the charges to water consumers.

Held (reversing the judgment of Bigham J.), that there was no obligation on the corporation in making charges under section 36 of the Act of 1884 to charge all consumers at the same rate in the pound on the rateable values of their houses.

The plaintiffs' borough was extended by a Provisional Order of 1900, duly confirmed, which contained a provision that for a certain period the general district rate in the added area should not in any one year when added to the

WATER—Continued.

poor rate, the borough rate, and any other rate made by the corporation exceed a certain amount in the pound.

Held (affirming Bigham J.), that the water rate levied by the corporation was not a rate for the purpose of this limitation.

Northampton Corporation v. Ellen 473

(9) Waterworks—Compensation water—Neglect of statutory duty to deliver compensation water—Penalties—Penalties in nature of liquidated damages—Recovery of penalties—Huddersfield Water Act, 1869 (32 & 33 Vict. c. cx.), ss. 28, 32—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—161.

The Huddersfield Water Act, 1869, under which the defendant Corporation have constructed and maintained waterworks, requires them to deliver certain compensation water; and provides that in case of neglect on the part of the Corporation, in consequence of which the statutory quantity of compensation water is not delivered, the Corporation shall, for every day on which the neglect occurs, forfeit and pay to the occupiers of each of the mills and works affected thereby (who may sue for and recover the same) the sum of £5, and shall in addition make compensation for any damage sustained by such occupiers, or any of them, in respect of which such penalties are an insufficient compensation, and that such occupiers may recover such compensation by proceedings in any court of competent jurisdiction. The Act provides that the expression court of competent jurisdiction shall have effect as if the debt or demand with respect to which that term is used was an ordinary simple contract debt. And the Act in effect incorporates the clauses of the Railways Clauses Consolidation Act, 1845, with reference to the recovery of damages not specially provided for and of penalties, which clauses provide for the recovery of such damages and penalties summarily before justices.

Held (1), following Beaumont v. Huddersfield Corporation (1902) 1 L. G. R. 118, that the £5 a day recoverable under the Huddersfield Water Act, 1869, is in the nature of liquidated damages, and is not a "penalty" properly so called.

(2) That the expression "penalty," in sections 140 et seq. of the Railways Clauses Consolidation Act, 1845, means a penalty properly so called, i.e., a penalty imposed for punitive purposes, and not for the purpose of compensating the party injured.

(3) That the provisions of the Railways Clauses Consolidation Act, 1845, are consequently not applicable to the recovery of the £5 a day; and that that sum may accordingly be sued for by action in the High Court.

Meltham Spinning Co. v. Huddersfield Corporation 32

WATER-CLOSETS.

(1) Bye-laws—Water-closet accommodation in lodging-houses—Bye-law requiring owner of house let in lodgings to provide water-closet accommodation—Want of provision for notice before commencement of proceedings.

See Bye-laws (11) 334

(2) Drains—Bye-laws—"Construction of water-closet"—Ventilation of trap of water-closet—Extension of bye-laws to existing building.

See Bye-laws (7) 233

WEIGHTS AND MEASURES.

(1) Coal sold in bulk—Tare weight of vehicle—Entry of tare weight on delivery ticket—Incorrect weight entered—Weight and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 22.

Coal merchants were summoned under section 22 of the Weights and

WEIGHTS AND MEASURES—Continued.

Measures Act, 1889, for failing to insert on the delivery ticket the correct tare weight of a wagon in which coal exceeding 2 cwt. was conveyed for delivery on sale in bulk. The tare weight of the wagon was inserted on the delivery ticket as 10½ cwt., but there was evidence that the actual weight was after delivery found to be 11 cwt. The justices found that the vehicle had not been weighed on the day in question, but on the occasion of a delivery three days previously had weighed 10½ cwt., and dismissed the summons on the ground that the weight need not be taken previous to each delivery of coal, but only at reasonable intervals.

Held, without laying down any rule that such wagons must be weighed before each delivery, that the requirements of the statute had not been fulfilled, and that the case must be remitted to the justices.

Beardsley v. Pike 710

(2) "False or unjust" scales—Adjustment of scales at customer's request with no fraudulent intention—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25.

Wholesale tea merchants, with a view to expedite the weighing out of tea to their customers—retail tea dealers who desired to be supplied with packets of tea each weighing with its wrapper exactly ½ lb.—and at their customers' request, so adjusted their beam scales that the scales indicated a weight greater by the weight of the intended wrapper than the actual weight of the tea in the scoop. The adjustment was effected, in one instance, by fixing a metal disc on one arm of the scales, in another by attaching a paper bag underneath the goods scoop.

Held, that they were using scales which were "false or unjust" within the meaning of section 25 of the Weights and Measures Act, 1878, and liable to a penalty accordingly.

Lane v. Rendall, 1899, 2 Q. B. 673; 69 L. J. Q. B. 8, considered and followed.

London County Council v. Payne 184

(3) Fraudulent use of scale—Paper added to goods pan when weighing tea—Custom or trade usage—Weighing carried out in customer's presence—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26.

In proceedings against a grocer, under section 26 of the Weights and Measures Act, 1878, for being unlawfully and wilfully a party to the commission of a fraud in using a certain scale by adding paper to the goods pan when weighing tea, evidence of a custom or trade usage to weigh tea with paper is admissible as bearing on the question whether there has been a wilful commission of a fraud.

The offence in question may be committed where tea is weighed with paper though the weighing is done before the customer's eyes, if it is so done as to suggest to the customer that the nett weight of the tea alone is being ascertained.

King v. Spencer 979

(4) Fraudulent use of scale—Sugar already weighed in paper wrapper—Sale of packet over counter—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26.

To constitute the offence, under section 26 of the Weights and Measures Act, 1878, of fraud wilfully committed in the using of a scale, there must be some fraud in the actual use of the scale, consequently a shopkeeper who sells, as a pound of sugar, a package of sugar of which the total weight, inclusive of the wrapper, is one pound, and which he has previously accurately weighed in anticipation of custom, is not guilty of that offence.

Stone v. Tyler 1363

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WEIGHTS AND MEASURES—Continued.

(5) Weighing paper with tea.—False trade description—Tea sold in packets—Weight expressed on ticket inside—Checks entitling purchasers to some small article—Qualification as to gross weight on outside wrapper—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (1, d).

A ticket, inserted under the string of a packet of tea, on one side of which is printed "Quarter pound 2s. 8d. tea ticket," and on the other a notice that every purchaser from a quarter pound and upwards will be given some useful article, is, when the packet contains only $3\frac{1}{2}$ ounces of tea, a false trade description within section 2 (1, d) of the Merchandise Marks Act, 1887, and is none the less so because the words "Quarter pound gross weight" are printed on the outside wrapper of the packet.

Star Tea Co. v. Whitworth 1000

WELL.

Abandoned pit shaft used as public well—Well vested in local authority—Owner's liability to fence.

See Mine 456

WORKHOUSE SCHOOL.

Water supply—Domestic purposes.

See Water (4) 567

